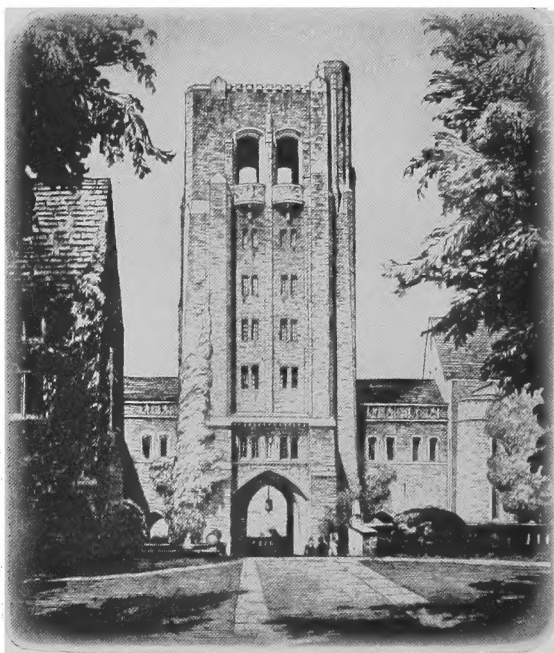


CORNELL LAW LIBRARY



**Cornell Law School Library**



Cornell University Library

**KF 8933.E56**

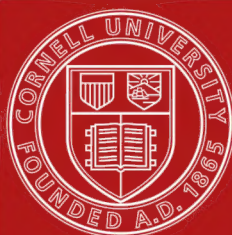
v.3

**The Encyclopædia of evidence.**



3 1924 020 099 556

law



## Cornell University Library

The original of this book is in  
the Cornell University Library.

There are no known copyright restrictions in  
the United States on the use of the text.









THE  
ENCYCLOPÆDIA  
OF  
EVIDENCE

EDITED BY  
EDGAR W. CAMP AND JOHN F. CROWE

VOL. III

LOS ANGELES, CAL.  
L. D. POWELL COMPANY

1904

B26304

**COPYRIGHT 1904**

**BY L. D. POWELL COMPANY**

**TIMES-MIRROR PRINTING AND BINDING HOUSE**  
**LOS ANGELES, CAL.**



# TABLE OF TITLES.

CHARACTER .....	I
CHASTITY .....	54
CIRCUMSTANTIAL EVIDENCE .....	60
CITIZENS AND ALIENS .....	152
COMPETENCY .....	161
COMPOUNDING OFFENSES .....	246
COMPROMISE AND SETTLEMENT .....	248
CONCLUSIVE EVIDENCE .....	267
CONFESSIONS .....	294
CONFUSION OF GOODS .....	363
CONSIDERATION .....	368
CONSPIRACY .....	405
CONTEMPT .....	436
CONTRACTS .....	510
CONTRADICTION OF WITNESSES .....	530
COPIES .....	538
COPYRIGHT .....	550
CORONER'S INQUEST .....	568
CORPORATIONS .....	577
CORPUS DELICTI .....	659
CORROBORATION .....	667
COUNTERFEITING .....	744
CREDIBILITY .....	751
CRIMINAL CONVERSATION .....	780
CROSS-EXAMINATION .....	801
CUMULATIVE EVIDENCE .....	914
CUSTOMS AND USAGES .....	949





# CHARACTER.

By CHARLES A. ROBBINS.

## I. DEFINITION, 3.

## II. WHEN CHARACTER IS RELEVANT, 3

1. *Character of Party to Civil Action, 3*
  - A. *When in Issue, 3*
  - B. *When Not in Issue, 4*
    - a. *In General, 4*
    - b. *Assault, 5*
    - c. *Fraud, 5*
    - d. *Divorce, 6*
2. *Character of Defendant in Criminal Action, 6*
  - A. *The Grade of the Offense, 6*
  - B. *Purpose of Admission, 7*
  - C. *The Question of Doubt, 7*
  - D. *Who May Put Defendant's Character in Issue, 12*
3. *Character of Deceased and of Complaining Witness, 14*
4. *Character of Witness, 14*
  - A. *Impeaching, 14*
    - a. *In General, 14*
    - b. *Party to Action, 14*
    - c. *Subscribing Witness and Deceased Declarant, 15*
    - d. *Character Witness, 15*
  - B. *Sustaining, 15*
    - a. *Where Not Attacked, 15*
    - b. *On Direct Attack, 16*
    - c. *On Collateral Attack, 16*
      - (1.) *By Contradictory Statements, 16*
      - (2.) *On Cross-Examination, 17*
      - (3.) *By Direct Contradiction, 18*
      - (4.) *By Charge of Wrongdoing, 19*

## III. WHAT CHARACTER IS RELEVANT, 20

1. *The Trait of Character, 20*
  - A. *Of Defendant in Criminal Action, 20*
    - a. *Particular Traits, 20*
    - b. *General-Moral Character, 21*
    - c. *Irrelevant Traits, 21*
  - B. *Of Witness, 22*
    - a. *Truth and Veracity, 22*

- b. *General Moral Character*, 23
  - c. *Irrelevant Traits*, 25
  - d. *General Moral Character or Trait*, 26
- C. *Of Deceased Person in Homicide*, 27
- 2. *The Time and Place of Reputation*, 27
  - A. *General Rules as to Time*, 27
    - a. *As to Defendant in Criminal Action*, 27
    - b. *As to Deceased or Complaining Witness*, 28
    - c. *As to Party to Civil Action*, 28
    - d. *As to Witness*, 28
  - B. *General Rules as to Place*, 29
  - C. *Reputation at Other Times and Places*, 30
- IV. **PROOF OF CHARACTER**, 34
  - 1. *Presumption of Good Character*, 34
  - 2. *Personal Knowledge of Character*, 35
  - 3. *Particular Acts of Party or Witness*, 36
  - 4. *Competency of Character Witness*, 42
    - A. *In General*, 42
    - B. *Knowledge from Specific Inquiries*, 42
    - C. *Knowledge Acquired Post Litem Motam*, 42
    - D. *Negative Testimony*, 43
  - 5. *Examination of Character Witness*, 43
    - A. *Form and Order of Questions*, 43
    - B. *Credibility of Witness on Oath*, 45
    - C. *Cross-Examination*, 47
      - a. *By Party Calling Witness*, 47
      - b. *By Opposite Party*, 47
        - (1.) *In General*, 47
        - (2.) *Particular Acts*, 49
        - (3.) *Particular Rumors*, 49
    - D. *Re-Examination*, 50
  - 6. *Number of Character Witnesses*, 51
  - 7. *Weight and Effect of Character Evidence*, 51

#### CROSS-REFERENCES.

Bastardy; Breach of Promise of Marriage;  
 Chastity; Criminal Conversation;  
 Damages;  
 False Imprisonment;  
 Libel and Slander;  
 Malicious Prosecution;  
 Rape;  
 Seduction;  
 Witnesses.

## I. DEFINITION.

Specifically, character is the sum of the inherited and acquired ethical traits which give to a person his moral individuality. Reputation is the estimate attached to a person by the community.<sup>1</sup> Strictly speaking, the terms are not synonymous, but they are used interchangeably by most courts and law writers.<sup>2</sup>

## II. WHEN CHARACTER IS RELEVANT.

**1. Character of Party to Civil Action.** — **A. WHEN IN ISSUE.**—In a number of civil actions, the nature of the proceeding is such as to put the character of the plaintiff in issue, either directly under the pleadings or in mitigation of damages.<sup>3</sup>

**1. Century Dict.**

**2. Definition.** — “The term ‘character,’ when more strictly applied, refers to the inherent qualities of the person, rather than to any opinion that may be formed or expressed of him by others. The term ‘reputation’ applies to the opinion which others may have formed and expressed of his character; so that, as has been remarked in some of the books, when treating on this subject, a man’s character may really be good, when his reputation is bad; and, on the other hand, his reputation may be good, when his character is bad.”

Bucklin v. State, 20 Ohio 18. See also Powers v. Leach, 26 Vt. 270.

“Character, in the sense in which the term is used in jurisprudence, means the estimate attached to the individual by the community, not the real qualities of the individual, as conceived by the witness. In other words, it is not what the individual in question really is, but what he is held to be by the society in which he moves.” Brownlee v. State, 13 Tex. App. 255; Berneker v. State, 40 Neb. 810, 59 N. W. 372.

“The character of persons is known to those who are acquainted with them before it is known abroad—they have character before they have reputation. A man’s actions are his character—they speak louder than words. A man’s character must be true; his reputation may be most

false.” Seely v. Blair, Wright (Ohio) 683.

“Character is the estimation in which one is held by the public who know his standing.” De Arman v. State, 71 Ala. 351; Pickens v. State, 61 Miss. 563.

“Limited to general character which is described by Erskine as the ‘slow spreading influence of opinion arising from the deportment of a man in society.’ As a man’s deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion, that general opinion is allowed to be given in evidence.” State v. Laxton, 76 N. C. 216.

**3. See the articles** “BREACH OF PROMISE OF MARRIAGE,” “CRIMINAL CONVERSATION,” “DAMAGES,” “FALSE IMPRISONMENT,” “MALICIOUS PROSECUTION,” “SEDUCTION,” “LIBEL AND SLANDER.”

Where trustworthiness is directly in issue, as in an action for falsely representing another to be trustworthy, it may be proved by the general reputation of such person for trustworthiness. Sheen v. Bumpstead, 1 H. & C. 358, 32 L. J. Ex. 124; affirmed, 2 H. & C. 193, 33 L. J. Ex. 271.

Habits of drunkenness may be proved by general reputation. Allgeyer v. Rutherford, (Tex. Civ. App.), 45 S. W. 628.

The good character of the plain-

**B. WHEN NOT IN ISSUE.** — a. *In General.* — As a rule, however, the character of a party to a civil action, as such, is not in issue, and evidence thereof is not relevant.<sup>4</sup> The rule is the same though the

tiff is admissible to rebut evidence of her unchastity, in an action for breach of promise of marriage. *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386.

4. *United States.* — *Ketland v. Bissett*, 1 Wash. C. C. 144, 14 Fed. Cas. No. 7742.

*Alabama.* — *Lord v. Mobile*, 113 Ala. 360, 21 So. 366.

*Illinois.* — *Croze v. Rutledge*, 81 Ill. 266; *Cummins v. Crawford*, 88 Ill. 312, 30 Am. Rep. 558.

*Indiana.* — *Walker v. State*, 6 Blackf. 1; *Haun v. Wilson*, 28 Ind. 296.

*Iowa.* — *Barton v. Thompson*, 56 Iowa 571, 41 Am. Rep. 119.

*Maine.* — *Thayer v. Boyle*, 30 Me. 475.

*Massachusetts.* — *Com. v. Worcester*, 3 Pick. 461.

*Michigan.* — *Fahey v. Crotty*, 63 Mich. 383, 29 N. W. 876, 6 Am. St. Rep. 305.

*Missouri.* — *Boggs v. Lynch*, 22 Mo. 563; *Alkire Grocer Co. v. Taggart*, 78 Mo. App. 166.

*Nebraska.* — *Diers v. Mallon*, 46 Neb. 121, 64 N. W. 722, 50 Am. St. Rep. 598.

*New Hampshire.* — *Matthews v. Huntley*, 9 N. H. 146.

*New York.* — *Pratt v. Andrews*, 4 N. Y. 493.

*North Carolina.* — *Jeffries v. Harris*, 3 Hawks 105; *Marcom v. Adams*, 122 N. C. 222, 29 S. E. 333.

*Ohio.* — *Sayen v. Ryan*, 9 Ohio C. C. 631.

*Pennsylvania.* — *Anderson v. Long*, 10 Serg. & R. 55; *Zitzer v. Merkel*, 24 Pa. St. 408; *Battles v. Laudenslager*, 84 Pa. St. 446.

*Texas.* — *Tipton v. Thompson*, 21 Tex. Civ. App. 143, 50 S. W. 614; *Jackson v. Martin*, (Tex. Civ. App.), 41 S. W. 837.

*Vermont.* — *Wright v. McKee*, 37 Vt. 161; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

*Washington.* — *Hall v. Elgin Dairy Co.*, 15 Wash. 542, 46 Pac. 1049.

If such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct until his character becomes bad. Every man must be answerable for every improper act and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties. *Fowler v. Aetna F. Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460.

**False Imprisonment.** — It has been held that the good character of the plaintiff is not in issue in an action for false imprisonment. *Claiborne v. Chesapeake & O. R. Co.*, 46 W. Va. 363, 33 S. E. 262; *Davis v. Sanders*, 133 Ala. 275, 32 So. 499; *Diers v. Mallon*, 46 Neb. 121, 64 N. W. 722, 50 Am. St. Rep. 598. But see title "FALSE IMPRISONMENT."

**Malicious Prosecution.** — Where in an action for malicious prosecution and false imprisonment the defendant offered evidence of the plaintiff's guilt of the crime charged, proof of his good character was admitted. *San Antonio & A. P. R. Co. v. Griffin*, 20 Tex. Civ. App. 91, 48 S. W. 542. See also *Mark v. Merz*, 53 Ill. App. 458. See title "MALICIOUS PROSECUTION."

**Criminal Conversation.** — In an action for criminal conversation, the character of the defendant is not in issue, but that of the plaintiff's wife and (it seems) that of the plaintiff himself are in issue. *Croze v. Rutledge*, 81 Ill. 266. See title "CRIMINAL CONVERSATION."

**Libel and Slander.** — It has been held that evidence of the truth of the defamatory charge in slander is not rebuttable by proof of the good character of the defendant. *Matthews v. Huntley*, 9 N. H. 146.

But in an action for libel, the general character of the plaintiff, as well as the trait of character involved in the defamatory publication, is admissible in evidence. *Sickra v. Small*, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep.

injury complained of amounts to the commission of a crime.<sup>5</sup>

b. *Assault*.—Evidence of the character of the defendant in an action for damages for an assault, or assault and battery, is not admissible.<sup>6</sup>

c. *Fraud*.—It was formerly thought that, where a party was charged with fraud from mere circumstances, evidence of his good character might be received to overcome the presumption;<sup>7</sup> but the general rule now is that no presumption or allegation of fraud will render such evidence admissible.<sup>8</sup> That the plaintiff in an action on an insurance policy is charged with fraud in obtaining the insur-

344. See title "LIBEL AND SLANDER."

*Conspiracy*.—In an action for damages growing out of an alleged conspiracy to defraud between the defendant and another person, since deceased, evidence of the good character of the deceased person was admitted. *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497. See also *Bowman v. Bowman*, 76 Hun 46, 27 N. Y. Supp. 579. But compare *Redus v. Burnett*, 59 Tex. 576; *Omer v. Com.* 95 Ky. 353, 25 S. W. 594.

5. *Embezzlement*.—That a party to a civil action is in effect charged with embezzlement is not ground for the admission of evidence of good character. *Home Lum. Co. v. Hartman*, 45 Mo. App. 647.

*Arson*.—That the act complained of in an action for damages may amount to arson does not put the plaintiff's character in issue. *Gebhart v. Burkett*, 57 Ind. 378, 26 Am. Rep. 61.

*Perjury*.—The fact that a party to an action is incidentally charged with perjury does not render proper admission of evidence of his good character. *Alkire Grocer Co. v. Taggart*, 78 Mo. App. 166.

But where the defamatory statement in slander or libel amounted to a charge of perjury, and the defendant offered evidence to sustain the truth of the charge, proof of the good character of the defendant for truth and veracity was admitted. *Downey v. Dillon*, 52 Ind. 442.

6. *Assault*.—*California*.—*Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

*Connecticut*.—*Thompson v. Church*, 1 Root 312.

*Illinois*.—*Drohn v. Brewer*, 77 Ill. 280.

*Indiana*.—*Elliott v. Russell*, 92 Ind. 526; *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961.

*Kentucky*.—*Givens v. Bradley*, 3 Bibb 192, 6 Am. Dec. 646; *Reed v. Kelly*, 4 Bibb 400; *Morris v. Hazelwood*, 1 Bush 208.

*Massachusetts*.—*Bruce v. Priest*, 5 Allen 100; *Day v. Ross*, 154 Mass. 13, 27 N. E. 676.

*Missouri*.—*Lyddon v. Dose*, 81 Mo. App. 64.

*New York*.—*Willis v. Forrest*, 2 Duer 310; *Corning v. Corning*, 6 N. Y. 97.

*Pennsylvania*.—*Porter v. Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341.

In an action for damages for assault with intent to rape, the defendant is not entitled to show his reputation for chastity. *Kinneberg v. Kinneberg*, 8 N. D. 311, 79 N. W. 337; *Sayen v. Ryan*, 9 Ohio C. C. 631.

7. *Fraud*.—*Ruan v. Perry*, 3 Caines (N. Y.) 120; *Townsend v. Graves*, 3 Paige (N. Y.) 453; *State v. Beebe*, 17 Minn. 218; *Henry v. Brown*, 2 Heisk. (Tenn.) 213. See also *Werts v. Spearman*, 22 S. C. 200. "They hold such testimony admissible only where the evidence showing wrong intention or moral turpitude depends upon circumstantial evidence from which an inference of guilt may be deduced, and in such cases the evidence is admitted to repel the inference." *Fahey v. Crotty*, 63 Mich. 383, 29 N. W. 876, 6 Am. St. Rep. 305.

8. *Alabama*.—*Ward v. Herndon*, 5 Port. 382.

*Arkansas*.—*Powers v. Armstrong*, 62 Ark. 267, 35 S. W. 228.

ance, or causing the loss, does not, by the weight of authority, render the admission of evidence of his good character proper.<sup>9</sup>

d. *Divorce*. — In an action for divorce, neither party is entitled to show his or her good character.<sup>10</sup>

**2. Character of Defendant in Criminal Action.** — A. **GRADE OF OFFENSE.** — From an early day, the defendant accused of a capital crime has been permitted to show his good character.<sup>11</sup> In some jurisdictions, such evidence is admitted in any case where the defendant is charged with the commission of an offense involving a criminal intent.<sup>12</sup> In the majority of jurisdictions, it is now admitted in all criminal prosecutions, whether for felonies or misdemeanors,

*Connecticut*. — Woodruff v. Whitlesey, Kirby 60.

*Indiana*. — Church v. Drummond, 7 Ind. 17; Gebhart v. Burkett, 57 Ind. 378, 26 Am. Rep. 61; Vansickle v. Shenk, 150 Ind. 413, 50 N. E. 381.

*Kansas*. — Curtis v. Hoadley, 29 Kan. 566.

*Kentucky*. — Morris v. Hazelwood, 1 Bush 208.

*Maine*. — Potter v. Webb, 6 Greenl. 14.

*Maryland*. — Martin v. Good, 14 Md. 398, 74 Am. Dec. 545.

*Massachusetts*. — Atwood v. Dearborn, 1 Allen 483, 79 Am. Dec. 755.

*Michigan*. — Klein v. Bayer, 81 Mich. 233; 45 N. W. 991.

*Missouri*. — Dudley v. McCluer, 65 Mo. 241, 27 Am. Rep. 273.

*New Hampshire*. — Boardman v. Woodman, 47 N. H. 120.

*New York*. — Gough v. St. John, 16 Wend. 646; Pratt v. Andrews, 4 N. Y. 493.

*North Carolina*. — Norris v. Stewart, 105 N. C. 455, 10 S. E. 912, 18 Am. St. Rep. 228.

*Pennsylvania*. — Anderson v. Long, 10 Serg. & R. 55.

*South Carolina*. — Smets v. Plunket, 1 Strob. Law 372.

**9. Insurance Policy.** — Fowler v. Aetna F. Ins. Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; Schmidt v. New York U. M. F. Ins. Co., 1 Gray (Mass.) 529; Continental Ins. Co. v. Jachnichen, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194; Stone v. Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47; Munkers v. Farmers' & M. Ins. Co., 30 Or. 211, 46 Pac. 850; Mosely v. Vermont M. F. Ins. Co., 55 Vt. 142.

*Contra*, Spears v. International Ins.

Co., 1 Baxt. (Tenn.) 370; German American Mut. L. Assn. v. Farley, 102 Ga. 720, 29 S. E. 615; Fire Association v. Jones, (Tex. Civ. App.), 40 S. W. 44.

**10. Divorce.** — Humphrey v. Humphrey, 7 Conn. 116; Berdell v. Berdell, 80 Ill. 604; Breedlove v. Breedlove, 27 Ind. App. 560, 61 N. E. 797; Evans v. Evans, 93 Ky. 510, 20 S. W. 605; Sullivan v. Sullivan, 92 Me. 84, 42 Atl. 230; Howard v. Patrick, 43 Mich. 121; Gutzwiller v. Lackman, 23 Mo. 168; Rogers v. Troost, 51 Mo. 470; Dwyer v. Dwyer, 2 Mo. App. 17.

*Contra*, O'Bryan v. O'Bryan, 13 Mo. 16, 53 Am. Dec. 128.

See also Du Bose v. Du Bose, 75 Ga. 753.

**11. Capital Offense.** — State v. Laxton, 76 N. C. 216; Hopps v. People, 31 Ill. 385; Drake v. Com., 10 B. Mon. (Ky.) 225; Com. v. Hardy, 2 Mass. 303; State v. Northrup, 48 Iowa 583, 30 Am. Rep. 408. See also Matthews v. State, 32 Tex. 117.

**12. Criminal Intent.** — *California*. People v. Casey, 53 Cal. 360.

*Kansas*. — State v. Deuel, 63 Kan. 811, 66 Pac. 1037.

*Nevada*. — People v. Gleason, 1 Nev. 173.

*Pennsylvania*. — Com. v. Bloes, 1 Wilcox 39.

*Texas*. — Lann v. State, 25 Tex. App. 495, 8 S. W. 650, 8 Am. St. Rep. 445; Lincecum v. State, 29 Tex. App. 328, 15 S. W. 818, 25 Am. St. Rep. 727; Johnson v. State, 1 Tex. App. 146; Coffee v. State, 1 Tex. App. 548; Lockhart v. State, 3 Tex. App. 567; Jones v. State, 10 Tex. App. 552.

and whether the offense is such as was recognized at common law or has been created by statute.<sup>13</sup>

**B. PURPOSE OF ADMISSION.** — Such evidence is proper to disprove the commission of the offense, rebut the evidence of presumption of criminal intent, and show the probability of mistake or falsehood on the part of the witnesses for the prosecution.<sup>14</sup> Its effect should not be limited to the last purpose only.<sup>15</sup>

It may be admitted also to mitigate the punishment where it is fixed by the jury.<sup>16</sup>

**C. THE QUESTION OF DOUBT.** — The early practice was to admit testimony as to character only where the evidence was circumstantial, or the guilt of the defendant doubtful, and to exclude it where

*West Virginia.* — *State v. Madison*, 49 W. Va. 96, 38 S. E. 492.

**13. *United States.*** — *U. S. v. Whitaker*, 6 McLean 342, 28 Fed. Cas. No. 16,672; *U. S. v. Crow*, 1 Bond 51, 25 Fed. Cas. No. 14,895.

*Alabama.* — *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422.

*Illinois.* — *Jupitz v. People*, 34 Ill. 516.

*Kansas.* — *State v. Schlegel*, 50 Kan. 325, 31 Pac. 1105.

*Massachusetts.* — *Com. v. Nagle*, 157 Mass. 554, 32 N. E. 861.

*Michigan.* — *Hamilton v. People*, 29 Mich. 195.

*Minnesota.* — *State v. Dumphey*, 4 Minn. 438.

*Missouri.* — *State v. Bradford*, 79 Mo. App. 346.

*Nebraska.* — *Biester v. State*, (Neb.) 91 N. W. 416; *Olive v. State*, 11 Neb. 1, 7 N. W. 444.

*New York.* — *Cancemi v. People*, 16 N. Y. 501.

*North Carolina.* — *State v. Laxton*, 76 N. C. 216; *State v. Hice*, 117 N. C. 782, 23 S. E. 357.

*Ohio.* — *Harrington v. State*, 19 Ohio St. 264; *State v. Bennett*, 5 Ohio N. P. 284; *Ohio v. Gardner*, Tappan 124.

*Oregon.* — *State v. Porter*, 32 Or. 135, 49 Pac. 964.

*West Virginia.* — *State v. Donohoo*, 22 W. Va. 761.

In a prosecution for the unlawful sale of intoxicating liquors, evidence of the good character of the defendant is proper. *State v. Bradford*, 79 Mo. App. 346.

**Disbarment Proceedings.** — In disbarment proceedings, the accused at-

torney may offer evidence of his good character. *People v. Benson*, 24 Colo. 358, 51 Pac. 481.

**Accomplices.** — It is not error to refuse to permit a person accused of burglary to prove the good character of an alleged accomplice. *Walls v. State*, 125 Ind. 400, 25 N. E. 457; *Omer v. Com.*, 95 Ky. 353, 25 S. W. 594.

**14. *Guzinski v. People***, 77 Ill. App. 275; *State v. Beatty*, 45 Kan. 492, 62 Pac. 899; *Young v. Com.*, 6 Bush 312; *People v. Harrison*, 93 Mich. 594, 53 N. W. 725; *Olive v. State*, 11 Neb. 1, 7 N. W. 444; *Coffee v. State*, 1 Tex. App. 548. But see *Regina v. Burt*, 5 Cox C. C. 284.

**15. *State v. Deuel***, 63 Kan. 811, 66 Pac. 1037; *State v. Wolf*, 112 Iowa 458, 84 N. W. 536; *Renfro v. State*, (Tex. Crim. App.), 56 S. W. 1013; *State v. Van Kuran*, 25 Utah 8, 69 Pac. 60.

**16. *Voght v. State***, 145 Ind. 12, 43 N. E. 1049; *Walker v. State*, 136 Ind. 663, 36 N. E. 356. But see *Rosenbaum v. State*, 33 Ala. 354.

Evidence of the good character of one accused of crime is admissible both to controvert the fact of guilt and the degree thereof, but if the guilt and its degree are determined it is not admissible to reduce the punishment. *Rosenbaum v. State*, 33 Ala. 354.

**Time Admitted.** — Witnesses to the good character of the accused will not be examined after verdict, and before judgment, where they might have been examined on the trial. *Regina v. Mullins*, 3 Cox C. C. 526.

the evidence was clear, direct, and positive.<sup>17</sup> Other authorities seem to hold that while such testimony is admissible in all cases, it is entitled to weight only where the evidence of guilt is otherwise doubtful.<sup>18</sup> But according to the overwhelming weight of modern opinion, evidence of the defendant's good character is proper in all cases, and may, when considered with the other evidence, generate a doubt of guilt where none would otherwise exist.<sup>19</sup> In doubtful

17. *United States*.—U. S. v. Allen, 7 Int. Rev. Rec. 132, 24 Fed. Cas. No. 14,432; U. S. v. Freeman, 4 Mason 505, 25 Fed. Cas. No. 15,162; U. S. v. Knowles, 4 Sawy. 517, 26 Fed. Cas. No. 15,540; U. S. v. Mayer, Deady 127, 26 Fed. Cas. No. 15,753; U. S. v. Smith, 2 Bond 323, 27 Fed. Cas. No. 16,322; U. S. v. Johnson, 26 Fed. 682; U. S. v. Means, 42 Fed. 599.

*California*.—People v. Josephs, 7 Cal. 129; People v. Stewart, 28 Cal. 396.

*District of Columbia*.—U. S. v. Bowen, 3 MacArthur 64.

*Mississippi*.—McDaniel v. State, 8 Smed. & M. 401, 47 Am. Dec. 93.

*New York*.—Wagner v. People, 54 Barb. 367; People v. Hammill, 2 Park. Crim. 223; People v. Kirby, 1 Wheeler Crim. Cas. 64; Green v. Cornwell, 1 City Hall Rec. 11; Freedland's Case, 1 City Hall Rec. 82.

*South Carolina*.—State v. Ford, 3 Strob. Law. 517.

*Tennessee*.—Bennett v. State, 8 Humph. 118.

See also People v. Milgate, 5 Cal. 127; Jackson v. State, 76 Ga. 551; Redd v. State, 99 Ga. 210, 25 S. E. 268; Wesley v. State, 37 Miss. 327, 75 Am. Dec. 62; State v. Wells, 1 N. J. Law 424, 1 Am. Dec. 211; People v. Cole, 4 Park. Crim. (N. Y.) 35; Lowenberg v. People, 5 Park. Crim. (N. Y.) 414; Johnson v. State, 1 Tex. App. 146; Matthews v. State, 32 Tex. 117; Hogan v. State, 36 Wis. 226.

**Early Practice.**—"The practice of allowing defendants on trial, charged with crime, to introduce evidence showing good character, was first adopted in the English courts during the reign of Charles II., and the practice there was to admit such testimony only in capital cases, *in favorem vitæ*, when the evidence was circumstantial or there was

doubt as to the guilt of the accused, but never admitted when the guilt of the accused was plainly shown by the evidence, the court, we presume, being the judge as to whether the evidence showed a plain case of guilt." Reddick v. State, 25 Fla. 112, 433, 5 So. 704. See also State v. Laxton, 76 N. C. 216.

18. *Edmonds v. State*, 34 Ark. 720; *State v. Smith*, 9 Houst. (Del.) 588, 33 Atl. 441; *People v. Stewart*, 28 Cal. 396. But see *People v. Clements*, 42 Hun (N. Y.) 353.

**Other Evidence Positive.**—It has been held that where the guilt of the accused is positively proved by other evidence, proof of his good character is of no avail. *Epps v. State*, 19 Ga. 102; *Voght v. State*, 145 Ind. 12, 43 N. E. 1049. See also *Wesley v. State*, 37 Miss. 327, 75 Am. Dec. 62; *State v. McMurphy*, 52 Mo. 251.

19. *United States*.—*Edgington v. U. S.*, 164 U. S. 361, 17 Sup. Ct. 72; *U. S. v. Hutchins*, 26 Fed. Cas. No. 15,430; *U. S. v. Jones*, 31 Fed. 718.

*Alabama*.—*Goldsmith v. State*, 105 Ala. 8, 16 So. 933; *Scott v. State*, 105 Ala. 57, 16 So. 925, 53 Am. St. Rep. 100; *Newsom v. State*, 107 Ala. 133, 18 So. 206; *Murphy v. State*, 108 Ala. 10, 18 So. 557; *Dorsey v. State*, 110 Ala. 38, 20 So. 450; *Hussey v. State*, 87 Ala. 121, 6 So. 420; *Hays v. State*, 110 Ala. 60, 20 So. 322; *McLeroy v. State*, 120 Ala. 274, 25 So. 247.

*Arkansas*.—*Kee v. State*, 28 Ark. 155.

*California*.—*People v. Fenwick*, 45 Cal. 287; *People v. Bell*, 49 Cal. 485; *People v. Shepardson*, 49 Cal. 629; *People v. Lee*, (Cal.), 8 Pac. 685; *People v. Doggett*, 62 Cal. 27.

*Delaware*.—*State v. Snow*, 3 Pen. 259, 51 Atl. 653; *Daniels v. State*, 2 Pen. 586, 48 Atl. 196.

*District of Columbia*.—*U. S. v. Gunnell*, 5 Mackey 196.



*Florida*.—Hance *v.* State, 8 Fla. 56; Bacon *v.* State, 22 Fla. 51.

*Georgia*.—Davis *v.* State, 10 Ga. 101.

*Illinois*.—Jupitz *v.* People, 34 Ill. 516; Steele *v.* People, 45 Ill. 152; Walsh *v.* People, 65 Ill. 58, 16 Am. Rep. 569; Mark *v.* Merz, 53 Ill. App. 458; Aneals *v.* People, 134 Ill. 401, 25 N. E. 1022.

*Indiana*.—Wagner *v.* State, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79; Cavender *v.* State, 126 Ind. 47, 25 N. E. 875.

*Iowa*.—State *v.* Kinley, 43 Iowa 294; State *v.* Northrup, 48 Iowa 583, 30 Am. Rep. 408; State *v.* Horning, 49 Iowa 158; State *v.* Gustafson, 50 Iowa 104; State *v.* Lindley, 51 Iowa 343, 1 N. W. 484, 33 Am. Rep. 139.

*Kansas*.—State *v.* Douglass, 44 Kan. 618, 26 Pac. 476.

*Louisiana*.—State *v.* Garic, 35 La. Ann. 970.

*Massachusetts*.—Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711; Com. *v.* Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485; Com. *v.* Wilson, 152 Mass. 12, 25 N. E. 16.

*Michigan*.—People *v.* Garbutt, 17 Mich. 8; People *v.* Jassino, 100 Mich. 536, 59 N. W. 230; People *v.* Laird, 102 Mich. 135, 60 N. W. 457; People *v.* Van Dam, 107 Mich. 425, 65 N. W. 277.

*Minnesota*.—State *v.* Hogard, 12 Minn. 293; State *v.* Beebe, 17 Minn. 241; State *v.* Holmes, 65 Minn. 230, 68 N. W. 11.

*Mississippi*.—Coleman *v.* State, 59 Miss. 484.

*Missouri*.—State *v.* Alexander, 66 Mo. 148; State *v.* Crank, 75 Mo. 406; State *v.* McNally, 87 Mo. 644; State *v.* Howell, 100 Mo. 628, 14 S. W. 4; State *v.* Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344.

*Nebraska*.—Myers *v.* State, 51 Neb. 517, 71 N. W. 33.

*Nevada*.—People *v.* Gleason, 1 Nev. 173; State *v.* Levisne, 17 Nev. 435, 30 Pac. 1084.

*New Jersey*.—Baker *v.* State, 53 N. J. Law 45, 20 Atl. 858.

*New York*.—People *v.* Kerr, 6 N. Y. Crim. 406, 6 N. Y. Supp. 674; Ryan *v.* People, 19 Abb. Pr. (N. Y.) 232; People *v.* Pollock, 51 Hun 613, 4 N. Y. Supp. 297; Cancemi *v.* People, 16 N. Y. 501; People *v.* Lamb, 2

Keyes 360; Remsen *v.* People, 43 N. Y. 6, *overruling* 57 Barb. 324; Stover *v.* People, 56 N. Y. 315; People *v.* Brooks, 131 N. Y. 321, 30 N. E. 189; People *v.* Nileman, 8 N. Y. St. 300.

*North Carolina*.—State *v.* Johnson, Winst. Law. 151; State *v.* Henry, 5 Jones Law 65.

*Oregon*.—State *v.* Porter, 32 Or. 135, 49 Pac. 964.

*Pennsylvania*.—Com. *v.* Carey, 2 Brewst. 404; Kilpatrick *v.* Com., 31 Pa. St. 198; Heine *v.* Com., 91 Pa. St. 145; Hanney *v.* Com., 116 Pa. St. 322, 9 Atl. 339; Becker *v.* Com., (Pa. St.), 9 Atl. 510.

*Texas*.—Lee *v.* State, 2 Tex. App. 338.

*Utah*.—State *v.* Blue, 17 Utah 175, 53 Pac. 978; People *v.* Hancock, 7 Utah 170, 25 Pac. 1093; State *v.* Van Kuran, 25 Utah 8, 69 Pac. 60.

*Vermont*.—State *v.* Daley, 53 Vt. 442, 38 Am. Rep. 694.

*Washington*.—State *v.* Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883.

*West Virginia*.—State *v.* Madison, 49 W. Va. 96, 38 S. E. 492.

*Wisconsin*.—Conners *v.* State, 47 Wis. 527; Jackson *v.* State, 81 Wis. 127, 51 N. W. 89.

See also State *v.* Tarrant, 24 S. C. 593.

**Mala Prohibita**.—"This rule has little or no application to penal acts which have no moral quality, but are merely *mala prohibita*. That one is of good reputation as an honest, peaceable citizen has little tendency to show that he has not violated a statute or ordinance forbidding him to catch trout out of season, or to drive certain vehicles faster than a walk, or requiring him to keep the sidewalk abutting on his premises free from snow and ice." Com. *v.* Nagle, 157 Mass. 554, 32 N. E. 861.

**Admissible in All Cases**.—"Good character is an important fact with every man, and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases when it becomes man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most

clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skillful web of suspicion and falsehood which conspirators have been able to weave." Cooley, Ch. J., in *People v. Garbutt*, 17 Mich. 8.

Originally such evidence was admitted only in doubtful cases, but this notion has been pretty well exploded "because it was seen that if the evidence was not admitted in plain cases, it could avail the prisoner nothing in doubtful cases, as it was the duty of the jury in such cases to acquit without the aid of evidence of good character." *State v. Laxton*, 76 N. C. 216; *People v. Shepardson*, 49 Cal. 629; *Felix v. State*, 18 Ala. 720; *State v. Keefe*, 54 Kan. 197, 38 Pac. 302; *Com. v. Leonard*, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485.

In *People v. Bell*, 49 Cal. 485, an instruction that "the good character of the defendant is a circumstance in the case for your consideration in making up your verdict" was held defective as amounting only to the admission of evidence of character, and failing to instruct the jury that the fact of good character must be weighed as any other fact. See also *People v. Lamb*, 2 Keyes (N. Y.) 360.

An instruction that "The court charges the jury that good character itself may, in connection with all the evidence, generate a reasonable doubt and entitle defendant to an acquittal, even though without such proof of good character you would convict" was held proper. *Newsom v. State*, 107 Ala. 133, 18 So. 206.

No definite rule can be laid down as to when evidence of the good character of the defendant will create a doubt of his guilt. *Wagner v. State*, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79.

The good character of the defendant is a circumstance to be considered by the jury, but not a "strong circumstance." *Schaller v. State*, 14 Mo. 502.

Where the evidence of the witness' guilt is wholly circumstantial and there is evidence of his previous good

character, it is error to refuse to instruct the jury that the evidence of good character is "of special importance." *Jackson v. State*, 81 Wis. 127, 51 N. W. 89.

It has been said that while proof of the good character of a defendant may generate a doubt as to his guilt as against positive evidence, yet it can have such effect only when, in the judgment of the jury, that proof is so good as to raise a doubt as to the truthfulness or correctness of the positive evidence. *People v. Hughson*, 154 N. Y. 153, 47 N. E. 1092.

"Where evidence of good character is given it is to be considered as directly bearing upon the question of guilt or innocence, even though the evidence against the accused is of the most direct and positive nature; and in every case the weight to be given to it is for the jury."

*People v. Friedland*, 2 App. Div. 332, 37 N. Y. Supp. 974.

**Notorious Practice.**—Where the crime charged implies some notorious practice, as that of being a common scold, the general good reputation of the defendant is direct evidence of innocence. *Baker v. State*, 53 N. J. Law 45, 20 Atl. 858.

Where the evidence of the act is clear, evidence of good character of the accused may rebut the presumption of malice. *Kee v. State*, 28 Ark. 155.

**Possession of Stolen Property.** Proof of good character may overcome the presumption of guilt arising from the possession of stolen property. *State v. Crank*, 75 Mo. 406.

But the presumption of guilt arising from the possession of stolen property is not rebutted as a matter of law by proof of the defendant's good character, but the weight of such evidence is for the jury. *State v. Hogard*, 12 Minn. 293. *Wagner v. State*, 107 Ind. 71, 7 N. E. 896, 57 Am. Rep. 79.

**Continuance to Obtain Evidence.** A continuance will not be granted for the purpose of obtaining character evidence alone. *Steele v. People*, 45 Ill. 152.

**Reopening Case.**—It is not error for the court in its discretion to refuse to reopen the case for the purpose of permitting the defendant to

cases it will compel an acquittal.<sup>20</sup>

But such evidence is not to be considered apart from the other evidence in the case, but as a fact in connection with the other facts in evidence.<sup>21</sup>

introduce evidence of good character. *State v. Shroyer*, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344.

20. *Cavender v. State*, 126 Ind. 47, 25 N. E. 875; *State v. Levigne*, 17 Nev. 435, 30 Pac. 1084; *Stephens v. People*, 4 Park. Crim. (N. Y.) 396; *Kilpatrick v. Com.*, 31 Pa. St. 198; *Com. v. Carey*, 2 Brewst. (Pa.) 404. But see *Coates v. People*, 4 Park. Crim. (N. Y.) 662.

21. *United States v. White v. U. S.*, 164 U. S. 100, 17 Sup. Ct. 38; *U. S. v. Hutchins*, 26 Fed. Cas. No. 15,430.

*Alabama*.—*Williams v. State*, 52 Ala. 411; *Booker v. State*, 76 Ala. 22; *Pate v. State*, 94 Ala. 14, 10 So. 665; *Springfield v. State*, 96 Ala. 81, 11 So. 250, 38 Am. St. Rep. 85; *Webb v. State*, 106 Ala. 52, 18 So. 491; *Crawford v. State*, 112 Ala. 1, 21 So. 214; *Thornton v. State*, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97; *Dabney v. State*, 113 Ala. 38, 21 So. 211, 59 Am. St. Rep. 92; *Cobb v. State*, 115 Ala. 18, 22 So. 506; *Scott v. State*, 133 Ala. 112, 32 So. 623; *Miller v. State*, 107 Ala. 40, 19 So. 37.

*California*.—*People v. Milgate*, 5 Cal. 127; *People v. Ashe*, 44 Cal. 288; *People v. Raina*, 45 Cal. 292.

*District of Columbia*.—*U. S. v. Gunnell*, 5 Mackey 196.

*Florida*.—*Bacon v. State*, 22 Fla. 51; *Mitchell v. State*, 129 Fla. 23, 30 So. 803.

*Indiana*.—*Kistler v. State*, 54 Ind. 400; *McQueen v. State*, 82 Ind. 72; *Holland v. State*, 131 Ind. 568, 31 N. E. 359.

*Iowa*.—*State v. Northrup*, 48 Iowa 583, 30 Am. Rep. 408; *State v. Gustafson*, 50 Iowa 194.

*Kansas*.—*State v. Keefe*, 54 Kan. 197, 38 Pac. 302.

*Louisiana*.—*State v. Garic*, 35 La. Ann. 970.

*Massachusetts*.—*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *Com. v. Leonard*, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485; *Com. v. Wilson*, 152 Mass. 12, 25 N. E. 16.

*Michigan*.—*Campbell v. People*, 34 Mich. 351; *People v. Mead*, 50 Mich. 228; *People v. Jassino*, 100 Mich. 536, 59 N. W. 230.

*Mississippi*.—*Coleman v. State*, 59 Miss. 484; *Hammond v. State*, 74 Miss. 214, 21 So. 149.

*Missouri*.—*State v. McNally*, 87 Mo. 644; *State v. Howell*, 100 Mo. 628, 14 S. W. 4.

*Nevada*.—*State v. Levigne*, 17 Nev. 435, 30 Pac. 1084.

*New York*.—*People v. Brooks*, 131 N. Y. 321, 30 N. E. 189; *People v. Sweeney*, 133 N. Y. 609, 30 N. E. 1005; *People v. Nileman*, 8 N. Y. St. 300.

*Oregon*.—*State v. Porter*, 32 Or. 135, 49 Pac. 964.

*South Carolina*.—*State v. Barth*, 25 S. C. 175, 60 Am. Rep. 496.

*Washington*.—*State v. Cushing*, 14 Wash. 527, 45 Pac. 145; 53 Am. St. Rep. 883.

See also *Johnson v. State*, 95 Ga. 499, 22 S. E. 639; *Keys v. State*, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63.

"Good character cannot be dissociated from the other facts in the case by referring to it alone as being sufficient to generate a doubt, any more than a similar reference could be made to any other fact in evidence. Under our rule, good character of the defendant is a fact in the case, in the light of which the other facts must be weighed. The fact of good character may generate a reasonable doubt, when without this fact the jury might be satisfied beyond a reasonable doubt of guilt. The same may be true of other facts in the case. The rule does not authorize the framing of a charge in such way as to give undue prominence to the fact of character, any more than to any other fact in the case." *Murphy v. State*, 108 Ala. 10, 18 So. 557.

An instruction that "if the jury believe from the evidence that the defendant is shown to be a man of good character, that itself may generate a

It is proper to instruct the jury, in effect, that the good character of the defendant, if proved, is not in itself a defense.<sup>22</sup>

D. WHO MAY PUT DEFENDANT'S CHARACTER IN ISSUE. — Where the character or reputation of the accused is not an element of the crime charged,<sup>23</sup> the prosecution cannot put it in issue by offering

doubt, though none otherwise exists," was held bad, as instructing the jury that they might consider the evidence of character as an independent fact. *Johnson v. State*, 94 Ala. 53, 10 So. 427.

An instruction that "Previous good character is not of itself a defense, but is a circumstance which should be considered by the jury in connection with all the other evidence, and it may be sufficient to turn the scale in his favor, but its value as defensive evidence in any given case is to be determined by the jury," gives sufficient weight to character evidence. *State v. Donovan*, 61 Iowa 278, 16 N. W. 130.

22. *United States*. — U. S. *v. Jackson*, 29 Fed. 503; U. S. *v. Jones*, 31 Fed. 718.

*Alabama*. — *Armor v. State*, 63 Ala. 173; *Kilgore v. State*, 74 Ala. 1; *Paul v. State*, 100 Ala. 136, 14 So. 634; *Hussey v. State*, 87 Ala. 121, 6 So. 420.

*Arkansas*. — *Kee v. State*, 28 Ark. 155; *Edmonds v. State*, 34 Ark. 720.

*California*. — *People v. Fenwick*, 45 Cal. 287; *People v. Samuels*, 66 Cal. 99, 4 Pac. 1061; *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500.

*Georgia*. — *Epps v. State*, 19 Ga. 102; *Shropshire v. State*, 81 Ga. 589, 8 S. E. 450.

*Illinois*. — *Hirschman v. People*, 101 Ill. 568.

*Indiana*. — *Rollins v. State*, 62 Ind. 46; *McQueen v. State*, 82 Ind. 72; *Walker v. State*, 136 Ind. 663, 36 N. E. 356; *Voght v. State*, 145 Ind. 12, 43 N. E. 1049.

*Iowa*. — *State v. Turner*, 19 Iowa 144; *State v. Northrup*, 48 Iowa 583, 30 Am. Rep. 408; *State v. Donovan*, 61 Iowa 278, 16 N. W. 130.

*Michigan*. — *Campbell v. People*, 34 Mich. 351.

*Minnesota*. — *State v. Dumphey*, 4 Minn. 438.

*Missouri*. — *State v. McMurphy*, 52

Mo. 251; *State v. Ware*, 62 Mo. 597; *State v. Alexander*, 66 Mo. 148.

*Nebraska*. — *Olive v. State*, 11 Neb. 1, 7 N. W. 444.

*Nevada*. — *State v. Levigne*, 17 Nev. 435, 30 Pac. 1084.

*New York*. — *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189; *People v. Sweeney*, 133 N. Y. 609, 30 N. E. 1005.

*Oregon*. — *State v. Porter*, 32 Or. 135, 49 Pac. 964.

*Pennsylvania*. — *Com. v. Eckerd*, 174 Pa. St. 137, 34 Atl. 305.

*Vermont*. — *State v. Totten*, 72 Vt. 73, 47 Atl. 105.

An instruction that "If, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, . . . the evidence convinces you, beyond a reasonable doubt, of defendant's guilt, you must so find, notwithstanding his good character," was held correct. *People v. Mitchell*, 129 Cal. 584, 62 Pac. 187.

An instruction that the good character of the defendant does not go to the jury to shield him from the consequences of his conduct, but simply as a circumstance to be considered by them, together with the other facts, and that as such evidence it may raise a reasonable doubt of the act having been done with a criminal intent, is substantially correct. *Hussey v. State*, 87 Ala. 121, 6 So. 420.

23. See the articles "ABDUCTION;" "ADULTERY;" "ASSAULT AND BATTERY;" "BASTARDY;" "BURGLARY;" "HOMICIDE;" "LARCENY;" "RAPE;" "SEDUCTION."

**Notorious Adulterer.** — A charge of being an open and notorious adulterer may be proved by a bad reputation for chastity. *People v. Gates*, 46 Cal. 52.

**Common Thief.** — The charge of being a "common thief" may be proved by particular acts of thieving,

evidence thereof.<sup>24</sup> Nor can it do so in the first instance, by cross-examining the defendant's witnesses as to his character or reputation.<sup>25</sup>

But where the defendant offers any such evidence, the prosecution may rebut it by like evidence.<sup>26</sup> This rule applies, it seems,

and by general reputation as a thief. *World v. State*, 50 Md. 49.

**Common Gambler.** — Under a charge of being a common gambler particular acts of gambling may be shown to prove the issue. *Com. v. Moore*, 2 Dana (Ky.) 402.

**24. England.** — *Reg. v. Gadbury*, 8 Car. & P. 676, 34 Eng. C. L. 580; *Reg. v. Tuberfield, L. & C.* 495, 10 Jur. (N. S.) 1111.

*United States.* — *U. S. v. Carrigo*, 1 Cranch 49, 25 Fed. Cas. No. 14,735; *U. S. v. Jourdine*, 4 Cranch 338, 26 Fed. Cas. No. 15,499; *U. S. v. Warner*, 4 Cranch 342, 28 Fed. Cas. No. 16,642; *U. S. v. Holmes*, 1 Cliff. 98, 26 Fed. Cas. No. 15,382.

*Alabama.* — *Harrison v. State*, 37 Ala. 154.

*California.* — *People v. Fair*, 43 Cal. 137.

*Connecticut.* — *State v. Church*, 43 Conn. 471.

*Delaware.* — *State v. Lodge*, 9 Houst. 542, 33 Atl. 312; *State v. Carter*, 1 Houst. 402.

*Florida.* — *Mann v. State*, 22 Fla. 600; *Reddick v. State*, 25 Fla. 112, 433, 5 So. 704.

*Georgia.* — *Pound v. State*, 43 Ga. 88.

*Illinois.* — *Kribs v. People*, 82 Ill. 425.

*Indiana.* — *Redman v. State*, 1 Blackf. 96; *Todd v. State*, 31 Ind. 514, 95 Am. Dec. 710; *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 672; *Knight v. State*, 70 Ind. 375; *Drew v. State*, 124 Ind. 9, 23 N. E. 1098.

*Iowa.* — *State v. Kabrich*, 39 Iowa 277; *State v. Rainsbarger*, 71 Iowa 746, 31 N. W. 865.

*Kansas.* — *State v. Thurtell*, 29 Kan. 148.

*Kentucky.* — *Young v. Com.*, 6 Bush 312; *Petty v. Com.*, 12 Ky. L. Rep. 919, 15 S. W. 1059; *Feltner v. Com.*, 23 Ky. L. Rep. 1110, 64 S. W. 959.

*Massachusetts.* — *Rex v. Doaks*, Quincy 90; *Com. v. Robinson*, Thatch. Crim. Cas. 230; *Com. v.*

*O'Brien*, 119 Mass. 342, 20 Am. Rep. 325.

*Mississippi.* — *Dowling v. State*, 5 Smed. & M. 664.

*Missouri.* — *State v. Parker*, 96 Mo. 382, 9 S. W. 728.

*Nebraska.* — *Carter v. State*, 36 Neb. 481, 54 N. W. 853.

*New Hampshire.* — *State v. Renton*, 15 N. H. 169; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69.

*New York.* — *People v. Greenwall*, 108 N. Y. 296, 15 N. E. 404, 2 Am. St. Rep. 415; *People v. White*, 14 Wend. 111; *People v. Bodine*, 1 Edmond's Sel. Cas. 36; *People v. Clark*, 1 Wheeler's Crim. Cas. 292.

*North Carolina.* — *State v. Merrill*, 2 Dev. Law 269; *State v. O'Neal*, 7 Ired. Law 251; *State v. Hare*, 74 N. C. 591; *State v. Foster*, 130 N. C. 666, 41 S. E. 284.

*Ohio.* — *Barton v. State*, 18 Ohio 221; *Hamilton v. State*, 34 Ohio St. 82.

*Rhode Island.* — *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782; *State v. Hull*, 18 R. I. 207, 26 Atl. 191, 20 L. R. A. 609.

*Texas.* — *Turner v. State*, (Tex. Crim. App.), 51 S. W. 366; *Dimry v. State*, (Tex. Crim. App.), 53 S. W. 853; *Bell v. State*, (Tex. Crim. App.), 56 S. W. 913.

*Virginia.* — *Walker v. Com.*, 1 Leigh 628.

*Contra.* — *U. S. v. Gray*, 2 Cranch 675, 26 Fed. Cas. No. 15,251.

**Probable Cause for Arrest.** — Where the person is charged with resisting arrest, the prosecution cannot offer evidence of his bad character to show reasonable grounds for the arrest. *Reg. v. Tuberfield, L. & C.* 495, 10 Jur. (N. S.) 1111.

**25.** *Feltner v. Com.*, 23 Ky. L. Rep. 1110, 64 S. W. 959; *Carter v. State*, 36 Neb. 481, 54 N. W. 853.

**26.** *People v. Marks*, 90 Mich. 555, 51 N. W. 638; *Biester v. State*, (Neb.), 91 N. W. 416; *State v. Laxton*, 76 N. C. 216; *Reg. v. Hughes*, 1

where the evidence of character is adduced upon the cross-examination of the witnesses for the prosecution.<sup>27</sup>

**3. Character of Deceased and of Complaining Witness.** — Where evidence of the character of the deceased in a prosecution for homicide, or of the complaining witness in a prosecution for assault and battery, is relevant, such evidence can be offered, in the first instance, by the defendant only.<sup>28</sup> But where the defendant has offered evidence of threats against him made by the deceased or the complaining witness, the prosecution has been permitted to introduce evidence of the good character of the latter.<sup>29</sup>

**4. Character of Witness.** — A. IMPEACHING. — a. *In General.* Any party to an action, civil or criminal, may offer evidence of the bad character or reputation of an opposing witness for the purpose of impeaching his credibility.<sup>30</sup> But the rule does not apply to a witness who is not called upon to testify.<sup>31</sup>

b. *Party to Action.* — A party to a civil action,<sup>32</sup> or a defendant in a criminal prosecution,<sup>33</sup> testifying in his own behalf, may be so impeached.

Cox C. C. 44; Reg. v. Rowton, L. & C. 520, 34 L. J. M. C. 57. But see Reg. v. Burt, 5 Cox C. C. 284.

**Accomplices.** — It is not proper, however, to show the bad character of the defendant *and others*. State v. Beatty, 45 Kan. 492, 25 Pac. 899.

**27.** Reg. v. Gadbury, 8 Car. & P. 676, 34 Eng. C. L. 580; Reg. v. Shrimpton, 3 Car. & K. 373, 5 Cox C. C. 387.

**28.** Jimmerson v. State, 133 Ala. 18, 32 So. 141; Ben v. State, 37 Ala. 103; People v. Bezy, 67 Cal. 223, 7 Pac. 643; Pound v. State, 43 Ga. 88; State v. Potter, 13 Kan. 414. See also Gay v. State, 40 Tex. Crim. App. 242, 49 S. W. 612. But see Carroll v. State, 3 Humph. (Tenn.) 315.

**29.** Rhea v. State, 37 Tex. Crim. App. 138, 38 S. W. 1012; Sims v. State, 38 Tex. Crim. App. 637, 44 S. W. 522.

**30.** Koch v. State, 115 Ala. 99, 22 So. 471; Milton v. State, 40 Fla. 251, 24 So. 60; Hoffman v. State, 93 Md. 388, 49 Atl. 658; Roach v. State, 41 Tex. 261.

**Rebuttal Witness Impeached.** — A witness called in rebuttal for the first time may be impeached by evidence of bad character. State v. Staley, 45 W. Va. 792, 32 S. E. 198.

**Chancery Practice.** — A commission to examine into the credibility of witnesses should be executed be-

fore the decree. White v. Fussell, 1 Ves. & B. 151. Except where they testify in aid of the account taken under the decree. Malone v. Morris, 2 Moll. 324.

A charge against a witness of receiving money to testify from a party to the action cannot be proved by evidence of his bad moral character. White v. Houston & T. C. R. Co., (Tex. Civ. App.), 46 S. W. 382.

**31.** Lodge v. State, 122 Ala. 97, 26 So. 210, 82 Am. St. Rep. 23; Milton v. State, 40 Fla. 251, 24 So. 60.

**32.** De Kalb Co. v. Smith, 47 Ala. 407; Alkire Grocer Co. v. Tagart, 78 Mo. App. 166; Wright v. Hanna, 98 Ind. 217; Foster v. Newbrough, 58 N. Y. 481; Goodrich v. Warner, 21 Conn. 432.

**33. Alabama.** — Thompson v. State, 100 Ala. 70, 14 So. 878; Kilgore v. State, 124 Ala. 24, 27 So. 4.

**California.** — People v. Beck, 58 Cal. 212; People v. Hickman, 113 Cal. 80, 45 Pac. 175; People v. Mayes, 113 Cal. 618, 45 Pac. 860; People v. Reed, (Cal.), 52 Pac. 835.

**Indiana.** — Mershon v. State, 51 Ind. 14; Griffith v. State, 140 Ind. 163, 39 N. E. 440; State v. Beal, 68 Ind. 345, 34 Am. Dec. 263.

**Iowa.** — State v. Rainsbarger, 79 Iowa 745, 45 N. W. 302; State v. Teeter, 69 Iowa 717, 27 N. W. 485.

**Kentucky.** — McDonald v. Com.,

c. *Subscribing Witness and Deceased Declarant*. — Attesting and subscribing witnesses to deeds and wills have been so impeached,<sup>84</sup> and also declarants whose dying declarations have been received in evidence.<sup>85</sup>

d. *Character Witness*. — An impeaching or sustaining witness may be himself impeached or sustained by other character witnesses,<sup>86</sup> but these last witnesses may not, it is said, be impeached.<sup>87</sup>

B. SUSTAINING. — a. *Where Not Attacked*. — Evidence to sustain the character or reputation of a witness is not admissible where that character or reputation has not been made the subject of attack by the opposite party.<sup>88</sup> The rule applies to the defendant in a crim-

86 Ky. 10, 4 S. W. 687; Barton v. Com., 17 Ky. L. Rep. 580, 32 S. W. 171.

Maine. — State v. Watson, 65 Me. 74.

Missouri. — State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506.

Montana. — State v. Schnepel, 23 Mont. 523, 59 Pac. 927, 75 Am. St. Rep. 558.

South Carolina. — State v. Robertson, 26 S. C. 117, 1 S. E. 443.

Texas. — Ryburn v. Moore, 72 Tex. 85, 10 S. W. 393.

34. Vandyke v. Thompson, 1 Harr. (Del.) 109; Clarke v. Hall, 2 Har. & McH. (Md.) 378; Losee v. Losee, 2 Hill (N. Y.) 609; Chamberlain v. Torrance, 14 Grant Ch. (Can.) 181.

**Attesting Witness**. — The character of an attesting witness may be impeached where the other attesting witness is absent from the state. Lawless v. Guelbreth, 8 Mo. 139.

Where fraud and forgery in the execution of a sealed instrument are charged, proof of the bad character of a subscribing witness is admissible, but such evidence, unsupported by other evidence, will not overcome the presumption arising from the signing and attesting of the instrument. Boylan v. Meeker, 28 N. J. Law 274.

35. Lester v. State, 37 Fla. 382, 20 So. 232; People v. Knapp, 1 Edmond's Sel. Cas. (N. Y.) 177; State v. Thomason, 1 Jones Law (N. C.) 274; State v. Blackburn, 80 N. C. 474; Nesbit v. State, 43 Ga. 238; Harden v. Hays, 9 Pa. St. 151.

36. Phillips v. Thorn, 84 Ind. 84, 43 Am. Rep. 85; State v. Brant, 14 Iowa 180; State v. Moore, 25 Iowa

128, 95 Am. Dec. 776; Long v. Lamkin, 9 Cush. (Mass.) 361; Starks v. People, 5 Denio (N. Y.) 106; State v. Cherry, 63 N. C. 493; Johnson v. Brown, 51 Tex. 65; Gaines v. Relf, 12 How. (U. S.) 472. See also Hoard v. State, 15 Lea (Tenn.) 318. But see Rector v. Rector, 8 Ill. 105.

It has been held that the court may, in its discretion, refuse to permit the direct impeachment of a witness to the good character of an impeached person. State v. Summer, 55 S. C. 32, 32 S. E. 771.

37. Gaines v. Relf, 12 How. (U. S.) 472.

38. England. — Dodd v. Norris, 3 Camp. 519, 14 Rev. Rep. 832.

United States. — Woey Ho v. U. S., 109 Fed. 888; Spurr v. U. S., 87 Fed. 701.

California. — People v. Cowgill, 93 Cal. 596, 29 Pac. 228; People v. O'Brien, 130 Cal. 1, 62 Pac. Rep. 297.

Georgia. — Hamilton v. Conyers, 28 Ga. 276.

Illinois. — Tedens v. Schumers, 112 Ill. 263; Magee v. People, 139 Ill. 138, 28 N. E. 1077.

Indiana. — Brann v. Campbell, 86 Ind. 516.

Missouri. — State v. Thomas, 78 Mo. 327; Fullerson v. Murdock, 53 Mo. App. 151.

Nebraska. — Myers v. State, 51 Neb. 517, 71 N. W. 33.

New York. — People v. Rector, 19 Wend. (N. Y.) 569.

North Carolina. — Braswell v. Gay, 75 N. C. 515.

Oregon. — First Nat. Bank v. Commercial Union Assur. Co., 33 Or. 43, 52 Pac. 1050.

Pennsylvania. — Wertz v. May, 21 Pa. St. 274.

Texas. — McGrath v. State, 35

inal prosecution who testifies in his own behalf.<sup>39</sup>

b. *On Direct Attack*. — When the character of a witness is directly attacked by evidence of bad character,<sup>40</sup> or by proof of conviction of crime, or of indictment or arrest for crime, where permissible,<sup>41</sup> the credit of the witness may be fortified by evidence of his good character.

c. *On Collateral Attack*. — Whether a collateral attack upon the credit of a witness is to be treated as such an attack upon his character as to justify the admission of direct evidence to sustain it is a much disputed question.

(1.) *By Contradictory Statements*. — In many jurisdictions (the result being influenced in some by statutes) a witness whose credibility has been attacked by testimony of statements made by him out of court contradictory of, or inconsistent with, his testimony on material facts in court, may be sustained by proof of his good character.<sup>42</sup> The contrary doctrine obtains in many other jurisdic-

Tex. Crim. App. 413, 34 S. W. 127, 941; *Zysman v. State*, (Tex. Crim. App.), 60 S. W. 669.

Even though the case may turn on his testimony. *First Nat. Bank v. Commercial Union Assur. Co.*, 33 Or. 43, 52 Pac. 1050.

*Stranger Witness*. — It has been said that the good character of a witness, who is a stranger in the community, may be shown, though not attacked. *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *Rogers v. Moore*, 10 Conn. 13; *Merriam v. Hartford R. Co.*, 20 Conn. 354, 52 Am. Dec. 344; *McGrath v. State*, 35 Tex. Crim. App. 413, 34 S. W. 127, 941. *Contra*. — *Murphy v. State*, (Tex. Crim. App.), 40 S. W. 978; *Timmony v. Burns*, (Tex. Civ. App.), 42 S. W. 133.

39. *Morgan v. State*, 88 Ala. 223, 6 So. 761; *Funderberg v. State*, 100 Ala. 36, 14 So. 877; *Hays v. State*, 110 Ala. 60, 20 So. 322; *People v. Cowgill*, 93 Cal. 596, 29 Pac. 228; *State v. Heacock*, 106 Iowa 191, 76 N. W. 654; *State v. Cooper*, 71 Mo. 436; *Osmon v. Winters*, 25 Or. 260, 35 Pac. 250; *Bass v. State*, (Tex. Crim. App.), 65 S. W. 919; *Rutherford v. State*, (Tex. Crim. App.), 67 S. W. 100.

40. *Mercer v. State*, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135; *State v. Jones*, 29 S. C. 201, 7 S. E. 296. See also *People v. Tyler*, 36 Cal. 522; *Wilson v. State*, 17 Tex. App. 525.

As where there is testimony that a witness is a "tough negro." *Warren v. Com.*, 99 Ky. 370, 35 S. W. 1028.

*Unsuccessful Attempt to Impeach*. Where an attempt is made, without success, to impeach the character of a witness, evidence of good reputation is admissible. *Com. v. Ingraham*, 7 Gray (Mass.) 46.

41. *Mercer v. State*, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135; *Gertz v. Fitchburg R. Co.*, 137 Mass. 77, 50 Am. Rep. 285; *Webb v. State*, 29 Ohio St. 351; *Wick v. Baldwin*, 51 Ohio St. 51, 36 N. E. 671; *Farmer v. State*, 35 Tex. Crim. Rep. 270, 33 S. W. 232; *Luttrell v. State*, 40 Tex. Crim. App. 651, 51 S. W. 930.

42. *Alabama*. — *Hadjo v. Gooden*, 13 Ala. 718; *Haley v. State*, 63 Ala. 83; *Holley v. State*, 105 Ala. 100, 17 So. 102; *Towns v. State*, 111 Ala. 1, 20 So. 598.

*Florida*. — *Mercer v. State*, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

*Georgia*. — *McEwen v. Springfield*, 64 Ga. 159.

*Indiana*. — *Paxton v. Dye*, 26 Ind. 393; *Clark v. Bond*, 29 Ind. 555; *Harris v. State*, 30 Ind. 131; *Clem v. State*, 33 Ind. 418; *Stratton v. State*, 45 Ind. 468; *Carroll Co. v. O'Connor*, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16.

*Maryland*. — *Davis v. State*, 38 Md. 15.

*Missouri*. — *Berryman v. Cox*, 73 Mo. App. 67.



tions.<sup>43</sup>

(2.) **On Cross-Examination.**—A number of courts hold that where the cross-examination of a witness is such as to impeach his credibility by disparaging his character, testimony of his good reputation

*North Carolina.*—*Isler v. Dewey*, 71 N. C. 14.

*Oregon.*—*Glaze v. Whitley*, 5 Or. 164.

*South Carolina.*—*Farr v. Thompson*, Cheves Law 37.

*Texas.*—*Burrell v. State*, 18 Tex. 713; *Morrison v. State*, 37 Tex. Crim. Rep. 601, 40 S. W. 591; *Ledbetter v. State*, (Tex. Crim. App.), 29 S. W. 479.

*Vermont.*—*State v. Roe*, 12 Vt. 93; *Paine v. Tilden*, 20 Vt. 554; *Sweet v. Sherman*, 21 Vt. 23.

*Virginia.*—*George v. Pilcher*, 28 Gratt. 299, 26 Am. Rep. 350.

*West Virginia.*—*State v. Staley*, 45 W. Va. 792, 32 S. E. 198.

See also *Lusk v. State*, 129 Ala. 1, 30 So. 33; *Stacy v. Graham*, 14 N. Y. 492.

Where a witness is impeached by evidence of contradictory statements made by him elsewhere, and witnesses have been called to testify to his good character, this latter evidence may be rebutted by witnesses called to testify to the bad character of the first witness. *Johnson v. Brown*, 51 Tex. 65.

**Disclaiming Intention to Impeach.** That the opposite party disclaims any intention of impeaching the witness does not change the rule. *State v. Desforges*, 48 La. Ann. 73, 18 So. 912; *Isler v. Dewey*, 71 N. C. 14.

43. *California.*—*People v. Bush*, 65 Cal. 129, 3 Pac. 590.

*Connecticut.*—*Rogers v. Moore*, 10 Conn. 13.

*Florida.*—*Saussy v. South Fla. R. Co.*, 22 Fla. 327.

*Georgia.*—*Stamper v. Griffin*, 12 Ga. 450.

*Indiana.*—*Brann v. Campbell*, 86 Ind. 516.

*Iowa.*—*State v. Owens*, 109 Iowa 1, 79 N. W. 462.

*Kentucky.*—*Vance v. Vance*, 2 Met. 581.

*Massachusetts.*—*Heywood v. Reed*, 4 Gray 574; *Brown v. Mooers*, 6 Gray 451; *Gertz v. Fitchburg R. Co.*, 137 Mass. 77, 50 Am. Rep. 285.

*Michigan.*—*People v. Olmstead*, 30 Mich. 431.

*New York.*—*People v. Hulse*, 3 Hill 309; *Starks v. People*, 5 Denio 106; *Hannah v. McKellip*, 49 Barb. 342.

*Ohio.*—*Webb v. State*, 29 Ohio St. 351.

*Oregon.*—*Sheppard v. Yocum*, 10 Or. 402; *First Nat. Bank v. Commercial Union Assur. Co.*, 33 Or. 43, 52 Pac. 1050.

*Pennsylvania.*—*Wertz v. May*, 21 Pa. St. 274.

*South Carolina.*—*Chapman v. Cooley*, 12 Rich. Law 654; *State v. Rice*, 49 S. C. 418, 27 S. E. 452, 61 Am. St. Rep. 816.

*Texas.*—*Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114, 40 S. W. Rep. 425; *Murphy v. State*, (Tex. Crim. App.), 40 S. W. 978.

*Washington.*—*State v. Nelson*, 13 Wash. 523, 43 Pac. 637.

"Such testimony not only tends to unnecessarily consume and delay the time of the court, and unlimitedly extend the raising and investigating of collateral issues, but may tend to give additional weight and undue influence to the testimony of such witnesses whose characters have thus been proven to be positively good, over and above the same testimony, by the same witnesses, under the legal presumption of good character." *Brann v. Campbell*, 86 Ind. 516.

"A wise and good man may fail in his remembrance of any fact, and especially of its attendant circumstances. Surely, then, character and credit are distinct things, and every assault on the credit of a witness does not involve the imputation of perjury to him, nor, indeed, any reflection on his reputation. If a witness should contradict himself in the course of his testimony, it would not be pretended that this would be a sufficient basis for evidence as to his good character; and yet there is no difference, in principle, between his contradiction of himself on the stand and outside of the courthouse."

is admissible,<sup>44</sup> while other courts exclude such testimony in similar cases.<sup>45</sup>

(3.) **By Direct Contradiction.**—A few courts admit evidence of the good character of a witness whose testimony upon some material matter has been directly contradicted by another witness or witnesses,<sup>46</sup> but the delay and multiplicity of issues incident to such a

It is frequently a mere contest as to the number of the compurgators and the vilifiers, and in the muster the vicinage is canvassed and disquieted." *Chapman v. Cooley*, 12 Rich. Law (S. C.) 654. See also *Vernon v. Tucker*, 30 Md. 456; *Russell v. Coffin*, 8 Pick. (Mass.) 152.

44. *England.*—*Rex v. Clarke*, 2 Stark. 241.

*Florida.*—*Mercer v. State*, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

*Georgia.*—*Central R. & Banking Co. v. Dodd*, 83 Ga. 507, 10 S. E. 206.

*Louisiana.*—*State v. Boyd*, 38 La. Ann. 374.

*Michigan.*—*People v. Olmstead*, 30 Mich. 431.

*New York.*—*People v. Rector*, 19 Wend. 569; *People v. Hulse*, 3 Hill 309.

*North Carolina.*—*State v. Cherry*, 63 N. C. 493.

*Pennsylvania.*—*Postens v. Postens*, 3 Watts & S. 127.

*Tennessee.*—*Warfield v. Louisville & N. R. Co.*, 104 Tenn. 74, 55 S. W. 304; *Richmond v. Richmond*, 10 Yerg. 343.

*Texas.*—*Salvini v. Legumazabel*, (Tex. Civ. App.), 68 S. W. 183.

*Vermont.*—*Paine v. Tilden*, 20 Vt. 554.

See also *Hoard v. State*, 15 Lea (Tenn.) 318.

**Disparaging Cross-Examination.**

Where a witness is asked on cross-examination whether he has not committed a like offense to that charged against the defendant, his character may be sustained. *State v. Fruge*, 44 La. Ann. 165, 10 So. 621.

Where a witness on cross-examination admitted that he had been bound over for passing counterfeit money, evidence of his good character was admitted. *Carter v. People*, 2 Hill (N. Y.) 317.

45. *Rogers v. Moore*, 10 Conn. 13; *State v. Owens*, 109 Iowa 1, 79 N. W. 462; *Munroe v. Godkin*, 111 Mich. 183, 69 N. W. 244; *First Nat. Bank*

*v. Commercial Union Assur. Co.*, 33 Or. 43, 52 Pac. 1050; *Doe d. Reed v. Harris*, 7 Car. & P. 330.

See also *Harrington v. Inhabitants of Lincoln*, 4 Gray (Mass.) 563, 64 Am. Dec. 95; *McCarty v. Leary*, 118 Mass. 509; *Reynolds v. Richmond & M. R. Co.*, 92 Va. 400, 23 S. E. 770.

Where a witness admitted on cross-examination that he had been arrested and committed for perjury, though not tried, proof of good moral character was excluded. *People v. Gay*, 7 N. Y. 378.

46. *Mercer v. State*, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135; *Louisville N. A. & C. R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *State v. Desforges*, 48 La. Ann. 73, 18 So. 912; *Davis v. State*, 38 Md. 15; *Luttrell v. State*, 40 Tex. Crim. App. 651, 51 S. W. 930; *George v. Pilcher*, 28 Gratt. (Va.) 299, 26 Am. Rep. 350.

In *Newton v. Jackson*, 23 Ala. 335, where a witness had been contradicted on an immaterial matter, evidence of his good character was admitted, the court saying that the only purpose of such contradictions was the impeachment of the witness. See also *Paxton v. Dye*, 26 Ind. 393.

**Charge of Feigning Injuries.**

Where a plaintiff was accused of feigning injuries to which he testified in a civil damage case, proof of his good character was admitted. *Texas Cent. & N. W. R. Co. v. Weideman*, (Tex. Crim. App.), 62 S. W. 810.

*Contra.*—*Austin & N. W. R. Co. v. McElmurry*, (Tex. Civ. App.), 33 S. W. 249.

**Attesting Witness.**—Where imputations of fraud are cast on a deceased attesting witness, who also acted as an attorney in drafting a will, evidence to fortify his reputation is proper. *Provis v. Reed*, 3 M. & P. 4, 1 L. J. C. P. 163, 30 Rev. Rep. 695.

See also *People v. Rector*, 19

practice have influenced most courts to adopt a contrary rule.<sup>47</sup>

(4.) **By Charge of Wrong-Doing.**—That there is evidence in the case tending to show that a witness committed the injury or crime charged against the defendant is not ground for the admission of evidence of the good character of the former.<sup>48</sup> But there is some

Wend. (N. Y.) 569; Atwood v. Dearborn, 1 Allen (Mass.) 483, 79 Am. Dec. 755.

But where an attempt is made on the cross-examination of a witness to impeach the character of an attorney who drafted the will, and who is still living, evidence to fortify his character is not admissible. *Doe d. Reed v. Harris*, 7 Car. & P. 330.

47. *England.*—*Dodd v. Norris*, 3 Camp. 519, 14 Rev. Rep. 832.

*United States.*—*Spurr v. U. S.*, 87 Fed. 701; *Louisville & N. R. Co. v. McClish*, 115 Fed. 268.

*Alabama.*—*Owens v. White*, 28 Ala. 413; *Mobile & G. R. Co. v. Williams*, 54 Ala. 168; *Funderberg v. State*, 100 Ala. 36, 14 So. 877.

*Connecticut.*—*State v. Ward*, 49 Conn. 429.

*Florida.*—*Saussy v. South Fla. R. Co.*, 22 Fla. 327.

*Georgia.*—*Miller v. Western & A. R. Co.*, 93 Ga. 480, 21 S. E. 52; *Bell v. State*, 100 Ga. 78, 27 S. E. 669; *Anderson v. Southern R. Co.*, 107 Ga. 500, 33 S. E. 644.

*Illinois.*—*Tedens v. Schumers*, 112 Ill. 263; *Chicago & A. R. Co. v. Fisher*, 31 Ill. App. 36.

*Indiana.*—*Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 87; *Pruitt v. Cox*, 21 Ind. 15; *Johnson v. State*, 21 Ind. 329; *Presser v. State*, 77 Ind. 274; *Brann v. Campbell*, 86 Ind. 516.

*Iowa.*—*State v. Archer*, 73 Iowa 320, 35 N. W. 241.

*Maryland.*—*Vernon v. Tucker*, 30 Md. 456.

*Massachusetts.*—*Heywood v. Reed*, 4 Gray 574; *Brown v. Mooers*, 6 Gray 451; *Atwood v. Dearborn*, 1 Allen 483, 79 Am. Dec. 755.

*Missouri.*—*Fullerson v. Murdock*, 53 Mo. App. 151.

*New York.*—*Starks v. People*, 5 Denio 106; *People v. Rector*, 19 Wend. 569.

*North Carolina.*—*March v. Harrell*, 1 Jones Law 329.

*Pennsylvania.*—*Braddee v. Brownfield*, 9 Watts 124.

*Texas.*—*Ricks v. State*, 19 Tex. App. 308; *Phillips v. State*, 19 Tex. App. 158; *Rushing v. State*, 25 Tex. App. 607, 8 S. W. 807; *Harris v. State*, (Tex. Crim. App.), 45 S. W. 714; *Jacobs v. State*, (Tex. Crim. App.), 59 S. W. 1111; *Rutherford v. State*, (Tex. Crim. App.), 67 S. W. 100.

*Vermont.*—*Sweet v. Sherman*, 21 Vt. 23; *Stevenson v. Gunning*, 64 Vt. 601, 25 Atl. 697.

*Washington.*—*State v. Nelson*, 13 Wash. 523, 43 Pac. 637.

**Accused Contradicted.**—The rule applies to the accused when he testifies in his own behalf. *Turner v. State*, 124 Ala. 59, 27 So. 272.

And also to the prosecuting witness in bastardy proceedings who is contradicted as to acts of unchastity. *Bell v. State*, 124 Ala. 94, 27 So. 414.

48. **Witness Charged With Wrong-Doing.**—The fact that a witness has been contradicted on an immaterial matter, and that the evidence tends to show that he conspired with one party to the action to defraud the other, is not ground for fortifying his character. *Heywood v. Reed*, 4 Gray (Mass.) 574.

Evidence in a civil damage case that a witness acting as agent for the defendant committed the assault for which action is brought, does not justify the admission of proof of his good character not otherwise attacked. *Anderson v. Southern R. Co.*, 107 Ga. 500, 33 S. E. 644.

Evidence of the good character of a prosecuting witness is not admissible because he is charged by the defendant with having himself taken the money of the taking of which the defendant was accused. *Zysman v. State*, (Tex. Crim. App.), 60 S. W. 669.

But where the accused testified that a witness committed the crime with which he was charged, evidence of the good character of such person was admitted. *Kidwell v. State*, 35 Tex. Crim. App. 264, 33 S. W. 342.

authority for the admission of evidence of the good character of a witness charged with subornation of perjury in the case.<sup>49</sup>

### III. WHAT CHARACTER IS RELEVANT.

**1. The Trait of Character.** — A. OF DEFENDANT IN CRIMINAL ACTION. — a. *Particular Traits.* — According to the doctrine that obtains in most jurisdictions, the evidence of good character offered by the defendant in a criminal prosecution must be limited to the particular trait of character involved in the commission of the crime charged.<sup>50</sup> So in like manner the cross-examination of his wit-

**Prosecutrix in Rape.** — The reputation of the prosecuting witness in rape cannot be fortified by evidence of good character, unless attacked. *People v. Hulse*, 3 Hill (N. Y.) 309. *Contra.* — *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90; *Rogers v. Moore*, 10 Conn. 13.

Evidence of acts of unchastity upon the part of the prosecutrix in rape may be rebutted by proof of good reputation for chastity. *People v. Kuches*, 120 Cal. 566, 52 Pac. 1002.

**49. Interfering With Administration of Justice.** — Where a witness charges another with an attempt to influence him to give false testimony, the reputation of the latter may be sustained. *Lewis v. State*, 35 Ala. 380.

Where it is attempted to be shown that a witness for the state committed the crime charged against the defendant, and that the witness by false testimony, and by his management of the case, and his interference with other witnesses, is attempting to convict the defendant and exculpate himself, the character of such witness may be sustained by proof of his good reputation. *Webb v. State*, 29 Ohio St. 351.

Where the evidence tends to show that a witness has been suborned, his character may be sustained by evidence of good reputation. *People v. Ah Fat*, 48 Cal. 61.

**50. Arkansas.** — *Kee v. State*, 28 Ark. 155.

**California.** — *People v. Fair*, 43 Cal. 137.

**Delaware.** — *State v. Conlan*, 3 Pen. 50.

**Georgia.** — *Stamper v. Griffin*, 12 Ga. 450.

**Indiana.** — *Kahlenbeck v. State*, 119 Ind. 118, 21 N. E. 460.

**Iowa.** — *State v. Heacock*, 106 Iowa 191, 76 N. W. 654; *State v. Curran*, 51 Iowa 112, 49 N. W. 1006; *State v. Dexter*, 115 Iowa 678, 87 N. W. 417.

**Massachusetts.** — *Com. v. Nagle*, 157 Mass. 554, 32 N. E. 861.

**Mississippi.** — *Westbrooks v. State*, 76 Miss. 710, 25 So. 491; *McDaniel v. State*, 8 Smed. & M. 401, 47 Am. Dec. 93.

**Missouri.** — *State v. Dalton*, 27 Mo. 13; *State v. King*, 78 Mo. 555; *State v. Bradford*, 79 Mo. App. 346.

**Nebraska.** — *Basye v. State*, 45 Neb. 261, 63 N. W. 811.

**New Jersey.** — *State v. Snover*, 63 N. J. Law 382, 43 Atl. 1059.

**Ohio.** — *Griffin v. State*, 14 Ohio St. 55.

**Pennsylvania.** — *Com. v. Irwin*, 1 Clark 344; *Cathcart v. Com.*, 37 Pa. St. 108.

**Texas.** — *Lockhart v. State*, 3 Tex. App. 567; *Johnson v. State*, 1 Tex. App. 146; *Jones v. State*, 10 Tex. App. 552.

**Washington.** — *State v. Surry*, 23 Wash. 655, 63 Pac. 557.

See also *Edmonds v. State*, 34 Ark. 720.

"It being obviously irrelevant and absurd on a charge of stealing to inquire into the prisoner's loyalty, or on a charge of treason to inquire into his character for honesty in his private dealings." *Young v. Com.*, 6 Bush (Ky.) 312.

**Trait in Murder.** — In a prosecution for murder, the defendant may show his character for peace and quietude, but not for general morality. *Walker v. State*, 102 Ind. 502, 1 N. E. 856.

nesses<sup>51</sup> and testimony in rebuttal<sup>52</sup> must be limited to the same trait.

b. *General Moral Character.* — Some courts admit evidence of the general moral character of the accused.<sup>53</sup> But the same courts generally admit evidence of the particular trait also.<sup>54</sup> And on cross-examination the witness to general moral character may be interrogated as to particular traits of character;<sup>55</sup> and it has been held that evidence of general moral character may be rebutted by evidence of the particular trait more directly involved.<sup>56</sup>

c. *Irrelevant Traits.* — Under either rule, the defendant is not entitled to prove his reputation for some irrelevant trait of character.<sup>57</sup>

Evidence of the defendant's good reputation for peace and quietude is proper where the charge is for murder by poisoning. *Carr v. State*, 135 Ind. 1, 34 N. E. 533, 41 Am. St. Rep. 408, 20 L. R. 863.

**Rape.** — One charged with rape was not permitted to prove his general moral character. *People v. Josephs*, 7 Cal. 129.

**Perjury.** — Where the accused is charged with perjury, he may offer evidence of good character for truth and veracity. *State v. Kinley*, 43 Iowa 294.

So where charged with making a false deposition. *Edgington v. U. S.*, 164 U. S. 361, 17 Sup. Ct. 72.

**Larceny.** — The defendant's evidence of good character under an indictment for larceny should be limited to his reputation for honesty and integrity. *State v. Bloom*, 68 Ind. 54, 34 Am. Rep. 247.

**Whisky Selling.** — Proof of the reputation as a law abiding citizen of one accused of selling whisky to Indians, was held not relevant. *Chung Sing v. U. S.*, (Ariz.), 36 Pac. 205.

51. *Jackson v. State*, 77 Ala. 18; *Cauley v. State*, 92 Ala. 71, 9 So. 456; *Quinsigamond Bank v. Hobbs*, 11 Gray (Mass.) 250; *Ketchingman v. State*, 6 Wis. 426.

52. *Barnwell v. Hannegan*, 105 Ga. 396, 31 S. E. 116; *State v. Sterrett*, 71 Iowa 386, 32 N. W. 387; *Johnson v. State*, 17 Tex. App. 565; *U. S. v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958.

**Counterfeiting.** — In a prosecution for counterfeiting it was held improper to rebut the defendant's evidence of good character for honesty

by showing that he bore the reputation of being a counterfeiter. *Griffin v. State*, 14 Ohio St. 55.

53. *State v. King*, 78 Mo. 555; *Lincecum v. State*, 29 Tex. App. 328, 15 S. W. 818, 25 Am. St. Rep. 727; *State v. Parker*, 7 La. Ann. 83; *Baker v. State*, 53 N. J. Law 45, 20 Atl. 858; *Daley v. Overseers of Woodbridge*, 21 N. J. Law 491.

54. *State v. Kinley*, 43 Iowa 294; *State v. Parker*, 7 La. Ann. 83; *State v. King*, 78 Mo. 555; *Hawkins v. State*, 21 N. J. Law 630.

55. *Terry v. State*, 118 Ala. 79, 23 So. 776; *Noel v. Dickey*, 3 Bibb (Ky.) 268; *Leonard v. Allen*, 11 Cush. (Mass.) 241; *State v. Hairston*, 121 N. C. 579, 28 S. E. 492.

The impeaching witness may be asked whether, notwithstanding the bad moral character of the deposing witness, the latter has not preserved a good reputation for truth and veracity. *Gaines v. Relf*, 12 How. (U. S.) 472; *Anonymous*, 1 Hill Law (S. C.) 251.

56. *Fuller v. State*, 117 Ala. 36, 23 So. 688.

*Contra* — (Under statute) *Barnwell v. Hannegan*, 105 Ga. 396, 31 S. E. 116.

57. *Butler v. State*, 91 Ala. 87, 9 So. 191; *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136; *Baehner v. State*, 25 Ind. App. 597, 58 N. E. 741; *State v. King*, 78 Mo. 555; *State v. Parker*, 96 Mo. 382, 9 S. W. 728; *Com. v. Twitchell*, 1 Brewst. (Pa.) 551. But see *State v. Parker*, 7 La. Ann. 83.

**Trait in Murder.** — In a prosecution for murder the defendant is not entitled to show his reputation for honesty, nor that the deceased was a

**B. OF WITNESS. — a. Truth and Veracity.** — In many jurisdictions the testimony as to the character of a witness sought to be impeached or sustained is limited to his reputation for truth and veracity.<sup>58</sup>

robber. *State v. O'Shea*, 59 Kan. 593, 53 Pac. 876. See also *Basye v. State*, 45 Neb. 261, 63 N. W. 811.

One accused of murder is not entitled to show that he has "always been known as a kind-hearted man." *Cathcart v. Com.*, 37 Pa. St. 108.

A woman charged with murder is not entitled to show a good reputation for chastity. *People v. Fair*, 43 Cal. 137.

**Assault.** — One charged with felonious assault is not entitled to show a good reputation for industry. *State v. Dalton*, 27 Mo. 13.

One charged with assault who testifies in his own behalf, is not entitled to prove a good reputation for truth and veracity, when his reputation as a witness has not been attacked. *Morgan v. State*, 88 Ala. 223, 6 So. 761.

**Arson.** — One charged with arson may of right show his general reputation for good moral character, but to admit evidence that he has been orderly and industrious would be a mere favor. *State v. Emery*, 59 Vt. 84, 7 Atl. 129.

<sup>58.</sup> *United States.* — *Teese v. Huntingdon*, 23 How. 2; *U. S. v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958; *U. S. v. White*, 5 Cranch C. C. 73, 28 Fed. Cas. No. 16,676.

*Alabama.* — *Nugent v. State*, 18 Ala. 521.

*California.* — *People v. Yslas*, 27 Cal. 631.

*Florida.* — *Mercer v. State*, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135.

*Illinois.* — *Crabtree v. Kile*, 21 Ill. 180; *Cook v. Hunt*, 24 Ill. 536; *Dimick v. Downs*, 82 Ill. 570; *Tedens v. Schumers*, 112 Ill. 263; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *Flansburg v. Basin*, 3 Ill. App. 531.

*Indiana.* — *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 672.

*Iowa.* — *Carter v. Cavanaugh*, 1 Greene 171; *State v. Sater*, 8 Iowa 420.

*Kansas.* — *Taylor v. Clendening*, 4 Kan. 524.

*Kentucky.* — *Young v. Com.*, 6 Bush 312.

*Maine.* — *Inhabitants of Phillips v. Inhabitants of Kingfield*, 19 Me. 375, 36 Am. Dec. 760; *State v. Bruce*, 24 Me. 71; *Thayer v. Boyle*, 30 Me. 475; *Shaw v. Emery*, 42 Me. 59; *State v. Morse*, 67 Me. 428.

*Massachusetts.* — *Com. v. Moore*, 3 Pick. 194; *Com. v. Churchill*, 11 Metc. 538; *Quinsigamond Bank v. Hobbs*, 11 Gray 250.

*Michigan.* — *Lenox v. Fuller*, 39 Mich. 268; *People v. Abbott*, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; *Michigan Pipe Co. v. North British Ins. Co.*, 97 Mich. 493, 56 N. W. 849.

*Minnesota.* — *Rudsdill v. Slingerland*, 18 Minn. 380; *Moreland v. Lawrence*, 23 Minn. 84; *Warner v. Lockerby*, 31 Minn. 421, 18 N. W. 145, 821.

*Mississippi.* — *Newman v. Mackin*, 13 Smed. & M. 383; *Smith v. State*, 58 Miss. 867.

*Nevada.* — *State v. Ferguson*, 9 Nev. 106.

*New Hampshire.* — *State v. Howard*, 9 N. H. 485; *Kelley v. Proctor*, 41 N. H. 139.

*New Jersey.* — *State v. Mairs*, 1 N. J. Law 453; *Atwood v. Impson*, 20 N. J. Eq. 150.

*New York.* — *Troup v. Sherwood*, 3 Johns. Ch. 558.

*Ohio.* — *Perkins v. Mobley*, 4 Ohio St. 668; *Craig v. State*, 5 Ohio St. 605; *Hillis v. Wylie*, 26 Ohio St. 574.

*Pennsylvania.* — *Gilchrist v. McKee*, 4 Watts 380, 28 Am. Dec. 721.

*South Carolina.* — *Clark v. Bailey*, 2 Strob. Eq. 143; *State v. Robertson*, 26 S. C. 117, 1 S. E. 443.

*Texas.* — *Boon v. Weathered*, 23 Tex. 675; *Weathered v. Boon*, 17 Tex. 143; *Ayres v. Duprev*, 27 Tex. 594, 86 Am. Dec. 657; *Kennedy v. Upshaw*, 66 Tex. 442.

*Vermont.* — *State v. Smith*, 7 Vt. 141; *Morse v. Pineo*, 4 Vt. 281; *Crane v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142; *State v. Fournier*, 68 Vt. 262, 35 Atl. 178.

*Virginia.* — *Uhl v. Com.*, 6 Gratt.

The rule applies to testimony to impeach or sustain the character as a witness of one charged with the commission of a crime.<sup>59</sup>

Rebuttal testimony should also be limited to the reputation of the witness for truth.<sup>60</sup>

b. *General Moral Character*. — In many other jurisdictions a witness may be impeached or sustained by evidence of general moral character.<sup>61</sup> This rule is adopted by statute in some

706; *Rixey v. Bayse*, 4 Leigh 330.

*Wisconsin*. — *Ketchingman v. State*, 6 Wis. 426.

See also *Mobley v. Hamit*, 1 A. K. Marsh. (Ky.) 590; *Brown v. State*, 72 Md. 468, 20 Atl. 186; *People v. Rector*, 19 Wend. (N. Y.) 569; *French v. Millard*, 2 Ohio St. 44; *George v. Pilcher*, 28 Gratt. (Va.) 299, 26 Am. Rep. 350.

**Truth and Veracity**. — "Granting that universal immorality includes want of veracity, yet a man may be generally vicious without being universally so. He may be intemperate, incontinent, profane, and addicted to many other vices that ruin the reputation, and yet retain a scrupulous regard for truth. Countless instances of such partial exemption from depravity are in the knowledge of every one. It is, after all, character for veracity alone with which the jury have to do; and why not let it come to them in the first instance without admixture of ingredients that may alter its quality and corrupt its influence? If character for veracity be the legitimate point of inquiry, and if to this complexion it must come at last, it follows that it is the only one, and that an inquiry into anything else is illegitimate." *Gibson C. J.*, in *Gilchrist v. McKee*, 4 Watts (Pa.) 380, 28 Am. Dec. 721. See also *Noel v. Dickey*, 3 Bibb (Ky.) 268; *Carter v. Cavanaugh*, 1 Greene (Iowa) 171.

"Shall a public opinion which does not reach his credibility [general bad moral character] be proved as a fact from which the jury may infer a want of credibility? This would be an inference from public opinion which had not been drawn by the public. . . . It would be a conclusion inferred, not from original facts, but from an opinion formed on those facts by the public. It would be an inference on an inference."

*U. S. v. Van Sickle*, 2 McLean 219, 28 Fed. Cas. No. 16,609.

Evidence that the witness is a notorious counterfeiter is not admissible. *Crane v. Thayer*, 18 Vt. 162, 46 Am. Dec. 142.

59. *Farley v. State*, 57 Ind. 331; *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673; *Calhoon v. Com.*, 23 Ky. L. Rep. 1188, 64 S. W. 965; *Adams v. People*, 9 Hun (N. Y.) 89; *Kitchen v. Tyson*, 3 Murph. (N. C.) 314.

60. *Johnson v. State*, (Tex. Crim. App.), 62 S. W. 756; *People v. Turney*, 124 Mich. 542, 83 N. W. 273.

61. *England*. — *Carpenter v. Wall*, 11 Ad. & E. 803, 9 L. J. Q. B. 217; *Mawson v. Hartsink*, 4 Esp. 102, 6 Rev. Rep. 841.

*United States*. — *Gaines v. Relf*, 12 How. 472.

*Alabama*. — *McInerney v. Irvin*, 90 Ala. 275, 7 So. 841; *Birmingham U. R. Co. v. Hale*, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748; *Rhea v. State*, 100 Ala. 119, 14 So. 853; *Byers v. State*, 105 Ala. 31, 16 So. 716; *Yarbrough v. State*, 105 Ala. 43, 16 So. 758; *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810; *White v. State*, 114 Ala. 10, 22 So. 111; *Lodge v. State*, 122 Ala. 97, 26 So. 210, 82 Am. St. Rep. 23.

*Indiana*. — *Morrison v. State*, 76 Ind. 335.

*Kentucky*. — *Noel v. Dickey*, 3 Bibb 268; *Blue v. Kibby*, 1 T. B. Mon. 195, 15 Am. Dec. 95; *Hume v. Scott*, 3 A. K. Marsh. 260; *Evans v. Smith*, 5 T. B. Mon. 363, 17 Am. Dec. 74; *Thurman v. Virgin*, 18 B. Mon. 785; *Lockard v. Com.*, 87 Ky. 201, 8 S. W. 266; *Turner v. King*, 98 Ky. 253, 32 S. W. 941; *Roberts v. Johnson*, 23 Ky. L. Rep. 938, 64 S. W. 526.

*Louisiana*. — *State v. Jackson*, 44 La. Ann. 160, 10 So. 600; *State v. Guy*, 106 La. 8, 30 So. 268.

states.<sup>62</sup>

Under this practice, evidence to impeach a defendant in a criminal action, who testifies in his own behalf, will not be limited to his reputation for truth.<sup>63</sup> But where the defendant offers no evidence

*Missouri*.—*State v. Breeden*, 58 Mo. 507; *State v. Miller*, 71 Mo. 590; *State v. Rider*, 90 Mo. 54, 95 Mo. 474, 1 S. W. 825; *State v. Smith*, 125 Mo. 2, 28 S. W. 181; *State v. Clawson*, 30 Mo. App. 139; *State v. Coffey*, 44 Mo. App. 445.

*New Jersey*.—*Atwood v. Impson*, 20 N. J. Eq. 150.

*New York*.—*Johnson v. People*, 3 Hill 178, 38 Am. Dec. 624; *Bakeman v. Rose*, 18 Wend. 140; *Wehrkamp v. Willett*, 14 Abb. App. Dec. 548.

*North Carolina*.—*State v. Boswell*, 2 Dev. Law. 209; *State v. Stallings*, 2 Hayw. 300; *State v. O'Neale*, 4 Ired. Law 88.

*Pennsylvania*.—*Wike v. Lightner*, 11 Serg. & R. 198.

*South Carolina*.—Anonymous, 1 Hill Law 251.

*Tennessee*.—*Gilliam v. State*, 1 Head 38, 73 Am. Dec. 161; *Merriam v. State*, 3 Lea 393.

*Texas*.—*Fossett v. State*, (Tex. Crim. App.), 55 S. W. 497.

See also *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *Wood v. State*, 48 Ga. 192, 15 Am. Rep. 664; *Hutchings v. Cavalier*, 3 Har. & McH. (Md.) 389; *Bucklin v. State*, 20 Ohio 18; *Ligon v. Ford*, 5 Munf. (Va.) 10.

**General Moral Character of Witness.**—"Vice is certainly social, and my observation upon human character persuades me that a frequent indulgence in any of the grosser offenses against morality and religion weakens the force of moral principle, renders less sensitive the conscience, and predisposes to a disregard of truth, not only where there is a temptation to speak falsely, but from the depravity of the heart itself." *Sorrelle v. Craig*, 9 Ala. 534. See also *Bakeman v. Rose*, 18 Wend. (N. Y.) 146.

A defendant should have been permitted to show that a witness for the state was "an infamous character; that he was addicted to crimes, which indicated a total disregard of

truth, without specifying a particular crime committed by him; that he lived among low and abandoned women; that he was idle, dissolute and profligate; that he had no means of support but what he obtained by the crimes and vices mentioned; and that, from his vices and general bad character, he was unworthy of credit, and the witnesses would not believe him on oath." *State v. Parker*, 7 La. Ann. 83.

Where it is permissible to impeach the defendant by evidence of bad moral character, evidence that he is a "stubborn, contentious man" is inadmissible. *State v. Parker*, 96 Mo. 382, 9 S. W. 728.

62. *Arkansas*.—*Snow v. Grace*, 29 Ark. 131; *Anderson v. State*, 34 Ark. 257.

*California*.—*Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310.

*Georgia*.—*Weathers v. Barksdale*, 30 Ga. 888; *Watkins v. State*, 82 Ga. 231, 8 S. E. 875; 14 Am. St. Rep. 155; *Barnwell v. Hannegan*, 105 Ga. 396, 31 S. E. 116.

*Indiana*.—*Morrison v. State*, 76 Ind. 335; *Robinson v. State*, 84 Ind. 452; *Anderson v. State*, 104 Ind. 467, 5 N. E. 711; *Drew v. State*, 124 Ind. 9, 23 N. E. 1098.

*Iowa*.—*State v. Hart*, 67 Iowa 142, 25 N. W. 99, *State v. Froelick*, 70 Iowa 213, 30 N. W. 487; *State v. Seevers*, 108 Iowa 738, 78 N. W. 705.

63. *Alabama*.—*Mitchell v. State*, 94 Ala. 68, 10 So. 518; *Fields v. State*, 121 Ala. 16, 25 So. 726; *Kilgore v. State*, 124 Ala. 24, 27 So. 4.

*California*.—*People v. Mayes*, 113 Cal. 618, 45 Pac. 860; *People v. Prather*, 120 Cal. 660, 53 Pac. 259.

*Indiana*.—*Robinson v. State*, 84 Ind. 452; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *Drew v. State*, 124 Ind. 9, 23 N. E. 1098.

*Iowa*.—*State v. Kirkpatrick*, 63 Iowa 554, 19 N. W. 660.

*Kentucky*.—*Lockard v. Com.*, 87 Ky. 201, 8 S. W. 266; *Barton v. Com.*, 17 Ky. L. Rep. 580, 32 S. W. 171;



of good character as proof of innocence of the crime charged, the jury should be instructed to consider the evidence of general moral character as affecting only the question of his credibility as a witness.<sup>64</sup>

c. *Irrelevant Traits*.—Evidence of particular traits of character, not directly affecting veracity, is not admissible to impeach or sustain a witness.<sup>65</sup> In the absence of statute, his reputation for honesty is irrelevant.<sup>66</sup>

So, according to the weight of authority, is the witness' reputation for chastity.<sup>67</sup> There is much confusion, however, in the authori-

Justice v. Com., 20 Ky. L. Rep. 386, 46 S. W. 499.

*Louisiana*.—State v. Taylor, 45 La. Ann. 605, 12 So. 927; State v. Guy, 106 La. 8, 30 So. 268.

*Maine*.—State v. Farmer, 84 Me. 436, 24 Atl. 985.

*Missouri*.—State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506; State v. Palmer, 88 Mo. 568; State v. Bulla, 89 Mo. 595; State v. Rider, 90 Mo. 54, 95 Mo. 474, 1 S. W. 825; State v. Parker, 96 Mo. 382, 9 S. W. 728; State v. Day, 100 Mo. 242, 12 S. W. 365; State v. Weeden, 133 Mo. 70, 34 S. W. 473; State v. May, 142 Mo. 135, 43 S. W. 637; State v. Beaty, 25 Mo. App. 214.

*North Carolina*.—State v. Effer, 85 N. C. 585.

*Tennessee*.—Peck v. State, 86 Tenn. 259, 6 S. W. 389.

But see Fletcher v. State, 49 Ind. 124, 19 Am. Rep. 673; Morrison v. State, 76 Ind. 335; State v. Marks, 16 Utah 204, 51 Pac. 1089.

64. People v. Mayes, 113 Cal. 618, 45 Pac. 680; State v. Weeden, 133 Mo. 70, 34 S. W. 473; State v. Broderick, 61 Vt. 421, 17 Atl. 716; Peck v. State, 86 Tenn. 259, 6 S. W. 389; State v. Traylor, 121 N. C. 674, 28 S. E. 493.

"That evidence properly admissible for one purpose may be so perverted in its use as to effect a different and illegitimate purpose is not altogether preventable. But such evidence cannot on that account be wholly rejected. The correction of its abuse lies in such explanation as the presiding judge may feel required to give to the jury concerning it." State v. Farmer, 84 Me. 436, 24 Atl. 985.

But it is not error to fail to instruct

the jury that evidence of the moral character of a defendant who testifies in his own behalf is only to be considered for the purpose of affecting his credibility where no such instruction is asked. State v. Kirkpatrick, 63 Iowa 554, 19 N. W. 660.

65. Mercer v. State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135; Drew v. State, 124 Ind. 9, 23 N. E. 1098.

66. Davenport v. State, 85 Ala. 336, 5 So. 152; McCutchen v. Loggins, 109 Ala. 457, 19 So. 810; Mercer v. State, 40 Fla. 216, 24 So. 154, 74 Am. St. Rep. 135; State v. Guy, 106 La. 8, 30 So. 268; Inhabitants of Phillips v. Inhabitants of Kingfield, 19 Me. 375, 36 Am. Dec. 760; Quinsigamond Bank v. Hobbs, 11 Gray 250; Brown v. Perez, 89 Tex. 282, 34 S. W. 725. See also State v. Marks, 16 Utah 204, 51 Pac. 1089.

But see State v. Taylor, 45 La. Ann. 605, 12 So. 927; State v. Beaty, 25 Mo. App. 214; Salvini v. Legunazabel, (Tex. Civ. App.), 68 S. W. 183; People v. Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700, (by statute); People v. Prather, 120 Cal. 660, 53 Pac. 259; People v. Silva, 121 Cal. 668, 54 Pac. 146.

67. *Alabama*.—Crawford v. State, 112 Ala. 1, 21 So. 214; Rhea v. State, 100 Ala. 119, 14 So. 853; McInerny v. Irvin, 90 Ala. 275, 7 So. 841; Birmingham U. R. Co. v. Hale, 90 Ala. 88, 8 So. 142, 24 Am. St. Rep. 748. *Arkansas*.—Cline v. State, 51 Ark. 140, 10 S. W. 225.

*California*.—People v. Chin Hane, 108 Cal. 597, 41 Pac. 697; People v. Johnson, 106 Cal. 289, 39 Pac. 622; People v. Yslas, 27 Cal. 631.

*Connecticut*.—State v. Randolph, 24 Conn. 362.

ties, and in some states, and especially in prosecutions for offenses against sex and as affecting the credibility of female witnesses, evidence of unchastity is admitted.<sup>68</sup>

d. *General Moral Character or Trait.*—Where the practice permits evidence of general moral character to impeach or sustain a witness, evidence of his reputation for truth is also relevant.<sup>69</sup>

*Georgia.*—Smithwick v. Evans, 24 Ga. 461.

*Illinois.*—Dimick v. Downs, 82 Ill. 570.

*Iowa.*—Kilburn v. Mullen, 22 Iowa 498.

*Kansas.*—State v. Eberline, 47 Kan. 155, 27 Pac. 839.

*Massachusetts.*—Com. v. Moore, 3 Pick. 194; Com. v. Churchill, 11 Metc. 538, 45 Am. Dec. 229.

*Michigan.*—People v. Mills, 94 Mich. 630, 54 N. W. 488; People v. O'Hare, 124 Mich. 515, 83 N. W. 279; People v. Abbott, 97 Mich. 484, 55 N. W. 862, 37 Am. St. Rep. 360.

*Mississippi.*—Tucker v. Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623.

*Nevada.*—State v. Larkin, 11 Nev. 314.

*New York.*—Jackson v. Boyd, 13 Johns. 504; Bakeman v. Rose, 18 Wend. 146.

*Oregon.*—Leverich v. Frank, 6 Or. 212.

*Pennsylvania.*—Gilchrist v. McKee, 4 Watts 380, 28 Am. Dec. 721.

*Texas.*—Woodward v. State, (Tex. Crim. App.), 58 S. W. 135.

*Utah.*—State v. Hilberg, 22 Utah 27, 61 Pac. 215.

*Vermont.*—Morse v. Pineo, 4 Vt. 281; State v. Smith, 7 Vt. 141; Spears v. Forrest, 15 Vt. 435.

See also People v. Harlan, 133 Cal. 16, 65 Pac. 9; Spencer v. Robbins, 106 Ind. 580, 5 N. E. 726; Jones v. State, 13 Tex. 168, 62 Am. Dec. 550; State v. Fournier, 68 Vt. 262, 35 Atl. 178.

68. *Arkansas.*—Pleasant v. State, 15 Ark. 624.

*Georgia.*—Weathers v. Barksdale, 30 Ga. 888.

*Indiana.*—Wachstetter v. State, 99 Ind. 290, 50 Am. Rep. 94.

*Iowa.*—State v. Seevers, 108 Iowa 738, 78 N. W. 705.

*Kentucky.*—Evans v. Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74.

*Louisiana.*—State v. Guy, 106 La. 8, 30 So. 268.

*Missouri.*—State v. Shields, 13 Mo. 236, 53 Am. Dec. 147; State v. Shroyer, 104 Mo. 441, 16 S. W. 286, 24 Am. St. Rep. 344; State v. Bobbst, 131 Mo. 328, 32 S. W. 1149; State v. Dyer, 139 Mo. 199, 40 S. W. 768; Sittion v. Grand Lodge, 84 Mo. App. 208.

*New York.*—People v. Abbott, 19 Wend. 192.

*Texas.*—Thompson v. State, 35 Tex. Crim. App. 511, 34 S. W. 629.

See also Boles v. State, 46 Ala. 204; State v. Ward, 49 Conn. 429; Indianapolis P. & C. R. Co. v. Anthony, 43 Ind. 183; Dehler v. State, 22 Ind. App. 383, 53 N. E. 850; Craft v. State, 3 Kan. 450; Turner v. King, 98 Ky. 253, 32 S. W. 941, 33 S. W. 405; People v. Harrison, 93 Mich. 594, 53 N. W. 725; State v. Rider, 90 Mo. 54, 95 Mo. 474, 1 S. W. 825; State v. Duffey, 128 Mo. 549, 31 S. W. 98.

Some of the above authorities admit evidence of unchastity of a witness on cross-examination only. See Lee v. State, (Tex. Crim. App.), 44 S. W. 835; McCray v. State, 38 Tex. Crim. App. 609, 44 S. W. 170.

Where a witness is accused of enticement for the purpose of prostitution, it seems that evidence of bad reputation for chastity is admissible. Brown v. State, 72 Md. 468, 20 Atl. 186.

In State v. Sibley, 131 Mo. 519, 33 S. W. 167, it seems to have been held that the prosecuting witness in a prosecution for defiling a female may be impeached by evidence of bad reputation for chastity, but not the defendant testifying in his own behalf. To the same effect, see State v. Clawson, 30 Mo. App. 139; State v. Coffey, 44 Mo. App. 445; State v. Vandiver, 149 Mo. 502, 50 S. W. 892.

69. Davenport v. State, 85 Ala. 336, 5 So. 152; McCutchen v. Log-

C. OF DECEASED PERSON IN HOMICIDE. — In a prosecution for homicide, testimony of the character of the deceased person should be restricted to his reputation for violence, and the rebuttal testimony to the same trait.<sup>70</sup>

2. The Time and Place of Reputation. — A. GENERAL RULES AS TO TIME. — As a general proposition, evidence of character should relate to a time when the character of the person will tend to illustrate the act in question.

a. *As to Defendant in Criminal Action.* — Testimony of the reputation of the defendant in a criminal action should be limited to the time of the commission of the offense,<sup>71</sup> or at least to the time when the defendant is first accused of its commission,<sup>72</sup> as otherwise the offense and accusation might themselves injuriously affect his reputation. The rebuttal testimony,<sup>73</sup> and the cross-examination of

gins, 109 Ala. 457, 19 So. 810; State v. Parker, 7 La. Ann. 83; Tacket v. May, 3 Dana (Ky.) 80; Smith v. Com., 22 Ky. L. Rep. 1349, 60 S. W. 531; State v. Hamilton, 55 Mo. 520. See also Majors v. State, 29 Ark. 112. But see Barnwell v. Hannegan, 105 Ga. 396, 31 S. E. 116.

70. Franklin v. State, 29 Ala. 14; State v. O'Shea, 59 Kan. 593, 53 Pac. 876; State v. Smith, 12 Rich. Law (S. C.) 430.

71. United States. — Spurr v. United States, 59 U. S. App. 663, 31 C. C. A. 202, 87 Fed. 701.

Alabama. — Brown v. State, 46 Ala. 175; Griffith v. State, 90 Ala. 583, 8 So. 812.

Indiana. — Keyes v. State, 122 Ind. 527, 23 N. E. 1097.

Iowa. — State v. Ward, 73 Iowa 532, 35 N. W. 617; State v. Grinden, 91 Iowa 505, 60 N. W. 37.

Kentucky. — White v. Com., 80 Ky. 480, 4 Ky. L. Rep. 373; Com. v. Hourigan, 89 Ky. 305, 12 S. W. 550.

North Carolina. — State v. Johnson, Winst. 151.

Ohio. — Wroe v. State, 20 Ohio St. 460.

Tennessee. — Lea v. State, 94 Tenn. 495, 29 S. W. 900; Moore v. State, 96 Tenn. 209, 33 S. W. 1046.

Utah. — State v. Marks, 16 Utah 204, 51 Pac. 1089.

But see State v. King, 9 S. D. 628, 70 N. W. 1046; Com. v. Sacket, 22 Pick. (Mass.) 394.

"After the discovery that an offense has been committed, a previous

good character may be destroyed, and a bad one created by a discussion of the circumstances connected with the offense, as well before as after the formal charge by legal proceedings is had. To permit the inquiry as to character to extend beyond the time of the discovery that the offense had been committed would be to allow evidence based entirely upon a single transaction, which is contrary to the whole theory upon which evidence of character is admitted in support of the presumption of innocence." White v. Com., 80 Ky. 480, 4 Ky. L. Rep. 373. See also State v. Johnson, Winst. (N. C.) 151.

72. White v. State, 111 Ala. 92, 21 So. 330; Hallway v. People, 181 Ill. 544, 54 N. E. 1030; State v. Kinley, 43 Iowa 294; State v. Fontenot, 48 La. Ann. 305, 19 So. 111. See also Smalls v. State, 102 Ga. 31, 29 S. E. 153.

In State v. King, 9 S. D. 628, 70 N. W. 1046, evidence of the defendant's reputation for chastity after the commission of the alleged offense of seduction and until the time he was charged with it, was admitted.

Reputation in Jail. — Evidence of the character of the accused while in jail is not admissible. Hill v. State, 37 Tex. Crim. App. 415, 35 S. W. 660; Coates v. Sulau, 46 Kan. 341, 26 Pac. 720.

73. State v. Johnson, Winst. (N. C.) 151. Contra — Com. v. Sacket, 22 Pick. (Mass.) 394.

character witnesses as to particular reports or acts inconsistent with their testimony in chief,<sup>74</sup> should be so limited.

b. *As to Deceased or Complaining Witness.* — For similar reasons, evidence of the reputation of the deceased person, in a prosecution for homicide, should be limited to the time of the homicide,<sup>75</sup> and of the complaining witness in assault, or assault and battery, to the time of the assault, and of the prosecutrix (as such) in rape or seduction, to the time of the offense.<sup>76</sup>

c. *As to Party to Civil Action.* — And on like grounds, evidence of the reputation of the plaintiff in slander or libel should be limited to the time of the publication,<sup>77</sup> and the reputation of a party to a civil action (when pertinent) to the time of the act to be illustrated.<sup>78</sup>

d. *As to Witness.* — But the issue raised by evidence of the character of a witness relates to his credibility at the time of testifying, and the testimony should relate to his reputation at that time.<sup>79</sup>

For the purpose of impeaching his credibility only, it is proper to admit evidence of the reputation sustained by the defendant in a criminal action,<sup>80</sup> and it is equally so to either party in a civil

74. *Brown v. State*, 46 Ala. 175; *Hopperwood v. State*, 39 Tex. Crim. App. 15, 44 S. W. 841; *State v. Johnson*, Winst. (N. C.) 151.

But the cross-examination may extend to a period more remote than that covered by the examination in chief. *Halloway v. People*, 181 Ill. 544, 54 N. E. 1030.

75. *State v. Kenyon*, 18 R. I. 217, 26 Atl. 199; *Skaggs v. State*, 31 Tex. Crim. App. 563, 21 S. W. 257.

The reputation of the deceased ten years before the homicide, and not connected with evidence of his reputation at that time, is admissible. *State v. Pettit*, 119 Mo. 410, 24 S. W. 1014.

76. *Smith v. State*, 118 Ala. 117, 24 So. 55; *People v. Wade*, 118 Cal. 672, 50 Pac. 841; *State v. Ward*, 73 Iowa 532, 35 N. W. 617; *People v. Brewer*, 27 Mich. 134; *State v. Forschner*, 43 N. H. 89, 80 Am. Dec. 132; *O'Brien v. State*, 47 N. J. Law 279; *Duval v. Fuhrman*, 2 Ohio 174. *Contra*—*State v. Summar*, 143 Mo. 220, 45 S. W. 254; *Pratt v. State*, 19 Ohio St. 277.

77. *Douglass v. Tousey*, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616.

78. *Cincinnati Mut. Ins. Co. v. May*, 20 Ohio 211.

79. *Thrawley v. State*, 153 Ind.

375, 55 N. E. 95; *Fisher v. Conway*, 21 Kan. 18, 30 Am. Rep. 419; *Quinsigamond Bank v. Hobbs*, 11 Gray (Mass.) 250; *Smith v. Hine*, 179 Pa. St. 203, 36 Atl. 222, *Johnson v. Brown*, 51 Tex. 65.

**Witness' Reputation After Controversy Arose.** — Evidence of the plaintiff's reputation for truth and veracity after the controversy arose is admissible, but such evidence should be guarded by proper instructions to the jury. *Sterling v. Sterling*, 41 Vt. 80.

It is proper to show in rebuttal of impeaching testimony that the reputation of the witness was good before the commencement of the action. *King v. Hersey*, 2 Ind. 402.

If there had been a concerted attempt to injure the reputation of the witness since the suit was begun, such fact may be shown either on cross-examination, or (it is said) by direct evidence. *State v. Howard*, 9 N. H. 485.

80. *Com. v. Hourigan*, 89 Ky. 305, 12 S. W. 550; *State v. Sprague*, 64 N. J. Law 419, 45 Atl. 788; *State v. Spurling*, 118 N. C. 1250, 24 S. E. 533; *Renfro v. State*, (Tex. Crim. App.), 56 S. W. 1013. *Contra*.—*Hill v. State*, 37 Tex. Crim. App. 415, 35 S. W. 660.

Where testimony was offered of

action,<sup>81</sup> at the time he testifies in the case.

It is said that evidence of the present reputation of a witness whose testimony has been taken months before may be admitted, in the discretion of the trial court.<sup>82</sup>

**B. GENERAL RULES AS TO PLACE.**—The reputation of a party<sup>83</sup> or witness<sup>84</sup> admissible in evidence must ordinarily be that sustained by him in the neighborhood or community in which he resides. But the term neighborhood or community, so used, is not susceptible of exact geographical definition, but means, in a general way, where the person is well known and has established a reputation.<sup>85</sup>

the good character of the defendant prior to the alleged offense, and of his bad character since that time, the defendant having been a witness in his own behalf, it was held that the jury should have been instructed that "The character of the defendant before the present charge can be looked to as a witness for or against him as to his guilt; but his character since then can only be looked to in determining the amount of credit due him as a witness as to guilt or innocence." *Lea v. State*, 94 Tenn. 495, 29 S. W. 900. See also *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046.

81. *State v. Spurling*, 118 N. C. 1250, 24 S. E. 533; *Amidon v. Hosley*, 54 Vt. 25.

82. *Dollner v. Lintz*, 84 N. Y. 609.

Proof of the bad character of an attesting witness should be limited to the time of the attestation. *Losee v. Losee*, 2 Hill (N. Y.) 609.

83. *State v. Ward*, 73 Iowa 532, 35 N. W. 617; *Griffin v. State*, 14 Ohio St. 55; *State v. Parker*, 96 Mo. 382, 9 S. W. 728.

84. *City of Aurora v. Cobb*, 21 Ind. 492; *Indianapolis P. & C. R. Co. v. Anthony*, 43 Ind. 183; *Combs v. Com.*, 97 Ky. 24, 29 S. W. 734; *State v. Johnson*, 41 La. Ann. 574, 7 So. 670; *Woodman v. Churchill*, 51 Me. 112; *Kelley v. Proctor*, 41 N. H. 139; *Ramsey v. State*, (Tex. Crim. App.), 65 S. W. 187; *Gainey v. Relf*, 12 How. (U. S.) 472.

**"Neighbors" Defined.**— "Neighbors" are those who dwell near each other; and he who would testify as to the general reputation of a witness must be able to state what is generally said of the person by those

among whom he dwells, or with whom he is chiefly conversant." *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27.

85. *People v. Markham*, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700; *Boswell v. Blackman*, 12 Ga. 591; *Hope v. West Chicago St. R. Co.*, 82 Ill. App. 311; *Peters v. Bourneau*, 22 Ill. App. 177; *Woodman v. Churchill*, 51 Me. 112; *Pickens v. State*, 61 Miss. 563; *Powers v. Presgroves*, 38 Miss. 227; *Chess v. Chess*, 1 Pen. & W. (Pa.) 32, 21 Am. Dec. 350.

**"Neighborhood" Defined.**— "A man's neighborhood extends, for these purposes, as far as he is well known—as far as the people are acquainted with him and his character." *Kelley v. Proctor*, 41 N. H. 139.

One who knows the general character of the witness in a town from which he has moved a distance of four or five miles is a competent witness. *Turner v. State*, 70 Ga. 765.

The reputation of a witness in a town five or six miles from his place of residence, but where he does business and has acquired a general reputation, is proper. *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883; *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

That one called as a witness in a prosecution for homicide knew the character of the deceased only in what he termed "in the upper portion of the neighborhood in which he lived," but not "in the lower portion," affects the weight of his evidence, and not the witness' competency. *Jackson v. State*, 78 Ala. 471.

**Particular Place.**—In *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269,

His community is *prima facie* the town or immediate neighborhood in which he resides,<sup>86</sup> but it may extend throughout a county,<sup>87</sup> or large city,<sup>88</sup> or be restricted to narrow limits and few acquaintances.<sup>89</sup> Reputation in a community may be established in a short time.<sup>90</sup>

C. REPUTATION AT OTHER TIMES AND PLACES. — Evidence of the reputation of a party or witness at a time earlier than that of the offense or trial and in another community than that of his then residence should be admitted or rejected according to the remoteness of the time and place, and other circumstances and its tendency to prove the character of the party or witness at the time in issue.<sup>91</sup> The admission of such evidence rests largely in the discretion of the

it was held that one might have a reputation for violence at a particular place, as a brothel.

86. *Woodman v. Churchill*, 51 Me. 112.

87. *Boswell v. Blackman*, 12 Ga. 591; *Chess v. Chess*, 1 Pen. & W. (Pa.) 32, 21 Am. Dec. 350.

88. *Hope v. West Chicago St. R. Co.*, 82 Ill. App. 311.

89. *Mose v. State*, 36 Ala. 211.

"A person's position in a community may be so obscure that very few of his neighbors know anything of him; his general character may be very circumscribed." *Dave v. State*, 22 Ala. 23.

**Reputation in Custom House.** The reputation of an inspector in a custom house is not competent evidence of his character. *Williams v. U. S.*, 168 U. S. 382, 18 Sup. Ct. 92.

**Among Business Associates.** — One who knows the reputation of a witness among his business associates only is not a competent witness. *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496.

**Among Police.** — One's reputation among the police of a city only is not competent evidence of his character. "To impeach him when the inquiry is as to his reputation for truth, he must have reached the bad eminence of notoriety as a liar." *People v. Markham*, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700. See also *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915.

**Among Boarders.** — A person's reputation among a number of boarders is not competent evidence of character. *Douglas v. Tousev*, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616.

90. *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315; *State v. Cushenberry*, 157 Mo. 168, 56 S. W. 737.

It cannot be said as a matter of law that a reputation for unchastity may not be acquired in twenty-four hours. *State v. Brown*, 55 Kan. 766, 42 Pac. 363.

**Reputation While Visiting.** — The reputation acquired during a visit of three months' duration is not admissible. "A man's character is to be judged by the general tenor and current of his life, and not by a mere episode in it." *Waddingham v. Hulett*, 92 Mo. 528, 5 S. W. 27.

**91. Reputation at Other Time and Place Admitted.** — Such evidence was admitted in the following cases:

*Alabama.* — *Prater v. State*, 107 Ala. 26, 18 So. 238.

*Georgia.* — *Turner v. State*, 70 Ga. 765.

*Illinois.* — *Brown v. Luehrs*, 1 Ill. App. 74; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

*Indiana.* — *King v. Hersey*, 2 Ind. 402.

*Iowa.* — *State v. Foster*, 91 Iowa 164, 59 N. W. 8.

*Kentucky.* — *Marion v. Lambert*, 10 Bush (Ky.) 295.

*Maine.* — *State v. Farmer*, 84 Me. 436, 24 Atl. 985.

*Michigan.* — *Hamilton v. People*, 29 Mich. 195.

*Missouri.* — *State v. Miller*, 156 Mo. 76, 56 S. W. 907.

*New York.* — *Sturmwald v. Schreiber*, 69 App. Div. 476, 74 N. Y. Supp. 995; *Lake v. People*, 1 Park. Crim. 495.

*Pennsylvania.* — *Milliken v. Long*, 188 Pa. St. 411, 41 Atl. 540.

*Washington*.—State *v.* Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883.

And in the following cases after the lapses of time indicated:

*United States*.—Teese *v.* Huntington, 23 How. 2 (five years).

*Alabama*.—Kelly *v.* State, 61 Ala. 19 (three years); Jones *v.* State, 104 Ala. 30, 16 So. 135 (seven or eight years); Yarbrough *v.* State, 105 Ala. 43, 16 So. 758 (ten or twelve years).

*Arkansas*.—Snow *v.* Grace, 29 Ark. 131 (seven years); Lawson *v.* State, 32 Ark. 220 (two years); Holliday *v.* Cohen, 34 Ark. 707 (few months).

*Connecticut*.—Cadwell *v.* State, 17 Conn. 467 (two years).

*Georgia*.—Sims *v.* State, 68 Ga. 486 (one year); Watkins *v.* State, 82 Ga. 231, 9 S. E. 878 (eight years).

*Illinois*.—Holmes *v.* Stateler, 17 Ill. 453 (seven years); Hopps *v.* People, 31 Ill. 385 (three years); Kirkham *v.* People, 170 Ill. 9, 48 N. E. 465 (four years); Hope *v.* West Chicago Street R. Co., 82 Ill. App. 311 (two years).

*Indiana*.—Stratton *v.* State, 45 Ind. 468 (two years); Memphis & O. R. P. Co. *v.* McCool, 83 Ind. 392, 43 Am. Rep. 71 (two or three years); Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459 (two months); Hauk *v.* State, 148 Ind. 238, 46 N. E. 127 (fifteen months); Gemmill *v.* State, 16 Ind. App. 154, 43 N. E. 909 (four months); Houk *v.* Branson, 17 Ind. App. 119, 45 N. E. 78 (fifteen months); Lake Lighting Co. *v.* Lewis, (Ind. App.), 64 N. E. 35 (four or five years).

*Iowa*.—Schoep *v.* Bankers' Alliance Ins. Co., 104 Iowa 354, 73 N. W. 825 (short time).

*Kansas*.—Coates *v.* Sulau, 46 Kan. 341, 20 Pac. 720 (few months).

*Kentucky*.—Turner *v.* King, 98 Ky. 253, 32 S. W. 941, 33 S. W. 405 (sixteen years).

*Massachusetts*.—Parkhurst *v.* Ketchum, 6 Allen 406, 83 Am. Dec. 639 (ten years); Com. *v.* Billings, 97 Mass. 405 (eighteen months).

*Michigan*.—Keator *v.* People, 32 Mich. 484 (four years).

*Minnesota*.—Buse *v.* Page, 32 Minn. 111, 19 N. W. 736 (four years).

*Nevada*.—State *v.* Espinozei, 20 Nev. 209, 19 Pac. 677 (seven years).

*New York*.—Sleeper *v.* Van Middlesworth, 4 Denio 431 (four years); People *v.* Abbot, 19 Wend. 192 (seven years); Graham *v.* Chrystal, 2 Keyes 21 (eight or ten years); Rathbun *v.* Ross, 46 Barb. 127 (four years); Dollner *v.* Lintz, 84 N. Y. 669 (eighteen months).

*North Carolina*.—State *v.* Lanier, 79 N. C. 622 (three years).

*Pennsylvania*.—Morss *v.* Palmer, 15 Pa. St. 51 (ten years).

*Tennessee*.—Fry *v.* State, 96 Tenn. 467, 35 S. W. 883 (six or seven years).

*Texas*.—Mynatt *v.* Hudson, 66 Tex. 66, 17 S. W. 396 (four years); Brown *v.* Perez, 89 Tex. 282, 34 S. W. 725 (thirty years).

The court in admitting evidence of the character of a witness three years before said, "No doubt, evidence referring to the character of the witness sought to be impeached at a recent period would have more influence with the jury than evidence at a more remote period, still the evidence in each instance is of the same grade, and we cannot say that either would not aid the jury in estimating the value of what has been said by the witness." State *v.* Lanier, 79 N. C. 622.

Where the person whose character was sought to be impeached had lived many years in Ohio, and only a few months in Kansas City, his then place of residence, evidence of his general reputation in Ohio was admitted. "The fact that a person has moved away from a community in which he has lived for a long time, when his change of residence is recent, does not render the evidence of his old neighbors as to his reputation incompetent. There is no arbitrary iron-clad rule in relation to such evidence. It must depend largely upon the circumstances of the particular case." Coates *v.* Sulau, 46 Kan. 341, 26 Pac. 720.

Where a defendant testifies in his own behalf and introduces evidence of his good general character, and also of a good reputation for truth and veracity in certain communities, the state may show his bad reputation in those and other communities.

trial court,<sup>92</sup> but its decision may be reversed when its discretion is

*State v. Foster*, 91 Iowa 164, 59 N. W. 8. See also *Fry v. State*, 96 Tenn. 467, 35 S. W. 883.

Where an impeaching witness is acquainted with the reputation of lives and at a place of former residence, he may testify to that reputation at both places. *Hamilton v. People*, 29 Mich. 195.

It is proper to permit a witness to testify to the character of another covering a period of nine years. *State v. Miller*, 156 Mo. 76, 56 S. W. 907.

**Reputation at Another Time and Place Excluded.**—Such evidence was excluded after the lapses of time indicated in the following cases:

*United States*.—*Lease v. Huntingdon*, 23 How. 2 (five years).

*Indiana*.—*Rucker v. Beaty*, 3 Ind. 70 (five years); *Rogers v. Lewis*, 19 Ind. 405 (three years); *Abshire v. Mather*, 27 Ind. 381 (five years); *Chance v. Indianapolis & W. G. R. Co.*, 32 Ind. 472 (two years).

*Iowa*.—*State v. Potts*, 78 Iowa 656, 43 N. W. 534, 5 L. R. A. 814 (five years); *McGuire v. Kenefick*, 111 Iowa 147, 82 N. W. 485 (seven years).

*Kentucky*.—*Turner v. King*, 98 Ky. 253, 32 S. W. 941 (sixteen years); *Louisville & N. R. Co. v. Alumbaugh*, 21 Ky. L. Rep. 134, 51 S. W. 18 (seven years).

*Louisiana*.—*State v. Taylor*, 45 La. Ann. 605, 12 So. 927 (five years).

*Missouri*.—*Wood v. Matthews*, 73 Mo. 477 (three years); *State v. Parker*, 96 Mo. 382, 9 S. W. 728 (twenty years); *State v. Summar*, 143 Mo. 220, 45 S. W. 254 (three years).

*Nebraska*.—*Sun Fire Office v. Ayerst*, 37 Neb. 184, 55 N. W. 635 (two and a half years); *Faulkner v. Gilbert*, 61 Neb. 602, 85 N. W. 843 (several years).

*New Jersey*.—*State v. Shuster*, 63 N. J. Law 355, 46 Atl. 1101, 62 N. J. Law 521, 41 Atl. 701 (eighteen years).

*Pennsylvania*.—*Miller v. Miller*, 187 Pa. St. 572, 41 Atl. 277 (four years).

*Vermont*.—*Willard v. Goodenough*, 30 Vt. 393 (fifteen years).

And was also excluded on various grounds in the following cases: *Aurora v. Cobb*, 21 Ind. 492; *Walker v. State*, 6 Blackf. (Ind.) 1; *Rawles v. State*, 56 Ind. 433; *Young v. Commonwealth*, 6 Bush (Ky.) 312.

See also *Mitchell v. Com.*, 78 Ky. 219; *Baker v. Com.*, 20 Ky. L. Rep. 1778, 50 S. W. 54; *People v. Gotshall*, 123 Mich. 474, 82 N. W. 274; *Swanson v. Andrus*, 84 Minn. 168, 87 N. W. 363, 88 N. W. 252; *Ashford v. Metropolitan L. Ins. Co.*, 80 Mo. App. 638; *Herring v. Patten*, 18 Tex. Civ. App. 147, 44 S. W. 50.

"What the character had formerly been is relevant only as it blends with the continuous web of life and tinges its present texture." *Willard v. Goodenough*, 30 Vt. 393.

"To permit the prosecution, in such a case, to rake up the ashes of long-forgotten rumors, in order to overthrow the moral character of a defendant witness, is at war with public policy, as well as common fairness. Such a course, if permitted, would destroy one of the strongest inducements to the reformation of the supposed offender, a matter in which the state has the greatest possible interest." *State v. Parker*, 96 Mo. 382, 9 S. W. 728.

**Reputation from Boyhood.**—In a case where the defendant introduced evidence of good reputation it was held no error to refuse to permit him to show such character back to boyhood, since the state could not follow and contradict this latter evidence.. *State v. Barr*, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154.

**Reputation in "Old Country"**—An impeaching witness who testifies that he knew the other witness only "in the old country," where the latter has resided in this country about five years, is not competent to testify to the latter's reputation. *Webber v. Hanke*, 4 Mich. 198. See also *Vaughan v. Clarkson*, 19 R. I. 497, 36 Atl. 1135.

**92. United States.**—*Teese v. Huntingdon*, 23 How. 2.

*Arkansas*.—*Snow v. Grace*, 29 Ark. 131; *Holliday v. Cohen*, 34 Ark. 707; *Cline v. State*, 51 Ark. 140, 10 S. W. 225.



clearly abused.<sup>93</sup> There is some presumption against any sudden change in the character of a person who has reached years of maturity.<sup>94</sup> Somewhat greater latitude is allowed in the admission of such evidence to sustain character, than in admission of evidence to impeach it.<sup>95</sup> And evidence of reputation at another time and place is more freely admitted when there is some evidence of reputation at the time and place of the issue,<sup>96</sup> or when the person to be

*Georgia.*—*Watkins v. State*, 82 Ga. 231, 8 S. E. 875, 14 Am. St. Rep. 155.

*Illinois.*—*Kirkham v. People*, 170 Ill. 9, 48 N. E. 465.

*Iowa.*—*Schoep v. Bankers' Alliance Ins. Co.*, 104 Iowa 54, 73 N. W. 825.

*Louisiana.*—*State v. Spencer*, 45 La. Ann. 1, 12 So. 135.

*Michigan.*—*Webber v. Hanke*, 4 Mich. 198.

*Minnesota.*—*Buse v. Page*, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95.

*Missouri.*—*State v. Pettit*, 119 Mo. 410, 24 S. W. 1014.

*New York.*—*Dollner v. Lintz*, 84 N. Y. 669.

*South Carolina.*—*State v. Turner*, 36 S. C. 534, 15 S. E. 602.

*Texas.*—*Brown v. Perez*, 89 Tex. 282, 34 S. W. 725.

<sup>93.</sup> *Snow v. Grace*, 29 Ark. 131; *Lawson v. State*, 32 Ark. 220; *Holliday v. Cohen*, 34 Ark. 707.

It is error to exclude evidence of the bad reputation of a witness in the place where he has resided to within six weeks of the time of the trial. *Louisville N. A. & C. R. Co. v. Richardson*, 66 Ind. 43, 32 Am. Rep. 94.

<sup>94.</sup> *Mynatt v. Hudson*, 66 Tex. 66, 17 S. W. 396; *State v. Lanier*, 79 N. C. 622; *Snow v. Grace*, 29 Ark. 131; *Graham v. Chrystal*, 2 Keyes 21, (N. Y.) 263, 1 Abb. Pr. (N. S.) 121; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231. But compare *Faulkner v. Gilbert*, 61 Neb. 602, 85 N. W. 843, 86 N. W. 1074.

"That the character of a person may suddenly, from having been very good, become very bad, or, from having been very bad, become suddenly very good . . . is possible, but such is not so commonly the case as to justify the presumption that there is no permanency in character whether good or bad." *Stratton v. State*, 45 Ind. 468.

<sup>95.</sup> *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95; *Strumwald v. Schreiber*, 69 App. Div. 476, 74 N. Y. Supp. 995; *Sleeper v. Van Middlesworth*, 4 Denio (N. Y.) 431; *Mynatt v. Hudson*, 66 Tex. 66, 17 S. W. 396.

In admitting the testimony of witness living 7 to 17 miles distant from the residence of the witness whose reputation was sought to be sustained, and also the testimony of witnesses who knew him in another county ten years before, the court said: "It is sometimes easy to excite prejudice against him in the town, village, or neighborhood where he resides. To confine him, in vindication, to the same place where the atmosphere has been polluted by sinister arts, no man's character would be safe." *Morss v. Palmer*, 15 Pa. St. 51.

<sup>96.</sup> *Arkansas.*—*Snow v. Grace*, 29 Ark. 131.

*Indiana.*—*Stratton v. State*, 45 Ind. 468; *Memphis & O. R. P. Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *Houk v. Branson*, 17 Ind. App. 119, 45 N. E. 78; *Lake Lighting Co. v. Lewis*, (Ind. App.), 64 N. E. 35.

*Iowa.*—*McGuire v. Kenefick*, 111 Iowa 147, 82 N. W. 485.

*Kentucky.*—*Louisville & N. R. Co. v. Alumbaugh*, 21 Ky. L. Rep. 134, 51 S. W. 18.

*Massachusetts.*—*Parkhurst v. Ketchum*, 6 Allen 406, 83 Am. Dec. 639.

*Michigan.*—*Hamilton v. People*, 29 Mich. 173.

*Missouri.*—*Wood v. Mathews*, 73 Mo. 477; *State v. Pettit*, 119 Mo. 410, 24 S. W. 1014.

*Nevada.*—*State v. Espinozei*, 20 Nev. 209, 19 Pac. 677.

*New York.*—*People v. Abbott*, 19 Wend. 192. See also *Lake v. People*, 1 Park. Crim. (N. Y.) 495.

"When the witness has a perma-

impeached or sustained has acquired no subsequent residence,<sup>87</sup> or when he frequently visits his former place of residence, and, in a sense, maintains a reputation there.<sup>88</sup>

#### IV. PROOF OF CHARACTER.

**1. Presumption of Good Character.**—The law presumes the good character of a person accused of crime, and no inference of bad character arises from his failure to offer evidence of good character.<sup>89</sup> But if he elects to offer evidence of his good character, he

nent and long-continued residence in the community in which it is attempted to impeach him, the evidence of bad character, at a time long anterior, should not be admitted until a basis is laid by other proof tending to show that the character is then bad." *Mitchell v. Com.*, 78 Ky. 219.

**97. Blackburn v. Mann**, 85 Ill. 222; *Keator v. People*, 32 Mich. 484.

**Witness Having No Present Residence.**—In *Holmes v. Stateler*, 17 Ill. 453, evidence was admitted of the bad character of a witness for truth and veracity in a county where witness had lived 7 years previously, where he did not appear to have since acquired another residence. The court said: "If the testimony offered was incompetent, then might the most abandoned man, by floating about, not staying long enough in any one place to establish a character, be introduced upon the stand as a witness and set all impeachment at defiance."

Where a witness has lived at his present place of residence so short a time as not to have acquired a reputation, other evidence as to his reputation where he was better known was admitted. *Schoep v. Bankers' Alliance Ins. Co.*, 104 Iowa 354, 73 N. W. 825.

Where the witness had no settled abode, and had been absent from time to time in a foreign country for thirty years, evidence of his bad reputation thirty years before was admitted. *Brown v. Perez*, 89 Tex. 282, 34 S. W. 725.

**98. Blackburn v. Mann**, 85 Ill. 222; *Houk v. Branson*, 17 Ind. App. 119, 45 N. E. 78; *Houk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

Evidence of the present reputation

of a witness at a place from which he removed several years before was held improper. *Faulkner v. Gilbert*, 61 Neb. 602, 85 N. W. 843, 86 N. W. 1074.

**99. Alabama.**—*Danner v. State*, 54 Ala. 127, 25 Am. Rep. 662; *Little v. State*, 58 Ala. 265.

*Georgia.*—*Bennett v. State*, 86 Ga. 401, 12 S. E. 806, 22 Am. St. Rep. 465, 12 L. R. A. 449.

*Indiana.*—*Chuck v. State*, 40 Ind. 263; *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673.

*Iowa.*—*State v. Kabrich*, 39 Iowa 277; *State v. Dockstader*, 42 Iowa 436.

*Maine.*—*State v. Upham*, 38 Me. 261.

*Michigan.*—*People v. Evans*, 72 Mich. 367, 40 N. W. 473.

*Nebraska.*—*Olive v. State*, 11 Neb. 1, 7 N. W. 444.

*New York.*—*Ormsby v. People*, 53 N. Y. 472; *People v. Bodine*, 1 Denio 289.

*North Carolina.*—*State v. O'Neal*, 7 Ired. Law 251; *State v. Saunders*, 84 N. C. 728.

*Texas.*—*Stephens v. State*, 20 Tex. App. 255.

See also *State v. McAllister*, 24 Me. 139; *State v. Tozier*, 49 Me. 404; *People v. Vane*, 12 Wend. (N. Y.) 78.

The law assumes that the defendant's character is of "ordinary fairness." If the prisoner chooses to give no evidence on the subject, the jury are not at liberty to indulge in conjecture that his character is bad, in order to infer that he is guilty of the particular crime charged." *Ackley v. People*, 9 Barb. (N. Y.) 609.

**Comment by Counsel.**—Where the defendant has offered no proof of good character it is error for the

must rest the question upon such evidence alone, unsustained by the legal presumption.<sup>1</sup>

**2. Personal Knowledge of Character.**—It appears to have been the earlier practice to prove the character of a person by the testimony of others who testified directly to his character from personal knowledge and observation. There is some authority for so proving the character of the defendant in a criminal action,<sup>2</sup> of the deceased person in a prosecution for homicide or the complaining witness in assault and battery,<sup>3</sup> and of a witness.<sup>4</sup> It is believed, however, that the practice is unusual at the present time and against the great weight of modern authority.<sup>5</sup>

It is generally held that the personal opinion of a witness is incompetent evidence of either character or reputation, and that character is provable only by evidence of general reputation.<sup>6</sup>

prosecuting attorney to comment on that fact. *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Bennett v. State*, 86 Ga. 401, 12 S. E. 806, 22 Am. St. Rep. 465, 12 L. R. A. 449; *State v. Upham*, 38 Me. 261; *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673.

1. *Knight v. State*, 70 Ind. 375; *State v. Marks*, 16 Utah 204, 51 Pac. 1089.

It is not error to refuse to instruct the jury that "In addition to the evidence upon the subject of character, the law presumes that the character of the defendant for honesty is good." *McQueen v. State*, 82 Ind. 72.

2. *Sullivan v. State*, 66 Ala. 48; *State v. Sterrett*, 68 Iowa 76, 25 N. W. 936; *State v. Cross*, 68 Iowa 180, 26 N. W. 62; *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769; *Gandolfo v. State*, 11 Ohio St. 114; *Dufresne v. Weise*, 46 Wis. 290, 1 N. W. 59; *Davison's Trial*, 31 How. St. Tr. 186; *Hardy's Trial*, 24 How. St. Tr. 999. See also *Steele v. State*, 83 Ala. 20, 3 So. 547.

3. *Turner v. State*, 70 Ga. 765.

In prosecution for assault and battery it was held that the defendant might prove the character of the prosecuting witness by his personal knowledge of the latter's quarrels, and his vicious and dangerous character from particular acts of violence, and that such evidence might be rebutted by the state by proof of the prosecuting witness' general reputation. *Bowlus v. State*, 130 Ind. 227, 28 N. E. 1115.

4. *People v. Davis*, 21 Wend. (N. Y.) 309.

5. *England*.—Reg. v. Rowton, L. & C. 520, 34 L. J. M. C. 57.

*Arkansas*.—*Pleasant v. State*, 15 Ark. 624.

*California*.—*People v. Anderson*, 39 Cal. 703; *People v. Casey*, 53 Cal. 360; *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933.

*Iowa*.—*State v. Egan*, 59 Iowa 636, 13 N. W. 730.

*Missouri*.—*State v. King*, 78 Mo. 555.

*Nevada*.—*State v. Pearce*, 15 Nev. 188.

*New Hampshire*.—*Sargent v. Wilson*, 59 N. H. 396.

*New York*.—*Strumwald v. Schreiber*, 69 App. Div. 476, 74 N. Y. Supp. 995; *Healy v. Terry*, 30 N. Y. St. 664, 9 N. Y. Supp. 519; *Johnson v. People*, 3 Hill 178, 36 Am. Dec. 624; *Sawyer v. People*, 1 N. Y. Cr. 249.

*North Carolina*.—*State v. Speight*, 69 N. C. 72.

*Texas*.—*Brownlee v. State*, 13 Tex. App. 255.

*Vermont*.—*Powers v. Leach*, 26 Vt. 270.

See also *Wilson v. Runion*, Wright (Ohio) 651.

6. *England*.—Reg. v. Rowton, L. & C. 520, 34 L. J. M. C. 57.

*Alabama*.—*Sorrelle v. Craig*, 9 Ala. 534; *Martin v. Martin*, 25 Ala. 201; *Mose v. State*, 36 Ala. 211; *Hussey v. State*, 87 Ala. 121, 6 So. 420; *Jackson v. State*, 78 Ala. 471; *Holmes v. State*, 88 Ala. 26, 7 So. 193, 16 Am. St. Rep. 17; *Jackson v. State*, 106 Ala. 12, 17 So. 333.

**3. Particular Acts of Party or Witness.** — It is not ordinarily competent to prove the character of the defendant in a criminal action,<sup>7</sup>

*California.* — *People v. Casey*, 53 Cal. 360; *People v. Gordon*, 103 Cal. 568, 37 Pac. 534.

*Delaware.* — *State v. Briscoe*, 3 Pen. 7, 50 Atl. 271.

*Georgia.* — *Savannah F. & W. R. Co. v. Wideman*, 99 Ga. 245, 25 S. E. 400.

*Illinois.* — *Gifford v. People*, 148 Ill. 173, 35 N. E. 754.

*Iowa.* — *State v. Arnold*, 12 Iowa 479.

*Louisiana.* — *Stanton v. Parker*, 5 Rob. 108, 39 Am. Dec. 528.

*New York.* — *Hart v. McLaughlin*, 51 App. Div. 411, 64 N. Y. Supp. 827; *Fulton Bank v. Benedict*, 1 Hall 480.

*North Carolina.* — *Downey v. Murphy*, 1 Dev. & B. Law 82; *State v. Parks*, 3 Ired. Law 297; *Bottoms v. Kent*, 3 Jones Law 154.

*Ohio.* — *Bucklin v. State*, 20 Ohio 18.

*Texas.* — *Brownlee v. State*, 13 Tex. App. 255.

*Virginia.* — *Langhorne v. Com.*, 76 Va. 1012.

But see *People v. Samanset*, 97 Cal. 448, 32 Pac. 520.

#### **Witness as Member of Community.**

It has been said that while an impeaching witness must testify to the general reputation of the other, and not to his own personal opinion, that nevertheless as one member of the community he may take into account his own estimate of witness' reputation. *Smith v. State*, 88 Ala. 73, 7 So. 52.

But the question, "From what you know of his reputation, and *what you know of him*, would you believe him under oath in a matter in which he is interested?" was held improper. *People v. Methvin*, 53 Cal. 68. See also *Ford v. Ford*, 7 Humph. (Tenn.) 92.

"Opinion will not be evidence; for if it were, no witness would be safe from the shafts of calumny. No man is to be discredited by the mere opinion of another; few men live whom some do not think ill of." *Kimmel v. Kimmel*, 3 Serg. & R. (Pa.) 336, 8 Am. Dec. 655.

7. *Alabama.* — *Morgan v. State*,

88 Ala. 223, 6 So. 761; *Walker v. State*, 91 Ala. 76, 9 So. 87.

*California.* — *People v. Bowen*, 49 Cal. 654; *People v. Eckman*, 72 Cal. 582, 14 Pac. 359; *People v. Stewart*, 85 Cal. 174, 24 Pac. 722; *People v. Gordon*, 103 Cal. 568, 37 Pac. 534.

*Florida.* — *Mann v. State*, 22 Fla. 600.

*Georgia.* — *Pound v. State*, 43 Ga. 88.

*Indiana.* — *Redman v. State*, 1 Blackf. 96; *Todd v. State*, 31 Ind. 514; *Farley v. State*, 57 Ind. 514; *Stalcup v. State*, 146 Ind. 270, 45 N. E. 334.

*Iowa.* — *State v. Bysong*, (Iowa), 84 N. W. 505.

*Kentucky.* — *White v. Com.*, 80 Ky. 480.

*Massachusetts.* — *Leonard v. Allen*, 11 Cush. 241; *Day v. Ross*, 154 Mass. 13, 27 N. E. 676; *Com. v. Nagle*, 157 Mass. 554, 32 N. E. 861.

*Missouri.* — *State v. Parker*, 96 Mo. 382, 9 S. W. 728; *State v. Wellsor*, 117 Mo. 570, 21 S. W. 443; *State v. Gates*, 130 Mo. 351, 32 S. W. 971; *State v. Vandiver*, 149 Mo. 502, 50 S. W. 892; *State v. Lockett*, 168 Mo. 480, 68 S. W. 563.

*Montana.* — *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038.

*Nebraska.* — *Basye v. State*, 45 Neb. 261, 63 N. W. 811.

*New York.* — *People v. Greenwall*, 108 N. Y. 296, 15 N. E. 404, 2 Am. St. Rep. 415.

*Ohio.* — *Barton v. State*, 18 Ohio 221; *Hamilton v. State*, 34 Ohio St. 82.

*Texas.* — *Howard v. State*, 37 Tex. Crim. App. 494, 36 S. W. 475; *Woodard v. State*, (Tex. Crim. App.), 51 S. W. 1122.

*Virginia.* — *Walker v. Com.*, 1 Leigh 628.

See also *Betts v. Lockwood*, 8 Conn. 487.

*Compare Tooney v. State*, 8 Tex. App. 452.

**Position of Trust.** — Evidence that the defendant in a criminal action once held a position of trust at a fair salary is not competent to establish good character. *Howard v. State*, 37 Tex. Crim. App. 494, 36

of a party or agent in a civil action,<sup>8</sup> of the deceased in a prosecution for homicide or the complaining witness in assault and battery,<sup>9</sup> or of a witness,<sup>10</sup> by testimony of specific acts, or vices, or instances

S. W. 475; *Carson v. State*, 133 Mo. 606, 34 S. W. 855.

**Army Certificate.**—A defendant charged with burglary cannot prove his good moral character by a certificate of discharge from the United States Army certifying to his good character. *People v. Eckman*, 72 Cal. 582, 14 Pac. 359.

**Church Member.**—Defendant is not entitled to show that he is a church member. *Hussey v. State*, 87 Ala. 121, 6 So. 420; *Bird v. Halsy*, 87 Fed. 671.

Or that he has preached in a church several times. *State v. Brooks*, 23 Mont. 146, 57 Pac. 1038.

But plaintiff in an action for seduction was permitted to show that she was a "member of church." *Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341.

8. *St. Louis I. M. & S. R. Co. v. Stroud*, 67 Ark. 112, 56 S. W. 870; *Dorsey v. Clapp*, 22 Neb. 564, 35 N. W. 389; *Hart v. McLaughlin*, 51 App. Div. 411, 64 N. Y. Supp. 827; *Meyer v. Suburban Home Co.*, 25 Misc. 686, 55 N. Y. Supp. 566; *Sheen v. Bumpstead*, 1 H. & C. 358, 32 L. J. Ex. 124; *affirmed* 2 H. & C. 193, 33 L. J. Ex. 271; *Downing v. Butcher*, 2 M. & Rob. 374.

**Libel and Slander.**—The reputation of the plaintiff in libel or slander cannot be shown by particular acts. *McLaughlin v. Cowley*, 131 Mass. 70; *Proctor v. Houghtaling*, 37 Mich. 41; *Sawyer v. Eifert*, 2 Nott & McC. (S. C.) 511, 10 Am. Dec. 633. Nor by showing his popularity or unpopularity. *Alkire Grocer Co. v. Tagart*, 78 Mo. App. 166; *Remsen v. Bryant*, 36 App. Div. 240, 56 N. Y. Supp. 728. See title "LIBEL AND SLANDER."

9. *Alabama*.—*Franklin v. State*, 29 Ala. 14; *Jones v. State*, 76 Ala. 8; *Jackson v. State*, 78 Ala. 471; *Steele v. State*, 83 Ala. 20, 3 So. 547; *Davenport v. State*, 85 Ala. 336, 5 So. 152.

*Arkansas*.—*Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054.

*Florida*.—*Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 262.

*Georgia*.—*Powell v. State*, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277.

*Indiana*.—*Stalcup v. State*, 146 Ind. 270, 45 N. E. 334.

*Montana*.—*State v. Shadwell*, 22 Mont. 559, 57 Pac. 281.

*New York*.—*People v. Druse*, 103 N. Y. 655, 8 N. E. 733.

*Tennessee*.—*Ferguson v. Moore*, 98 Tenn. 342, 39 S. W. 341.

*Texas*.—*Darter v. State*, 39 Tex. Crim. App. 40, 44 S. W. 850.

But see *Bowlus v. State*, 130 Ind. 227, 28 N. E. 1115.

**Reputation of Deceased.**—Evidence of the violent character of the deceased person cannot be rebutted by proof that he was a cripple and received a wound in Confederate service. *Irvine v. State*, 26 Tex. App. 37, 9 S. W. 55.

10. *England*.—*Mawson v. Hart-sink*, 4 Esp. 102, 6 Rev. Rep. 695; *Rex v. Watson*, 2 Stark. 149; *Spencely v. De Willott*, 7 East 108, 3 Smith 289; *Reg. v. Rowton, L. & C.* 520, 34 L. J. M. C. 57.

*United States*.—*Gaines v. Relf*, 12 How. 472; *Teese v. Huntingdon*, 23 How. 2; *U. S. v. Vansickle*, 2 McLean 219, 28 Fed. Cas. No. 16,676.

*Alabama*.—*Sorrelle v. Craig*, 9 Ala. 534; *Nugent v. State*, 18 Ala. 521; *Holland v. Barnes*, 53 Ala. 83, 25 Am. Rep. 595; *Moore v. State*, 68 Ala. 360; *Lowery v. State*, 98 Ala. 45, 13 So. 498; *Feibelman v. Manchester Fire Assur. Co.*, 108 Ala. 180, 19 So. 540.

*Arkansas*.—*Pleasant v. State*, 15 Ark. 624; *Stanley v. Aetna Insurance Co.*, 70 Ark. 107, 66 S. W. 432.

*California*.—*Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *In re James' Estate*, 124 Cal. 653, 57 Pac. 578, 1008; *People v. Lee Dick Lung*, 129 Cal. 491, 62 Pac. 71; *People v. Harlan*, 133 Cal. 16, 65 Pac. 9; *Steen v. Santa Clara V. M. & L. Co.*, 134 Cal. 355, 66 Pac. 321.

*Connecticut*.—*State v. Randolph*, 24 Conn. 362.

*Florida*.—*Roberson v. State*, 40 Fla. 509, 24 So. 474.

*Georgia*.—*Weathers v. Barksdale*,

30 Ga. 888; *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684; *Columbus & R. R. Co. v. Christian*, 97 Ga. 56, 25 S. E. 411.

*Illinois*.—*Crabtree v. Kile*, 21 Ill. 180; *Dimick v. Downs*, 82 Ill. 570; *Gifford v. People*, 87 Ill. 210.

*Indiana*.—*Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72; *Rawles v. State*, 56 Ind. 433; *Cunningham v. State*, 65 Ind. 377; *Stitz v. State*, 104 Ind. 359, 4 N. E. 145; *Spencer v. Robins*, 106 Ind. 580, 5 N. E. 726; *Whitney v. State*, 154 Ind. 573, 57 N. E. 398; *Dehler v. State*, 22 Ind. App. 383, 53 N. E. 850.

*Iowa*.—*State v. Sater*, 8 Iowa 420; *Hanners v. McClelland*, 74 Iowa 318, 37 N. W. 389; *State v. Seevers*, 108 Iowa 738, 78 N. W. 705.

*Kentucky*.—*Evans v. Smith*, 5 T. B. Mon. 363, 17 Am. Dec. 74; *Thurman v. Virgin*, 18 B. Mon. 785; *Young v. Com.*, 6 Bush 312; *Roberts v. Johnson*, 23 Ky. L. Rep. 938, 64 S. W. 526.

*Louisiana*.—*State v. Parker*, 7 La. Ann. 83; *State v. Taylor*, 45 La. Ann. 605, 12 So. 927; *State v. Wiggins*, 50 La. Ann. 330, 23 So. 334; *State v. Guy*, 106 La. 8, 30 So. 268.

*Massachusetts*.—*Parkhurst v. Ketchum*, 6 Allen 406, 83 Am. Dec. 639; *Com. v. Kennon*, 130 Mass. 39.

*Minnesota*.—*State v. Barrett*, 40 Minn. 65, 41 N. W. 459.

*Mississippi*.—*Smith v. State*, 58 Miss. 867.

*Missouri*.—*State v. Parker*, 96 Mo. 382, 9 S. W. 728; *State v. Nelson*, 101 Mo. 464, 14 S. W. 712; *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855; *State v. Vandiver*, 149 Mo. 502, 50 S. W. 892; *Blasland P. J. Shoe Co. v. Hicks*, 70 Mo. App. 301; *State v. Beaty*, 25 Mo. App. 214.

*Nebraska*.—*Myers v. State*, 51 Neb. 517, 71 N. W. 33.

*New Hampshire*.—*Hoitt v. Moulton*, 21 N. H. 586; *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132.

*New Jersey*.—*Schenck v. Griffin*, 38 N. J. Law 462.

*New York*.—*Bakeman v. Rose*, 18 Wend. 146; *People v. Rector*, 19 Wend. 569; *Wehrkamp v. Willett*, 4 Abb. App. Dec. 548; *Couley v. Meeker*, 85 N. Y. 618; *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 30 N. E. 1001, 28 Am. St. Rep. 632; *Silliman*

*v. Sampson*, 42 App. Div. 623, 59 N. Y. Supp. 923; *Haulish v. Boller*, 72 App. Div. 559, 75 N. Y. Supp. 992.

*North Carolina*.—*State v. Boswell*, 2 Dev. Law 209; *Downey v. Murphey*, 1 Dev. & B. Law 82.

*Pennsylvania*.—*Kimmel v. Kimmel*, 3 Serg. & R. 336, 8 Am. Dec. 655.

*Texas*.—*Boon v. Weathered*, 23 Tex. 675, 17 Tex. 143; *Johnson v. Brown*, 51 Tex. 65; *Parker v. State*, (Tex. Crim. App.), 53 S. W. 115; *White v. Houston & T. C. R. Co.*, (Tex. Civ. App.), 46 S. W. 382; *Red v. State*, 39 Tex. Crim. App. 414, 46 S. W. 408; *Fields v. State*, 39 Tex. Crim. App. 488, 46 S. W. 814; *Barkman v. State*, (Tex. Crim. App.), 52 S. W. 69; *Drye v. State*, (Tex. Crim. App.), 55 S. W. 65; *Herod v. State*, (Tex. Crim. App.), 56 S. W. 59; *Winn v. Winn*, (Tex. Crim. App.), 57 S. W. 80; *Harrington v. Clafin*, (Tex. Civ. App.), 66 S. W. 898; *Texas & P. R. Co. v. Durrett*, (Tex. Civ. App.), 58 S. W. 187.

*Vermont*.—*State v. Fournier*, 68 Vt. 262, 35 Atl. 178.

*Wisconsin*.—*Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900.

See also *Ashford v. Mut. L. Ins. Co.*, 80 Mo. App. 638; *People v. Dorothy*, 50 App. Div. 44, 63 N. Y. Supp. 592; *Sweet v. Gilmore*, 52 S. C. 530, 30 S. E. 395; *Anonymous*, 3 Ves. & J. 93; *Robinson v. Burton*, 5 Harr. (Del.) 335.

Bad character of a witness can not be proved by showing that there is a warrant for him outstanding. *Welsh v. Com.*, 23 Ky. L. Rep. 151, 60 S. W. 185, 948, 1118, 63 S. W. 984, 64 S. W. 262.

Or that the witness is a saloon loafer and drinker. *Drye v. State*, (Tex. Crim. App.), 55 S. W. 65.

**Former Impeachment.**—Proof that eighteen witnesses testified in another case that the reputation of the deposing witness for truth and veracity was bad is inadmissible. *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900.

**Lodge Membership.**—Evidence that after an alleged investigation of the character of a party, a lodge admitted him to membership is not admissible. *State v. Gates*, 130 Mo. 351, 32 S. W. 971.

**Crimen Falsi.**—But evidence that a witness attempted to influence the

of wrong-doing.<sup>11</sup>

Testimony of the person's associations,<sup>12</sup> of irrelevant traits of character or habits,<sup>13</sup> of particular reports of acts,<sup>14</sup> and of mere rumors,<sup>15</sup> is equally incompetent evidence of character.

A defendant's evidence of good character is not rebuttable by testimony in chief of his particular acts or vices,<sup>16</sup> or admis-

testimony of another witness was admitted to impeach the former. *Webb v. State*, (Tex. Crim. App.), 58 S. W. 82.

But not that the witness gave false testimony upon another trial. *Preston v. State*, (Tex. Crim. App.), 53 S. W. 881.

11. "Every person is supposed to be capable at any time of sustaining his general reputation, but it would be unreasonable to expect any one to be prepared, without special notice, to answer an assault on his character imputed by particular facts of bad conduct. To allow such evidence, moreover, would lead to the mischief of raising any number of collateral issues, the trial of which might be almost interminable, and otherwise objectionable as diverting the mind of the jury from the main issue." *Moulton v. State*, 88 Ala. 116, 6 So. 758, 6 L. R. A. 301. See also *Hussey v. State*, 87 Ala. 121, 6 So. 420; *Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325.

12. *Western & A. R. Co. v. Vaughan*, 113 Ga. 354, 38 S. E. 851; *State v. Bige*, (Iowa), 84 N. W. 518; *State v. Jackson*, 44 La. Ann. 160, 10 So. 600; *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915; *Parker v. State*, (Tex. Crim. App.), 34 S. W. 265; *Hudson v. State*, (Tex. Crim. App.), 55 S. W. 492; *Caviness v. State*, (Tex. Crim. App.), 60 S. W. 555.

**Reputation of Place.**—The bad character of the defendant in a criminal prosecution can not be established by evidence of the reputation of the place kept by him.

*People v. Christy*, 65 Hun 349, 20 N. Y. Supp. 278.

13. *State v. Deputy*, 3 Pen. (Del.) 19, 50 Atl. 178; *Hoffman v. State*, 93 Md. 388, 49 Atl. 568; *Calkins v. Ann Arbor R. Co.*, 119 Mich. 312, 78 N. W. 129; *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915; *Gates v.*

*Bowers*, 169 N. Y. 14, 61 N. E. 993; *Remsen v. Bryant*, 36 App. Div. 240, 56 N. Y. Supp. 728.

**Witness Street Loafer.**—As by showing that the witness is a street loafer and "bum." *White v. Houston & T. C. R. Co.*, (Tex. Crim. App.), 46 S. W. 382.

**Visiting Wine Rooms.**—Character as a prostitute cannot be shown by evidence of visits to wine rooms. *McVey v. State*, 55 Neb. 777, 76 N. W. 438.

14. *Com v. Rogers*, 136 Mass. 158.

15. *Haley v. State*, 63 Ala. 83; *Sheahan v. Collins*, 20 Ill. 326; *Hanners v. McClelland*, 74 Iowa 318, 37 N. W. 389; *Peterson v. Morgan*, 116 Mass. 350; *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *Bakeman v. Rose*, 18 Wend. (N. Y.) 146; *Luther v. Skeen*, 8 Jones Law (N. C.) 356; *Fitzhugh v. State*, 13 Lea (Tenn.) 258; *Baldwin v. State*, 39 Tex. Crim. App. 245, 45 S. W. 714; *Parks v. State*, 35 Tex. Crim. App. 378, 33 S. W. 872.

**Rumors are Not Reputation.** *Ford v. Ford*, 7 Humph. (Tenn.) 92.

The general good character of a person at his place of residence cannot be proved by what rumor said of him before coming to that place. *Campbell v. State*, 23 Ala. 44.

16. *Alabama*.—*Hussey v. State*, 87 Ala. 121, 6 So. 420; *Smith v. State*, 47 Ala. 540; *Morgan v. State*, 88 Ala. 223, 6 So. 761.

*Arkansas*.—*Hollingsworth v. State*, 53 Ark. 387, 14 S. W. 41.

*Florida*.—*Reddick v. State*, 25 Fla. 112, 433, 5 So. 704.

*Illinois*.—*Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231.

*Iowa*.—*State v. Sterrett*, 71 Iowa 386, 32 N. W. 387.

*Kentucky*.—*White v. Com.*, 4 Ky. L. Rep. 373.

*Louisiana*.—*State v. Donelon*, 45 La. Ann. 744, 12 So. 922.

sions,<sup>17</sup> reports<sup>18</sup> thereof, nor by testimony of the bad character of his associations.<sup>19</sup>

It would seem that, where not directly in issue, character for unchastity cannot be proved by particular acts.<sup>20</sup>

A witness is not competent to testify to the reputation of another person merely because he is personally acquainted with that person,

*Massachusetts.*—*Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325.

*Michigan.*—*Brownell v. People*, 38 Mich. 732.

*Missouri.*—*State v. Lockett*, 168 Mo. 480, 68 S. W. 563.

*Nebraska.*—*Olive v. State*, 11 Neb. 1, 7 N. W. 444.

*New Hampshire.*—*State v. Lepage*, 57 N. H. 245, 24 Am. Rep. 69.

*New Jersey.*—*Bullock v. State*, (N. J.), 47 Atl. 62.

*Oregon.*—*State v. Garrand*, 5 Or. 156.

*Pennsylvania.*—*Snyder v. Com.*, 85 Pa. St. 519.

*Texas.*—*Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523.

**Conduct Under Arrest.**—The state cannot rebut the defendant's evidence of good character by showing his bad conduct while under arrest for the alleged offense. *Gibbs v. State*, 34 Tex. 134.

**Record As Soldier.**—Evidence of the defendant's character cannot be rebutted by proof that his record as a soldier was not good, he being in the habit of being absent without leave, and of drinking and gaming. *Burns v. State*, 23 Tex. App. 641, 5 S. W. 140.

**Warrant Outstanding.**—Where the defendant in a prosecution for murder has introduced evidence of good moral character, it is error to permit the state to show by the sheriff of the county that "he nearly always had a warrant for the defendant's arrest." *Murphy v. State*, 108 Ala. 10, 18 So. 557.

**Defendant's Admissions.**—Where the defendant has offered evidence of good character, his admissions to having been in the penitentiary and work-house are admissible to rebut it. *State v. Williams*, 77 Mo. 310.

Where the defendant in a prosecution for arson offered evidence of good character, testimony of other witnesses of his use of profane and

violent declarations with respect to disturbances in the neighborhood were admitted to rebut the evidence of good character, and the prosecutor was permitted to ask the defendant on cross-examination as to persons who were with him before daylight on the morning of his arrest for the same purpose. *State v. Parks*, 109 N. C. 813, 13 S. E. 939.

17. *People v. Gibson*, 51 Hun 640, 4 N. Y. Supp. 170.

But see last preceding note.

18. *State v. Briscoe*, 3 Pen. (Del.) 7, 50 Atl. 271; *McCarty v. People*, 51 Ill. 231, 99 Am. Dec. 542; *Hussey v. State*, 87 Ala. 121, 6 So. 420; *State v. Laxton*, 76 N. C. 216; *Griffin v. State*, 14 Ohio St. 55; *Drew v. State*, 124 Ind. 9, 23 N. E. 1098. See also *Snyder v. Com.*, 85 Pa. St. 519.

19. *Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523.

20. *Canada.*—*Gross v. Brodrecht*, 24 Ont. App. 687.

*Alabama.*—*McQuirk v. State*, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381; *Rhea v. State*, 100 Ala. 119, 14 So. 853.

*Florida.*—*Rice v. State*, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245.

*Georgia.*—*Johnson v. State*, 61 Ga. 305.

*Illinois.*—*Sherwin v. People*, 69 Ill. 55.

*Indiana.*—*Richie v. State*, 58 Ind. 355.

*Iowa.*—*State v. McDonough*, 104 Iowa 6, 73 N. W. 357; *State v. Seevers*, 108 Iowa 738, 78 N. W. 705.

*Kansas.*—*State v. Atterbury*, 59 Kan. 237, 52 Pac. 451.

*Massachusetts.*—*Com. v. Harris*, 131 Mass. 336.

*Michigan.*—*Strang v. People*, 24 Mich. 1.

*Missouri.*—*State v. White*, 35 Mo. 500; *State v. Sibley*, 131 Mo. 519, 33 S. W. 167.

*New Hampshire.*—*State v. Forsh-*



or has had business relations with him,<sup>21</sup> nor because he has formed an opinion of that person's character or reputation,<sup>22</sup> nor merely because he has heard "other" persons or "some" persons speak of his character or reputation,<sup>23</sup> nor unless he can say that he believes he knows the general reputation of such person in the community.<sup>24</sup>

ner, 43 N. H. 89, 80 Am. Dec. 132; State v. Knapp, 45 N. H. 148.

*New York.*—People v. Jackson, 3 Park. Crim. 391.

*North Carolina.*—State v. Jefferston, 6 Ired. Law 305.

*Ohio.*—McDermott v. State, 13 Ohio St. 332, 82 Am. Dec. 444.

*Oregon.*—State v. Ogden, 39 Or. 195, 65 Pac. 449.

*Wisconsin.*—Goodwin v. State, 114 Wis. 318, 90 N. W. 170.

See also Weathers v. Barksdale, 30 Ga. 888. But compare People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; Shattuck v. Myers, 13 Ind. 46, 74 Am. Dec. 239; Smith v. Yaryan, 69 Ind. 445, 35 Am. Rep. 232; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Benstine v. State, 2 Lea (Tenn.) 169, 31 Am. Rep. 593; Love v. Masoner, 6 Baxt. (Tenn.) 24, 32 Am. Rep. 522; State v. Reed, 39 Vt. 417, 94 Am. Dec. 337; State v. Hollenbeck, 67 Vt. 34, 30 Atl. 696; Stewart v. Smith, 92 Wis. 76, 65 N. W. 736.

Admissions of sexual intercourse with other persons are admissible to prove the bad character of the prosecutrix in bastardy proceedings. Dehler v. State, 22 Ind. App. 383, 53 N. E. 850.

<sup>21</sup> State v. King, 78 Mo. 555; Sargent v. Wilson, 59 N. H. 396; State v. Speight, 69 N. C. 72; Strumwald v. Schreiber, 69 App. Div. 476, 74 N. Y. Supp. 995; Healy v. Terry, 30 N. Y. St. 664, 9 N. Y. Supp. 519; Brownlee v. State, 13 Tex. App. 255.

<sup>22</sup> See note 6.

<sup>23</sup> *England.*—Reg v. Rowton, L. & C., 520, 34 L. J. M. C. 57.

*United States.*—Gaines v. Relf, 12 How. 472.

*Alabama.*—Sorrelle v. Craig, 9 Ala. 534; Hadjo v. Gooden, 13 Ala. 718; Haley v. State, 63 Ala. 83; Buchanan v. State, 109 Ala. 7, 19 So. 410.

*Illinois.*—Regnier v. Cabot, 7 Ill. 34; Crabtree v. Kile, 21 Ill. 180.

*Indiana.*—Fahnestock v. State, 23 Ind. 231.

*Iowa.*—Dance v. McBride, 43 Iowa 624.

*Massachusetts.*—Com. v. Lawler, 12 Allen 585; Com. v. Rogers, 136 Mass. 158.

*Michigan.*—Webber v. Hanke, 4 Mich. 198.

*Mississippi.*—Pickens v. State, 61 Miss. 563.

*Missouri.*—St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915.

*Nebraska.*—Matthewson v. Burr, 6 Neb. 312; Taylor v. Ryan, 15 Neb. 573, 19 N. W. 475.

*New York.*—Cheritree v. Roggen, 67 Barb. 124; Conkey v. People, 5 Park. Crim. 31; Meyer v. Suburban Home Co., 25 Misc. 686, 55 N. Y. Supp. 566.

*North Carolina.*—State v. Parks, 3 Ired. Law 297.

*Pennsylvania.*—Wike v. Lightner, 11 Serg. & R. 198.

But see People v. Seldner, 62 App. Div. 357, 71 N. Y. Supp. 35.

**Petition for Appointment to Office.**  
The good character of the plaintiff in libel cannot be proved by a petition for his appointment to public office. Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119.

<sup>24</sup> Cook v. Hunt, 24 Ill. 535; State v. Johnson, 41 La. Ann. 574, 7 So. 670; Com. v. Lawler, 12 Allen (Mass.) 580; Powers v. Presgroves, 38 Miss. 227; St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915; State v. Perkins, 66 N. C. 126; Ayres v. Duprey, 27 Tex. 594.

But see Adams v. Greenwich Ins. Co., 70 N. Y. 166.

One who states that he knows the "general character of the defendant from rumor" is not a competent witness. Haley v. State, 63 Ala. 83.

**Treatment by Community.**  
Knowledge of the "treatment and conduct of the community generally" toward the witness sought to be im-

**4. Competency of Character Witness.**—A. IN GENERAL.—But, if the witness knows the general reputation of the other person in the community, he is competent to testify thereto,<sup>25</sup> though he cannot say that he has heard a majority of such persons, neighbors or associates,<sup>26</sup> nor indeed any definite number of them,<sup>27</sup> speak of that reputation.

A character witness, otherwise qualified, is not necessarily incompetent because he does not reside in the immediate neighborhood of the other person,<sup>28</sup> nor because he has known him but a short time,<sup>29</sup> nor, it is held, though he is not personally acquainted with him.<sup>30</sup>

B. KNOWLEDGE FROM SPECIFIC INQUIRIES.—But a witness who bases his knowledge of the other person's reputation on specific inquiries directed to that purpose is not competent.<sup>31</sup>

C. KNOWLEDGE ACQUIRED POST LITEM MOTAM.—One whose knowledge of the reputation of a person accused of crime is acquired from information and reports heard after the commission of the

peached does not render the impeaching witness competent. *Bates v. Barber*, 4 Cush. (Mass.) 107.

25. *Haley v. State*, 63 Ala. 83; *McClellan v. State*, 117 Ala. 140, 23 So. 653; *Kilgore v. State*, 124 Ala. 24, 27 So. 4; *People v. Hoagland*, (Cal.), 69 Pac. 1063; *Crabtree v. Hagenbaugh*, 25 Ill. 214, 76 Am. Dec. 793; *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769; *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225.

One who knows the reputation of a witness either among his neighbors or among his personal acquaintances is competent to testify to his reputation. *Henderson v. Hayne*, 2 Met. (Ky.) 342.

26. *Haley v. State*, 63 Ala. 83; *Dave v. State*, 22 Ala. 23; *Robinson v. State*, 16 Fla. 835; *Crabtree v. Hagenbaugh*, 25 Ill. 214, 76 Am. Dec. 793; *French v. Sale*, 63 Miss. 386.

27. *Hadjo v. Gooden*, 13 Ala. 718; *Gifford v. People*, 148 Ill. 173, 35 N. E. 754; *State v. Reed*, 41 La. Ann. 581, 7 So. 132; *Pickens v. State*, 61 Miss. 563; *State v. Turner*, 36 S. C. 534, 15 S. E. 602.

28. *Hadjo v. Gooden*, 13 Ala. 718; *Turner v. State*, 70 Ga. 765; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315; *Chess v. Chess*, 1 Pen. & W. (Pa.) 32, 21 Am. Dec. 350; *Wallis v. White*, 58 Wis. 26, 15 N. W. 767.

One who has known the defendant eight or ten years and knows his reputation in the community where he lives, is competent to testify to that reputation, although the witness himself lives more than twenty miles from the other's place of residence. *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422.

One who has lived in the same neighborhood with another, and known his reputation therein for a number of years, is not disqualified to testify thereto by his having removed therefrom some eighteen months before the trial. *Thurmond v. State*, 27 Tex. App. 347, 11 S. W. 451.

One who had not resided in the neighborhood for seven years was held incompetent as a witness. *State v. Fontenot*, 48 La. Ann. 305, 19 So. 111.

29. *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315 (six or eight months.)

30. *State v. Turner*, 36 S. C. 534, 15 S. E. 602.

An impeaching witness is not incompetent because he moved into the neighborhood about the time the deposing witness left it. *Martin v. Martin*, 25 Ala. 201.

31. *Sorrelle v. Craig*, 9 Ala. 534; *Haley v. State*, 63 Ala. 83; *Griffith v. State*, 90 Ala. 583, 8 So. 812; *State v. Forshner*, 43 N. H. 89, 80 Am. Dec.

offense, is not a competent witness to that reputation.<sup>32</sup> But one may testify to the reputation of a witness, though his knowledge of the witness' reputation has been obtained since the matter in controversy arose.<sup>33</sup>

D. NEGATIVE TESTIMONY. — By the great weight of current authority, one who has been personally acquainted with another for a considerable length of time, and who has been in a position where he probably would have heard that other's reputation talked about were it the subject of comment, and who has never heard it questioned, may testify to the good character of such person.<sup>34</sup>

5. Examination of Character Witness. — A. FORM AND ORDER OF QUESTIONS. — There is no arbitrary form of inquiry prescribed by

132; *Reid v. Reid*, 17 N. J. Eq. 101; *Douglass v. Tousey*, 2 Wend. (N. Y.) 352; *Curtis v. Fay*, 37 Barb. (N. Y.) 64; *Houston & T. C. R. Co. v. White*, 23 Tex. Civ. App. 280, 56 S. W. 204; *Mawson v. Hartsink*, 4 Esp. 102, 6 Rev. Rep. 695. Compare *Foulkes v. Silway*, 3 Esp. 236.

32. *Buchanan v. State*, 120 Ala. 670, 25 So. 1024; *People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396; *State v. Grinden*, 91 Iowa 505, 60 N. W. 37; *Carter v. Com.*, 2 Va. Cas. 169.

33. *Fisher v. Conway*, 21 Kan. 18;

*Mask v. State*, 36 Miss. 77; *State v. Turner*, 36 S. C. 534, 15 S. E. 602.

Partisan Opinions. — "It does not appear that his connection with the controversy had become the subject of conversation or discussion in the neighborhood in which he lived, nor that the reputation testified to was founded upon the expression of partisan opinions by those who had taken sides in the dispute. If this had appeared it might be considered by the jury in determining the weight to be given to the testimony for and against him, but it was not ground for its exclusion." *Smith v. Hine*, 179 Pa. St. 203, 36 Atl. 222.

34. *England*. — *Reg. v. Cary*, 10 Cox C. C. 25.

*United States*. — *Foerster v. U. S.*, 116 Fed. 860.

*Alabama*. — *Hadjo v. Gooden*, 13 Ala. 718; *Hussey v. State*, 87 Ala. 121, 6 So. 420; *Ward v. State*, 28 Ala. 53; *Childs v. State*, 55 Ala. 28; *Holmes v. State*, 88 Ala. 26, 7 So. 193, 16 Am. St. Rep. 17.

*Arkansas*. — *Cole v. State*, 59 Ark. 50, 26 S. W. 377.

*California*. — *Oakland First Nat. Bank v. Wolff*, 79 Cal. 69.

*Georgia*. — *Taylor v. Smith*, 16 Ga. 7; *Flemister v. State*, 81 Ga. 768, 7 S. E. 642; *Hodgkins v. State*, 89 Ga. 761, 15 S. E. 695.

*Illinois*. — *Gifford v. People*, 148 Ill. 173, 35 N. E. 754.

*Indiana*. — *Hallowel v. Guntle*, 82 Ind. 554.

*Iowa*. — *State v. Nelson*, 58 Iowa 208, 12 N. W. 253; *State v. Case*, 96 Iowa 264, 65 N. W. 149.

*Kansas*. — *Stevens v. Blake*, 5 Kan. App. 124, 48 Pac. 888.

*Michigan*. — *Lenox v. Fuller*, 39 Mich. 268.

*Mississippi*. — *French v. Sale*, 63 Miss. 386.

*Missouri*. — *State v. Grate*, 68 Mo. 22.

*Montana*. — *State v. Shafer*, 22 Mont. 17, 55 Pac. 526.

*Texas*. — *Reid v. State*, (Tex. Crim. App.), 57 S. W. 662.

*Virginia*. — *Davis v. Franke*, 33 Gratt. 413.

*West Virginia*. — *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293.

But see *People v. Moan*, 65 Cal. 532, 4 Pac. 545; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *State v. Speight*, 69 N. C. 72; *U. S. v. Mayer*, Deady 127, 26 Fed. Cas. No. 15,753.

"The absurdity of the rule (against negative testimony) becomes more apparent when it is remembered that the more unsullied and exalted the character, the less likely it is ever to be called in question, or spoken of with respect to truthfulness, and consequently more difficult to sustain than characters of far less worth, be-

the common law for the examination of character witnesses.<sup>35</sup> The form of the questions may be varied to suit the comprehension of the particular witness.<sup>36</sup>

But whatever form of inquiry be adopted, the witness must first establish his competency to testify by saying whether or not he knows the general reputation of the person whose character is in issue in the given community, and as to the trait or quality in question.<sup>37</sup>

*cause* the latter had been the subject of conversation and speculation in the community, while the former had not." *Lemons v. State*, 4 W. Va. 755, 6 Am. Rep. 293. See also *Reg. v. Cary*, 10 Cox C. C. 25; *State v. Grate*, 68 Mo. 22.

But it has been held that such negative testimony does not tend to disprove positive evidence of bad character. *Hays v. Johnson*, 92 Ill. App. 80.

One who testifies that he has known the other only two years, during which time he has seen him frequently, but that he does not know where he lived, and that their relations were not intimate, is not competent to testify to the other's good character. *Holmes v. State*, 88 Ala. 26, 7 So. 193, 16 Am. St. Rep. 17.

**Latitude in Sustaining Character.** More latitude is allowed in passing on the competency of a sustaining witness than on that of an impeaching witness. *Cole v. State*, 59 Ark. 50, 26 S. W. 377; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315; *Morse v. Palmer*, 15 Pa. St. 51; *Chess v. Chess*, 1 Pen. & W. (Pa.) 32, 21 Am. Dec. 350.

**35. Form of Inquiry.**—For various forms of inquiry see *State v. Ward*, 73 Iowa 532, 35 N. W. 617; *Hadjo v. Gooden*, 13 Ala. 718; *Dave v. State*, 22 Ala. 23; *Pleasant v. State*, 15 Ark. 624; *Cole v. State*, 59 Ark. 50, 26 S. W. 377; *Stokes v. State*, 18 Ga. 17; *Kelley v. Proctor*, 41 N. H. 139; *Craig v. State*, 5 Ohio St. 605; *Searles v. State*, 6 Ohio C. C. 331; *Bogle v. Kreitzer*, 46 Pa. St. 465; *Peck v. State*, 86 Tenn. 259, 6 S. W. 389; *Johnson v. Brown*, 51 Tex. 65; *Teese v. Huntingdon*, 23 How. (U. S.) 2.

A common form of inquiry is to ask the witness whether or not he knows the general reputation of the

other person, and, if he knows that reputation, what it is. *Young v. Com.*, 6 Bush (Ky.) 312.

"The proper question to be put to a witness called to impeach another, is whether he knows the general reputation of the person sought to be impeached among his neighbors, for truth and veracity. If this question be answered affirmatively, the witness may then be inquired of as to what that reputation is, and whether from that reputation he would believe him on oath." *Frye v. Bank*, 11 Ill. 367.

**36.** *Meyncke v. State*, 68 Ind. 401; *Webber v. Hanke*, 4 Mich. 198; *State v. Grate*, 68 Mo. 22; *State v. Dove*, 10 Ired. Law (N. C.) 469; *Craig v. State*, 5 Ohio St. 605; *Wike v. Lightner*, 11 Serg. & R. (Pa.) 198.

**Phraseology.**—"Counsel should be allowed to vary the phraseology, or sever the constituent parts or members of the sentence, so as to place the subject within the comprehension of the witness." *Sullivan v. State*, 66 Ala. 48.

If the witness does not understand the nature of the preliminary question, he should be instructed that he is not to express his private opinion or speak of particular facts tending to show good or bad character, but to say whether or not he knows the general reputation of the person for truth and veracity in the neighborhood in which the person resides, or has lately resided; that general reputation means the character attributed to him in a general way by his neighbors where he is best known; that if the witness has heard a sufficient number express themselves to be able to say, as a matter of conscience, that he knows the common or general opinion of the community or neighborhood on the subject, he is competent. *French v. Sale*, 63 Miss. 386.

**37.** *Elam v. State*, 25 Ala. 53;

But if no objection is made to the sufficiency of the question touching the witness' competency, or the order of asking the questions, and the competency of the witness appears from the entire examination, there is no error.<sup>38</sup>

It is considered proper practice in some jurisdictions to permit the witness, after answering the preliminary question and before saying what that reputation is, to be cross-examined as to the grounds for his belief that he has such knowledge.<sup>39</sup> But in other jurisdictions, the soundness of this practice is denied.<sup>40</sup>

**B. CREDIBILITY OF WITNESS ON OATH.** — It is the more general practice to permit a witness called to impeach or sustain another witness, after stating that he knows the general reputation of the latter, and what that reputation is, to say whether, from that reputation, he would believe him on oath.<sup>41</sup> This form of inquiry is not

*Foulk v. Eckert*, 61 Ill. 318; *Doner v. People*, 92 Ill. App. 43; *Hays v. Johnson*, 92 Ill. App. 80; *Paradise v. Sun Mut. Ins. Co.*, 6 La. Ann. 596; *State v. Polhamus*, (N. J.), 47 Atl. 470; *Carlson v. Winterson*, 147 N. Y. 652, 42 N. E. 347; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Johnson v. Brown*, 51 Tex. 65.

✓ Where the witness is asked the question whether or not he knows the general reputation of another, and in response volunteers his opinion of what that reputation is, his answer should, on motion, be stricken out. The competency of a witness to testify should be first established. *Gifford v. People*, 148 Ill. 173, 35 N. E. 754.

Where a witness called to sustain the character of one sought to be impeached said that he did not know the general reputation of the latter for truth and veracity, but further gave evidence importing acquaintances with his associates and actual knowledge of his character, and that he had heard his character questioned, it was held that he was competent to testify as to whether or not he would believe the deposing witness under oath. *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166.

38. *Elam v. State*, 25 Ala. 53; *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *Warlick v. Peterson*, 58 Mo. 408; *Foulk v. Eckert*, 61 Ill. 318.

**The Word "General."** — In an Illinois case the omission of the word "general" from the question was deemed fatal. *Gifford v. People*, 148

Ill. 173, 35 N. E. 754. See also *Searles v. State*, 6 Ohio C. C. 331.

But the omission of the word "general" from the question is not material where the whole testimony of the witness indicates that he so understood the question as put. *Coates v. Sulau*, 46 Kan. 341, 26 Pac. 720.

39. *Johnson v. Brown*, 51 Tex. 65; *State v. Boswell*, 2 Dev. Law (N. C.) 209.

40. *Nelson v. State*, 32 Fla. 244, 13 So. 361; *McClellan v. State*, 117 Ala. 140, 23 S. W. 653. See also *Wetherby v. Norris*, 103 Mass. 565; *Powers v. Presgroves*, 38 Miss. 227.

"There is no question of competency for the court to settle, in regard to the knowledge of witnesses called to testify to the point of reputation for truth and veracity. The whole examination is before the jury, as to a matter of fact merely. It is not like the case of experts, who are called to give opinions, and whose qualifications to give such opinions must be first examined and decided upon by the court." *Bates v. Barber*, 4 Cush. (Mass.) 107.

41. *England*. — *Mawson v. Hart-sink*, 4 Esp. 102, 6 Rev. Rep. 695; *Carpenter v. Wall*, 11 Ad. & E. 803; *Carlos v. Brook*, 10 Ves. 50; *Watmore v. Dickinson*, 2 Ves. & B. 267; *Reg. v. Brown*, L. Rep. C. C. 70; *Rex v. Rockford*, 13 How. St. Tr. 211; *Rex v. Watson*, 32 How. St. Tr. 496.

*United States*. — *Gaines v. Relf*, 12 How. 472.

*Alabama*. — *Sorrelle v. Craig*, 9

Ala. 534; *Crawford v. State*, 112 Ala. 1, 21 So. 214.

*Arkansas*.—*Pleasant v. State*, 15 Ark. 624; *Snow v. Grace*, 29 Ark. 131; *Hudspeth v. State*, 50 Ark. 534, 9 S. W. 1; *Cole v. State*, 59 Ark. 50, 26 S. W. 377.

*California*.—*Stevens v. Irwin*, 12 Cal. 306; *Wise v. Wakefield*, 118 Cal. 107, 50 Pac. 310.

*Florida*.—*Nelson v. State*, 32 Fla. 244, 13 So. 361.

*Georgia*.—*Stokes v. State*, 18 Ga. 17; *Sims v. State*, 68 Ga. 486; *Watkins v. State*, 82 Ga. 231, 8 S. E. 875, 14 Am. St. Rep. 155.

*Illinois*.—*Frye v. Bank*, 11 Ill. 367; *Eason v. Chapman*, 21 Ill. 33; *Massey v. Farmers' Nat. Bank*, 104 Ill. 327; *Doner v. People*, 92 Ill. App. 43.

*Kansas*.—*State v. Johnson*, 40 Kan. 266, 19 Pac. 749.

*Kentucky*.—*Thurman v. Virgin*, 18 B. Mon. 785.

*Louisiana*.—*State v. Parker*, 7 La. Ann. 83; *Stanton v. Parker*, 5 Rob. 108, 39 Am. Dec. 528; *State v. Jackson*, 44 La. Ann. 160, 10 So. 600; *State v. Christian*, 44 La. Ann. 950, 11 So. 589.

*Maryland*.—*Knight v. House*, 29 Md. 194, 96 Am. Dec. 515.

*Michigan*.—*Hamilton v. People*, 29 Mich. 173; *Keator v. People*, 32 Mich. 484.

*Mississippi*.—*French v. Sale*, 63 Miss. 386.

*Nebraska*.—*Watson v. Roode*, 30 Neb. 264, 46 N. W. 491.

*New Hampshire*.—*State v. Howard*, 9 N. H. 485; *Titus v. Ash*, 24 N. H. 319; *Kelley v. Proctor*, 41 N. H. 139.

*New York*.—*Adams v. Greenwich Ins. Co.*, 70 N. Y. 166; *People v. Davis*, 21 Wend. 309; *Fulton Bank v. Benedict*, 1 Hall 480.

*North Carolina*.—*State v. Cave-ness*, 78 N. C. 484; *State v. Dove*, 10 Ired. Law 469; *State v. Boswell*, 2 Dev. Law 209.

*Ohio*.—*Hillis v. Wylie*, 26 Ohio St. 574.

*Pennsylvania*.—*Bogle v. Kreitzer*, 46 Pa. St. 465; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Wike v. Lightner*, 11 Serg. & R. 198.

*South Carolina*.—*Anonymous*, 1 Hill Law 251.

*Tennessee*.—*Gardenhire v. Parks*, 2 Yerg. 23; *Ford v. Ford*, 7 Humph. 92.

*West Virginia*.—*State v. Meadows*, 18 W. Va. 658.

*Wisconsin*.—*Wilson v. State*, 3 Wis. 698.

See also *Wilson v. Runyon*, *Wright (Ohio)* 651; *People v. Davis*, 21 Wend. (N. Y.) 309; *Johnson v. People*, 3 Hill (N. Y.) 178, 38 Am. Dec. 624; *State v. Polhamus*, (N. J.), 47 Atl. 470.

"The reason given is that, unless the impeaching witness is held to showing the extent to which an evil reputation has affected a person's credit, the jury cannot accurately tell what the witness means to express by stating that such reputation is good or bad, and can have no guide in weighing his testimony. And since it has become settled that they are not bound to disregard a witness entirely, even if he falsifies in some matters, it becomes still more important to know the extent to which the opinion in his neighborhood has touched him. It has also been commonly observed that impeaching questions as to character are often misunderstood, and witnesses, in spite of caution, base their answer on bad character generally, which may or may not be of such a nature as to impair confidence in testimony. When the question of credit under oath is distinctly presented, the answers will be more cautious." *Hamilton v. People*, 29 Mich. 173. See also *De Kalb County v. Smith*, 47 Ala. 407; *Hillis v. Wylie*, 26 Ohio St. 574; *Hume v. Scott*, 3 A. K. Marsh. (Ky.) 260.

#### Element of Personal Interest.

Where an impeaching witness testifies that the reputation for truth and veracity of another witness is bad, it is required to permit the impeaching witness to be asked whether "from that reputation, would you, or not, in a case where he was personally interested, believe him under oath," since the effect of the interest of the witness is for the jury. *Massey v. Farmers' Nat. Bank*, 104 Ill. 327. Compare *Knight v. House*, 29 Md. 194, 96 Am. Dec. 515.

The person who testifies to the bad reputation of another should not be

permitted in a number of jurisdictions.<sup>42</sup> Where it is permitted, the question may be asked of adversary character witnesses on cross-examination,<sup>43</sup> or it may be omitted altogether.<sup>44</sup>

A few courts which hold the above question improper permit the character witness to be asked whether the other witness' reputation is such as to entitle him to credit on oath.<sup>45</sup>

C. CROSS-EXAMINATION. — a. *By Party Calling Witness.* — The party calling a character witness is restricted to a general form of inquiry.<sup>46</sup> He is not entitled to ask the witness the grounds of his belief, or particulars as to the other person's reputation.<sup>47</sup>

b. *By Opposite Party.* — (1.) *In General.* — The opposite party may cross-examine a character witness as to the grounds of his

permitted to say that he would be more likely to believe such person where he had no interest, or whether he would believe him if in a position to see the thing testified to by the other person, and the matter were corroborated by circumstances. *Benson v. State*, 79 Miss. 538, 31 So. 200.

42. *Carter v. Kavenaugh*, 1 Greene (Iowa) 171; *Walton v. State*, 88 Ind. 9; *Inhabitants of Phillips v. Inhabitants of Kingfield*, 19 Me. 375, 36 Am. Dec. 760; *Boon v. Weathered*, 23 Tex. 675, 17 Tex. 143; *Marshall v. State*, 5 Tex. App. 273; *Willard v. Goodenough*, 30 Vt. 393; *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *State v. Miles*, 15 Wash. 534, 46 Pac. 1047. See also *Benesch v. Waggoner*, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254; *Gass v. Stinson*, 2 Sumn. 605, 10 Fed. Cas. No. 5261.

43. *Keator v. People*, 32 Mich. 484; *Hamilton v. State*, 40 Tex. Crim. App. 464, 51 S. W. 217.

44. *Byers v. State*, 105 Ala. 31, 16 So. 716; *Mitchell v. State*, 94 Ala. 68, 10 So. 578; *People v. Tyler*, 35 Cal. 553; *Laclede Bank v. Keeler*, 109 Ill. 385; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

45. *Boon v. Weathered*, 23 Tex. 675, 17 Tex. 143; *Bluitt v. State*, 12 Tex. App. 39; *Holbert v. State*, 9 Tex. App. 219, 35 Am. Rep. 738. See also *Mawson v. Hartsink*, 4 Esp. 102, 6 Rev. Rep. 695; *Rex v. Clarke*, 2 Stark. 241; *Carlos v. Brook*, 10 Ves. 50; *Anonymous*, 3 Ves. & B. 93; *Reg. v. Brown*, L. R. 1 C. C. 70, 10 Cox C. C. 453; *Rex v. Murphy*, 19 How. St. Tr. 724. But see *Durham v. Beaumont*, 1 Camp. 207.

46. *Pierce v. Newton*, 13 Gray

(Mass.) 528; *State v. O'Neale*, 4 Ired. Law (N. C.) 88; *People v. Clark*, 1 Wheeler Crim. Cas. (N. Y.) 292; *Johnson v. Brown*, 51 Tex. 65. But see *Titus v. Ashe*, 24 N. H. 319.

Where the witness states that he does not know the general character of the person, he cannot be cross-examined by the party calling him. *State v. Perkins*, 66 N. C. 126.

*Negative Testimony.* — But in *Lenox v. Fuller*, 39 Mich. 268, a witness who testified that he did not know the reputation of the deposing witness for truth and veracity, was further asked whether or not he had ever heard it called in question.

*Contra.* — *Webber v. Hanke*, 4 Mich. 198.

A witness called to testify to the good character of the defendant in a criminal action may testify on direct examination that he has been acquainted with the accused for a considerable time, and under such circumstances that he would be more or less likely to hear what was said about him, and that he has never heard any remarks about his character. *Cole v. State*, 59 Ark. 50, 26 S. W. 377; *Hussey v. State*, 87 Ala. 121, 6 So. 420.

A witness who states that he has never heard the character of the defendant spoken of prior to the transaction involved in the case, and who says "I think I am acquainted with defendant's general character for peaceableness," is competent to testify to that character. *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769.

47. *People v. Gibson*, 51 Hun 640, 4 N. Y. Supp. 170; *Bakeman v. Rose*, 18 Wend. (N. Y.) 146; *Birmingham*

knowledge or opinion, his acquaintance with the other person and his opportunities for acquiring information, the number and names of those whom he has heard speak of him, and what they said, how long and how generally favorable or unfavorable reports have prevailed, and the like;<sup>48</sup> as to his own contradictory expressions of opinion;<sup>49</sup> and as to the particular or trait for which the reputation

U. R. Co. v. Hale, 90 Ala. 8, 8 So. 142, 24 Am. St. Rep. 748; State v. Dexter (Iowa), 87 N. W. 417; Benson v. State, 79 Miss. 538, 31 So. 200; Carlos v. Brook, 10 Ves. 50. See also McAlpine v. State, 117 Ala. 93, 23 So. 130.

48. *United States*. — Gaines v. Relf, 12 How. 472.

*Alabama*. — Hadjo v. Gooden, 13 Ala. 718; Mose v. State, 36 Ala. 211; Bullard v. Lambert, 40 Ala. 204; De Kalb Co. v. Smith, 47 Ala. 407; Montgomery v. Crossthwaite, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140.

*Connecticut*. — Weeks v. Hull, 19 Conn. 376, 50 Am. Dec. 249.

*Florida*. — Robinson v. State, 16 Fla. 835.

*Illinois*. — Crabtree v. Hagenbaugh, 25 Ill. 214, 76 Am. Dec. 793.

*Louisiana*. — State v. Reed, 41 La. Ann. 581, 7 So. 132.

*Massachusetts*. — Bates v. Barber, 4 Cush. 107; Leonard v. Allen, 11 Cush. 241.

*Missouri*. — State v. Miller, 71 Mo. 89; State v. Crow, 107 Mo. 341, 17 S. W. 745; State v. McLaughlin, 149 Mo. 19, 50 S. W. 315.

*New Hampshire*. — State v. Howard, 9 N. H. 485.

*New York*. — People v. Mather, 4 Wend. 229, 21 Am. Dec. 122; Lower v. Winters, 7 Cow. 263; People v. Clark, 1 Wheeler Crim. Cas. 292; Gates v. Bowers, 41 App. Div. 612, 58 N. Y. Supp. 287; People v. Gibson, 51 Hun 640, 4 N. Y. Supp. 170.

*North Carolina*. — State v. Perkins, 66 N. C. 126; State v. Laxton, 76 N. C. 216.

*Tennessee*. — McLarin v. State, 4 Humph. 381.

*West Virginia*. — State v. Meadows, 18 W. Va. 658.

But see Rex v. Hodgkiss, 7 Car. & P. 298; Reg. v. Rogan, 1 Cox C. C. 291.

Cross-Examination. — "Nothing

short of a cross-examination which compels the impeaching witness to state both the source of the reports and their nature will enable the party either to test the correctness of the impeaching evidence or to protect the witness who is assailed, if he is assailed, unjustly." People v. Annis, 13 Mich. 511.

"Whether the witness knows what he pretends to know in regard to the disposition of a person in question, whether his opportunities for acquiring such knowledge have been sufficient, or his ability to acquire it has been competent, are matters which there is no practical difficulty in testing, either upon a preliminary or cross-examination, or both." State v. Lee, 22 Minn. 407, 21 Am. Rep. 769.

Where the cross-examination develops the fact that an impeaching witness bases his testimony of the bad character of another for truth and veracity upon the latter's reputation for not paying his bills, the impeaching testimony should be stricken out. Calkins v. Ann Arbor R. Co., 119 Mich. 312, 78 N. W. 129. See also Hutts v. Hutts, 62 Ind. 214.

It is error to permit the prosecution to ask a witness to the good character of the accused if he would consider the accused's character bad, if it should develop that the defendant has been guilty of various acts of wrong-doing. People v. Elliott, 163 N. Y. 11, 57 N. E. 103.

Where an impeaching witness on cross-examination gives the names of persons whom he has heard speak of the reputation of the other person, he cannot be contradicted. Robbins v. Spencer, 121 Ind. 594, 22 N. E. 660.

49. Jackson v. State, 78 Ala. 471; Dehler v. State, 22 Ind. App. 383, 53 N. E. 850; State v. Lawlor, 28 Minn. 216, 9 N. W. 698; State v. Williams, 77 Mo. 310; State v. Smith, 125 Mo. 2, 28 S. W. 181; Lyles v. Com., 88 Va. 396, 13 S. E. 802.



of the other person is good or bad.<sup>50</sup>

(2.) **Particular Acts.**—There is some authority for cross-examining a witness who testifies to the good character of another person as to his personal knowledge of particular acts or habits of wrongdoing on the part of such person,<sup>51</sup> but the weight of authority is against the practice as amounting to proof of particular acts and not germane to the issue of reputation.<sup>52</sup>

(3.) **Particular Rumors.**—It is generally held that such a witness may be asked on cross-examination as to the existence of reports of particular acts, vices, or associations of the other person, inconsistent with the reputation attributed to him by the witness, not for the purpose of establishing the truth of such facts, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony.<sup>53</sup> The extent of such cross-examina-

A witness who testifies to the good character of another witness for truth and veracity may be asked on cross-examination if he did not say at another time that he would not believe the other witness on oath. *Hamilton v. People*, 29 Mich. 173.

50. See note 55.

51. *Jackson v. State*, 78 Ala. 471; *People v. Mayes*, 113 Cal. 618, 451 Pac. 860; *State v. Ogden*, 39 Or. 195, 65 Pac. 449. See also *Carthaus v. State*, 78 Wis. 560, 47 N. W. 629; *Abernethy v. Com.*, 101 Pa. St. 322.

A witness who testifies in a prosecution for forgery to the defendant's good reputation for honesty and fair dealing was asked on cross-examination whether the defendant has not been convicted previously of a similar offense. *Howard v. State*, 37 Tex. Crim. App. 494, 36 S. W. 475.

52. *Moulton v. State*, 88 Ala. 116, 6 So. 758, 6 L. R. A. 301; *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494; *State v. Gordon*, 3 Iowa 410; *State v. McGee*, 81 Iowa 17, 46 N. W. 764; *State v. McDonald*, 57 Kan. 537, 46 Pac. 966; *Kearney v. State*, 68 Miss. 233, 8 So. 292; *Hussey v. State*, 87 Ala. 121, 6 So. 420.

A witness called to establish the good character of the defendant cannot be interrogated on cross-examination as to current reports as to how a jury divided on a former trial of the defendant for the same offense. *State v. Austin*, 108 N. C. 780, 13 S. E. 219.

53. *Alabama*.—*Moulton v. State*, 88 Ala. 116, 6 So. 758, 6 L. R. A.

301; *Thompson v. State*, 100 Ala. 70, 14 So. 878; *Hussey v. State*, 87 Ala. 121, 6 So. 420; *Goodwin v. State*, 102 Ala. 87, 15 So. 571; *White v. State*, 111 Ala. 92, 21 So. 330; *Carson v. State*, 58 Ala. 128, 29 So. 608.

*California*.—*People v. Gordon*, 103 Cal. 568, 37 Pac. 534.

*Indiana*.—*McDonel v. State*, 90 Ind. 320; *Wachstetter v. State*, 99 Ind. 290, 50 Am. Rep. 94; *Randall v. State*, 132 Ind. 539, 32 N. E. 305.

*Iowa*.—*State v. Arnold*, 12 Iowa 479; *Barr v. Hack*, 46 Iowa 308.

*Kansas*.—*State v. McDonald*, 57 Kan. 537, 46 Pac. 966.

*Kentucky*.—*Thurman v. Virgin*, 18 B. Mon. 785.

*Louisiana*.—*State v. Pain*, 48 La. Ann. 311, 19 So. 138.

*Massachusetts*.—*Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325.

*Michigan*.—*People v. Pyckett*, 99 Mich. 613, 58 N. W. 621.

*Missouri*.—*State v. Crow*, 107 Mo. 341, 17 S. W. 745; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315.

*Nebraska*.—*Basye v. State*, 45 Neb. 261, 63 N. W. 811.

*New Hampshire*.—*State v. Knapp*, 45 N. H. 148.

*New York*.—*People v. Elliott*, 163 N. Y. 11, 57 N. E. 103; *Carpenter v. Blake*, 10 Hun 358.

*South Carolina*.—*State v. Merri-man*, 34 S. C. 16, 12 S. E. 619.

*Texas*.—*Howard v. State*, 37 Tex. Crim. App. 494, 36 S. W. 475.

*Virginia*.—*Langhorne v. Com.*, 76 Va. 1012.

**Difficulties With Deceased.**—A

tion is in the discretion of the trial court.<sup>54</sup> But it must not enter into the grounds or particulars of the reports.<sup>55</sup> Where the witness denies his knowledge of such reports his answer is conclusive.<sup>56</sup> Some courts refuse altogether to permit cross-examination as to particular reports.<sup>57</sup>

**D. RE-EXAMINATION.**—The party calling the witness will not be permitted on the re-examination to interrogate the witness as to

witness to the good character for peace and quiet of the defendant charged with murder may be asked on cross-examination whether he has heard of the defendant having had previous difficulties with the deceased. *Jones v. State*, 120 Ala. 303, 25 So. 204.

So a witness who has testified to the good character of the defendant charged with the murder of his wife and children may testify on cross-examination, "I have heard for the last few years that he frequently had difficulties with his wife and struck her." *Hawes v. State*, 88 Ala. 37, 7 So. 302.

**Other Difficulties.**—A witness to the good moral character of one charged with murder may be cross-examined as to reports of the defendant having stolen hogs. *Terry v. State*, 118 Ala. 79, 23 So. 776.

A witness who testifies to the good character of a defendant for peace and quietude may be asked on cross-examination if he has heard that the defendant "killed a man in Georgia." *Ingram v. State*, 67 Ala. 67.

Or if he has not heard of a prior conviction of the defendant for murder, and also of his having drawn a pistol on different persons. *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933.

Witness to the good moral character of a defendant may be asked on cross-examination whether the defendant is not reputed to be a habitual violator of the dispensary law. *State v. Dill*, 48 S. C. 249, 26 S. E. 567.

Or if he has not heard that defendant once "wore stripes." *Holmes v. State*, 88 Ala. 26, 7 So. 193, 16 Am. St. Rep. 17.

Or as to having heard of the defendant's being connected with a criminal case a few weeks before.

*People v. Watson*, 54 Hun 637, 7 N. Y. Supp. 532.

**Political Influence.**—Where one was charged with the violation of election laws, it was held proper to cross-examine witnesses called to prove his good character as to what they had heard of his political power and influence and ability to control elections. *People v. McKane*, 143 N. Y. 455, 38 N. E. 950.

One who has testified to the general good character of the deceased person may be asked on cross-examination if he has not heard one or more witnesses state that the deceased was a "bad man." *Jackson v. State*, 78 Ala. 471.

**Question by Court.**—But it has been held that the court should not cross-examine the witnesses to good character as to particular inconsistent remarks, because it might give the impression to the jury that the court considered the defendant bad. *Harris v. State*, 61 Ga. 359.

**Hearsay.**—It is not proper to ask a character witness on cross-examination if he has not heard the reputation of the deposing witness called in question on a former trial of the case by impeaching witnesses. *Davis v. Franke*, 33 Gratt. (Va.) 413.

Or whether six witnesses did not testify some years before that his reputation for truth and veracity was bad. *Cullen v. Hanisch*, 114 Wis. 24, 89 N. W. 900.

<sup>54.</sup> *Randall v. State*, 132 Ind. 539, 32 N. E. 305; *Basye v. State*, 45 Neb. 261, 63 N. W. 811.

<sup>55.</sup> *Jones v. State*, 120 Ala. 303, 25 So. 204.

<sup>56.</sup> *Hussey v. State*, 87 Ala. 121, 6 So. 420.

<sup>57.</sup> *Gifford v. People*, 87 Ill. 210; *Aiken v. People*, 183 Ill. 215, 55 N. E. 695; *State v. Bullard*, 100 N. C. 486, 6 S. E. 191; *Barton v. Morphes*, 2

the origin of such particular reports,<sup>58</sup> nor as to the details of the matters involved therein,<sup>59</sup> nor as to the existence of other reports.<sup>60</sup>

**6. Number of Character Witnesses.**—Where character is in issue, a party has a right to call a reasonable number of impeaching or sustaining witnesses,<sup>61</sup> but the number may be limited in the sound discretion of the trial court.<sup>62</sup>

**7. Weight and Effect of Character Evidence.**—The impeachment of a witness does not necessarily deprive his testimony of all credit.<sup>63</sup> The weight and effect to be given to evidence of the character of a

Dev. Law (N. C.) 520; *Poole v. State*, 2 Baxt. (Tenn.) 288. See also *Bullard v. Lambert*, 40 Ala. 204; *Pulliam v. Cantrell*, 77 Ga. 563, 3 S. E. 280; *Olive v. State*, 11 Neb. 1, 7 N. W. 444; *State v. Austin*, 108 N. C. 780, 13 S. E. 219.

In a case where a witness testified to the general reputation and character of the defendant as a peaceable and law-abiding citizen, it was held error to ask the witness on cross-examination if he had not heard of the defendant shooting into a house full of women about ten days before the shooting for which the defendant was being prosecuted. *Nelson v. State*, 32 Fla. 244, 13 So. 361.

**58.** *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

**59.** *Aneals v. People*, 134 Ill. 401, 25 N. E. 1022; *Carson v. State*, 58 Ala. 128, 29 So. 608.

**Particulars of Reports.**—A witness who testifies to the good character of a defendant and who, on cross-examination, admits that he had heard that the defendant shot a man in Georgia, and had also heard the report denied, can not be further asked on cross-examination whether he knows the rumor to be false. *Evans v. State*, 109 Ala. 11, 19 So. 535.

A witness called to establish the good character of the defendant for peace and quiet who says on cross-examination that he has heard of the defendant having been engaged in an affray cannot be asked on a re-examination if the defendant was not tried and acquitted on that charge. *White v. State*, 111 Ala. 92, 21 So. 330.

But where it appeared on the cross-examination of a witness called to establish the good character of the defendant that he had been an inmate

of the reform school, it was held permissible to show that he was admitted to the school to provide him with maintenance and an education, and not for an offense. *Abernethy v. Com.*, 101 Pa. St. 322.

**60.** *Jones v. State*, 118 Ind. 39, 20 N. E. 634.

*Robinson v. State*, 84 Ind. 452.

*Stape v. People*, 85 N. Y. 390.

Where an impeaching witness has testified for the state to the "general bad moral character" of the accused, it is error to permit the prosecutor to ask the witness on re-examination, "Did you ever hear of him beating his wife?" *Drew v. State*, 124 Ind. 9, 23 N. E. 1098.

**61.** It has been held that to limit the defendant to four witnesses to prove his reputation for honesty and truth and to impeach the witnesses of the state is unreasonable. *Browder v. State*, 30 Tex. App. 614, 18 S. W. 197.

**62.** *People v. Kalkman*, 72 Cal. 212, 13 Pac. 500; *Bunnell v. Butter*, 23 Conn. 65; *Johnson v. Brown*, 51 Tex. 65.

Where a great many witnesses have already testified to the good character of the accused, and attempt has been made to rebut such evidence by the state, it is not error to refuse to allow another witness to testify to the defendant's good character who says that he has never heard it discussed. *People v. Moan*, 65 Cal. 532, 4 Pac. 545.

**63.** *Prior v. State*, 99 Ala. 196, 13 So. 681; *Hollingsworth v. State*, 53 Ark. 387, 14 S. W. 41; *Flansburg v. Basin*, 3 Ill. 531; *People v. O'Brien*, 68 Mich. 468, 36 N. W. 225; *Jones v. State*, 13 Tex. 168; *Boon v. Weathered*, 23 Tex. 675, 17 Tex. 143. See also *Smith v. State*, (Ga.), 35 S. E.

witness or other person are in all cases questions for the jury.<sup>64</sup> But it has been held proper to instruct the jury that they might disregard the testimony of an impeached witness where not corroborated by other evidence.<sup>65</sup>

59; *In re Wellcome*, 23 Mont. 450, 59 Pac. 445.

64. *Alabama*.—*Jones v. State*, 104 Ala. 30, 16 So. 135; *Cobb v. State*, 115 Ala. 18, 22 So. 506; *McClellan v. State*, 117 Ala. 140, 23 So. 653.

*California*.—*People v. Casey*, 53 Cal. 360.

*Connecticut*.—*State v. Shields*, 45 Conn. 256.

*Delaware*.—*State v. Snow*, 3 Pen. 259, 51 Atl. 653; *State v. Lynn*, 3 Pen. 316, 51 Atl. 878.

*Georgia*.—*Suddeth v. State*, 112 Ga. 407, 37 S. E. 747.

*Indiana*.—*Cavender v. State*, 126 Ind. 47, 25 N. E. 875.

*Iowa*.—*State v. Gustafson*, 50 Iowa 194; *State v. Donovan*, 61 Iowa 278, 16 N. W. 130; *State v. Kirkpatrick*, 63 Iowa 554, 19 N. W. 660.

*Kansas*.—*Craft v. State*, 3 Kan. 450; *Fisher v. Conway*, 21 Kan. 18, 30 Am. Rep. 419.

*Massachusetts*.—*Com. v. Wilson*, 152 Mass. 12, 25 N. E. 16.

*Michigan*.—*People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162.

*Minnesota*.—*State v. Hogard*, 12 Minn. 293; *State v. Beebe*, 17 Min. 241.

*Mississippi*.—*Powers v. Presgroves*, 38 Miss. 227.

*Missouri*.—*State v. O'Connor*, 31 Mo. 389.

*New York*.—*Sleeper v. Van Middlesworth*, 4 Denio 431.

*Pennsylvania*.—*Com. v. Carey*, 2 Brewst. 404.

*South Carolina*.—*State v. Tarrant*, 24 S. C. 593.

*Tennessee*.—*Kinchelow v. State*, 5 Humph. 9.

*Texas*.—*Mynatt v. Hudson*, 66 Tex. 66, 17 S. W. 396; *Lockhart v. State*, 3 Tex. App. 567; *Holmes v. State*, 38 Tex. Crim. App. 370, 42 S. W. 996. But see *Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569.

The weight of impeaching testimony "is to be judged, not by the number of witnesses, but by their responsibility and intelligence, consistency and means of information." *Kinchelow v. State*, 5 Humph. (Tenn.) 9.

**Setting Aside Verdict.**—It has been held that the character evidence of a defendant may be of such weight as to justify setting aside a verdict of guilty. *Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569; *Cavender v. State*, 126 Ind. 47, 25 N. E. 875.

A verdict of guilty will not be reversed because the defendant, who testified in his own behalf, was impeached by the testimony of one witness only. *Holmes v. State*, 38 Tex. Crim. App. 370, 42 S. W. 996.

A new trial will not be given in order that a defendant may obtain the advantage of character evidence. *Mirando v. State*, (Tex. Crim. App.), 50 S. W. 714.

65. *Turner v. State*, 70 Ga. 765; *Loehn v. People*, 132 Ill. 504, 24 N. E. 68; *Hill v. Montgomery*, 184 Ill. 220, 56 N. E. 320; 84 Ill. App. 300; *Watson v. Rood*, 30 Neb. 264, 46 N. W. 491.

**CHART.—See Maps.**

---

**CHARTER.—See Corporations; Franchise; Municipal Corporations.**

---

**CHARTER PARTY.—See Admiralty.**

**Vol. III**

# CHASTITY.

By F. A. STEVENS.

- I. SCOPE OF ARTICLE, 54
- II. PRESUMPTIONS, 54
- III. BURDEN OF PROOF, 55
- IV. MODE OF PROOF, 56
  - 1. *General Reputation*, 56
  - 2. *Specific Acts*, 56
  - 3. *Hearsay Evidence*, 57
  - 4. *Opinion Evidence*, 57
  - 5. *Negative Evidence*, 57
  - 6. *Admissions*, 58

## CROSS-REFERENCES.

Abduction; Adultery; Assault and Battery;  
Breach of Promise of Marriage;  
Character; Criminal Conversation; Divorce;  
Homicide;  
Presumptions;  
Rape;  
Seduction.

## I. SCOPE OF ARTICLE.

This article attempts to deal only with the mode of proving chastity. For general rules as to admissibility of such evidence, and so as to its admissibility in connection with particular actions and offenses, see cross-references *supra*.

## II. PRESUMPTIONS.

The presumption as to chastity arises only in actions where the question of chaste character is involved, or may be put in issue.<sup>1</sup> A good character for chastity is generally presumed in the absence of evidence to the contrary.<sup>2</sup> The statutes in some states, however,

1. For a discussion as to when character for chastity is or may be put in issue, see the article, "CHARACTER."

2. *Alabama*. — *Wilson v. State*, 73 Ala. 527; *Smith v. State*, 118 Ala. 117, 24 So. 55.

*Illinois*. — *Bradshaw v. People*, 153 Ill. 156, 38 N. E. 652.

*Indiana*. — *Gemmil v. Brown*, 25 Ind. App. 6, 56 N. E. 691; *Robinson v. Powers*, 129 Ind. 480, 28 N. E. 1, 112.

*Iowa*. — *West v. Druff*, 55 Iowa 335,

in certain prosecutions make previous good character for chastity an element of the offense, and chastity will not be presumed.<sup>3</sup>

### III. BURDEN OF PROOF.

In those cases where chaste character is presumed the burden of proof is upon the party who asserts the lack of chastity.<sup>4</sup> Where the previous chaste character of the prosecutrix is a part of the offense, the burden of proof is upon the state to establish such chaste character affirmatively.<sup>5</sup>

7 N. W. 636; *State v. Higdon*, 32 Iowa 262; *State v. Curran*, 51 Iowa 112, 49 N. W. 1,006; *State v. Brown*, 86 Iowa 121, 53 N. W. 92; *State v. McClintic*, 73 Iowa 663, 35 N. W. 696.

*Mississippi*. — *Ferguson v. State*, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

"The defendant argues that to presume in favor of the character of the woman in this case is to presume against his innocence. But to our minds this is not so. He will be presumed innocent of the fact—the act charged—whilst the presumption may be in favor of the rectitude of her character. And there seems to us no inconsistency in applying these presumptions in this manner. If the prosecution were held to show such a character in the first instance, the lightest amount of evidence would be sufficient to make a *prima facie* case, and the burden would still be on the defendant. And there does not seem to be much weight in the argument which is satisfied with this merely formal compliance with the rule, whilst on the other hand, there is a substance in the presumption of innocence and uprightness which requires a force of evidence to overcome." *State v. Andre*, 5 Iowa 389, 68 Am. Dec. 708.

3. *California*. — *People v. Roderigas*, 49 Cal. 9; *People v. Wallace*, 109 Cal. 611, 42 Pac. 159.

*Massachusetts*. — *Com. v. Whittaker*, 131 Mass. 224.

*Minnesota*. — *State v. Wenz*, 41 Minn. 196, 42 N. W. 933.

*Missouri*. — *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511.

*New Jersey*. — *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610.

*New York*. — *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177.

*Wisconsin*. — *West v. State*, 1 Wis. 186.

"Some authorities hold that previous chaste character is presumed in the female until it is attacked by the defense, but the cases supported by the better reasoning reject this rule, and hold that previous chaste character of the prosecutrix, being an element of the crime, must be established in the first instance by competent proof, the same as any other necessary averment; and we accept this as the correct doctrine. The presumption of innocence which surrounds the defendant cannot be overcome by a presumption in favor of the prosecutrix, and thus shift burden of proof to the defendant." *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837.

4. *Smith v. State*, 118 Ala. 117, 24 So. 55; *State v. Curran*, 51 Iowa 112, 49 N. W. 1,006; *State v. Higdon*, 32 Iowa 262; *State v. Brown*, 86 Iowa 121, 53 N. W. 92.

"The presumption of the law establishes *prima facie* the chaste character of the plaintiff. This presumption is overcome by evidence sufficient to satisfy the jury that the plaintiff is unchaste. In other words, the law imposes upon the defendant the burden of establishing plaintiff's want of virtue. The character of the evidence demanded to overcome the presumption is such as will satisfy the mind of the jury that plaintiff is unchaste. No higher order of evidence, or fuller measure of proof, is required than to establish any other fact." *West v. Druff*, 55 Iowa 335, 7 N. W. 636.

5. *Com. v. Whittaker*, 131 Mass.

## IV. MODE OF PROOF.

The rules of evidence for the proof of character in general apply to a great extent in the proof of the particular traits such as chastity and unchastity, thus:

**1. General Reputation.** — A good or bad character for chastity can ordinarily be proved only by reference to the person's general reputation for chastity or unchastity; and evidence as to specific acts of lewdness and unchastity is inadmissible either as original evidence or in rebuttal.<sup>9</sup>

**2. Specific Acts.** — Some cases allow bad character for chastity

224; *People v. Squires*, 49 Mich. 487, 13 N. W. 828; *People v. Clark*, 33 Mich. 112; *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837.

"The court properly admitted the evidence of the prosecution as to the previous chaste character of the prosecutrix. That was one of the elements of the offense which the people were called upon to establish affirmatively, and as a fact of their case in chief, and the evidence offered was competent for the purpose." *People v. Wallace*, 109 Cal. 611, 42 Pac. 159.

**Chastity in Fact.** — "Character, as here used, means actual personal virtue, and not reputation. The female must be unmarried and chaste in fact, when seduced. By the terms 'chaste character' the legislature could only have meant personal qualities that make up the real character, and not public reputation, which is the estimate of character formed by the public. It could not have been intended to substitute reputation for character in this, its primary and true sense." *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177. See also *Suther v. State*, 118 Ala. 88, 24 So. 43.

**6. Canada.** — *Gross v. Brodrecht*, 24 Ont. App. 687.

**Alabama.** — *Boddie v. State*, 52 Ala. 395; *McQuirk v. State*, 84 Ala. 435, 4 So. 775, 5 Am. St. Rep. 381.

**Arkansas.** — *Pleasant v. State*, 15 Ark. 624.

**Florida.** — *Rice v. State*, 35 Fla. 236, 17 So. 286, 48 Am. St. Rep. 245.

**Georgia.** — *Camp v. State*, 3 Kelly 417.

**Indiana.** — *Wilson v. State*, 16 Ind. 392

**Iowa.** — *State v. McDonough*, 104 Iowa 6, 73 N. W. 357.

**Kansas.** — *State v. Bryan*, 34 Kan. 63, 8 Pac. 260; *State v. Atterbury*, 59 Kan. 237, 52 Pac. 451; *State v. Brown*, 55 Kan. 766, 42 Pac. 363.

**Maryland.** — *Shartzler v. State*, 63 Md. 149, 52 Am. Rep. 501.

**Massachusetts.** — *Com. v. Regan*, 105 Mass. 593; *Com. v. Harris*, 131 Mass. 336.

**Michigan.** — *People v. McLean*, 71 Mich. 309, 38 N. W. 917, 15 Am. St. Rep. 263.

**Missouri.** — *State v. White*, 35 Mo. 500.

**Nebraska.** — *Myers v. State*, 51 Neb. 517, 71 N. W. 33.

**Nevada.** — *State v. Campbell*, 20 Nev. 122, 17 Pac. 620.

**New Hampshire.** — *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132; *State v. Knapp*, 45 N. H. 148.

**New Mexico.** — *Territory v. Pino*, 9 N. M. 598, 58 Pac. 393.

**Texas.** — *Pefferling v. State*, 40 Tex. 487; *Dorsey v. State*, 1 Tex. App. 33; *Rogers v. State*, 1 Tex. App. 187; *Jenkins v. State*, 1 Tex. App. 346; *Mayo v. State*, 7 Tex. App. 342; *Lawson v. State*, 17 Tex. App. 292.

"The reason upon which the rule supported by such weight of judicial authority should rest is that while a prosecutrix, as a witness in an action of rape alleged to have been committed upon her, is expected to defend her general reputation for chastity, she cannot anticipate the charges of specific acts of illicit intercourse which may be made by men who perhaps have been suborned to testify that they have had such connection with her, so as to secure the ac-



to be proved by reference to particular and specific acts of lewdness and unchastity.<sup>7</sup>

**3. Hearsay Evidence.**— Mere reports or rumors in a neighborhood are not admissible in evidence to attack the character for chastity, unless these rumors and reports go to make the general character for virtue, or the want of it.<sup>8</sup>

**4. Opinion Evidence** is sometimes admissible to prove character for chastity.<sup>9</sup>

**5. Negative Evidence.**— Chastity may be proved by evidence

quittal of the accused." *State v. Ogden*, 39 Or. 195, 65 Pac. 449.

**7. Prosecution for Rape.**— *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *Shirwin v. People*, 69 Ill. 55; *Brown v. State*, 72 Miss. 997, 17 So. 278; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Titus v. State*, 7 Baxt. 132; *State v. Reed*, 39 Vt. 417, 94 Am. Dec. 337.

On the trial of a prosecution for rape the defendant offered to prove that the prosecutrix had consented to the having of sexual intercourse with other men previous to the commission of the alleged offense. In granting a new trial on account of the exclusion of such evidence, the court says: "In the early case of *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506, this identical question was involved, and it was there held that such evidence was competent and admissible. In *People v. Johnson*, 106 Cal. 289, the *Benson* case is cited, and the court said: 'This class of evidence is admissible for the purpose of tending to show the non-probability of resistance on the part of the prosecutrix. For it is certainly more probable that a woman who has done these things voluntarily in the past would be likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed.'

"It may be conceded that the weight of authority is opposed to the rule laid down in the *Benson* case. Yet there is respectable authority supporting the doctrine as there declared. (*State v. Southerland*, 30 Iowa, 573; *Benstine v. State*, 2 Lea 175, 31 Am. Rep. 593; *State v. Patterson*, 88 Mo. 91, 57 Am. Rep. 374; *People v. Abbott*, 19 Wend. 192; *Brennan v. People*, 7 Hun 171; *Woods v. People*,

55 N. Y. 515, 14 Am. Rep. 309.) The *Benson* case was quite well considered. And in view of the fact that it has stood so many years as evidencing the law of this State upon the proposition the reasons urged for its overthrow at this time are not deemed sufficient by the court." *People v. Shea*, 125 Cal. 151, 57 Pac. 885.

**Prosecution for Seduction.**— *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *State v. Wheeler*, 94 Mo. 252, 7 S. W. 103.

"All the cases agree that upon a trial for seduction, the girl's chastity may be impeached by particular instances of incontinence, occurring before the defendant's intimacy with her. This is in fact the best proof on the subject." *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17.

**8. Parks v. State**, 35 Tex. Crim. App. 378, 33 S. W. 872.

"The plaintiff having given evidence of her general character for chastity, the defendant offered to prove the statement of one Johnson, who was dead at the time of the trial, to the effect that he had had sexual intercourse with her; but, on objection, the evidence was excluded. This was clearly right. The statement of Johnson could have been but hearsay." *Short v. Stotts*, 58 Ind. 29.

**9.** In a prosecution for seduction a witness was asked his opinion as to the chastity of the prosecutrix, based upon his acquaintance and observation of her general conduct during the three months while she was a member of his family. Objections to the question were overruled, and on appeal it was held that the question was a proper one. *People v. Wade*, 118 Cal. 672, 50 Pac. 841.

showing that the character of the party for chastity has never been discussed in the neighborhood.<sup>10</sup>

**6. Admissions.**—A bad character for chastity may in some actions be established by the admissions of the prosecutrix.<sup>11</sup>

**10.** *Milliken v. Long*, 188 Pa. St. 411, 41 Atl. 540.

"The State called Mr. Heiney, who testified that he knew the reputation of the prosecutrix for chastity prior to January 27, 1895, and that it was good. He stated on cross-examination that he never heard any person say anything about it until after the 27th of January, 1895, whereupon appellant moved to strike out his answer that her reputation was good. The motion was properly overruled. The fact that he had heard nothing prior to the 27th is a circumstance tending to show that her reputation was good." *State v. Case*, 96 Iowa 264, 65 N. W. 149.

**11.** In a prosecution for indecent assault the defendant was allowed to offer in evidence the admission of the prosecutrix to him to the effect that she had had carnal intercourse with several other men. The court, in upholding the introduction of such evidence, says: "Certainly, with this knowledge on his part, if he had never had intercourse with her, it would be testimony tending to show that he had no intent to injure her by making an indecent proposition to her; that he felt warranted in doing so from the fact that she had told him she had had carnal intercourse with other men." *Wilson v. State*, (Tex. Crim. App.), 67 S. W. 106.

**CHATTEL MORTGAGES.—See Mortgages.**

---

**CHEAT.—See Conspiracy; Fraud; False Pretenses.**

---

**CHECKS.—See Bills and Notes.**

---

**CHEMISTS.—See Expert and Opinion Evidence.**

---

**CHILD.—See Competency; Credibility; Guardian and Ward; Infancy; Parent and Child; Presumptions.**

---

**CHILDBEARING.—See Capacity; Presumptions.**

---

**CHINESE.—See Citizens and Aliens.**

---

**CHIROGRAPHY.—See Handwriting.**

---

**CHRISTIANITY.—See Judicial Notice.**

---

**CIPHER.—See Books of Account; Private Writings.**

# CIRCUMSTANTIAL EVIDENCE.

By A. P. WILL.

## I. DEFINITIONS AND DISTINCTIONS, 63

1. *What Is Circumstantial Evidence*, 63
2. *Circumstantial Evidence and Direct Evidence Distinguished*, 63
3. *Circumstantial Evidence Distinguished From Presumptive Evidence*, 64
4. *Inferences*, 65
  - A. *Definition*, 65
  - B. *"Inference" Distinguished From "Presumption,"* 65
  - C. *Inference for the Jury*, 66
  - D. *Upon What May an Inference Be Based*, 66
  - E. *The Process by Which an Inference Must Be Reached*, 67
  - F. *The Court Decides Upon the Presence of Evidence*, 68
  - G. *Cautionary Rules Affecting the Inference*, 68
    - a. *Considerations Demanding Caution*, 68
    - b. *Falsehood Must Be Guarded Against*, 69
    - c. *Specious Arrangement by Others Must Be Guarded Against*, 70
    - d. *Facts Which Are the Basis of an Inference Must Be Clearly Proved*, 70
    - e. *In Criminal Cases*, 72
  - H. *Independency of Circumstances as Affecting the Inference*, 74

## II. NATURE AND VALUE OF CIRCUMSTANTIAL EVIDENCE,

75

1. *The Nature of Circumstantial Evidence In General*, 75
  - A. *The Chain Simile*, 75
  - B. *The Value of Circumstantial Evidence*, 76
    - a. *The Relative Merits of Circumstantial Evidence and Direct Evidence*, 76
    - b. *Circumstantial Evidence and Direct Evidence Should Not Be Contrasted*, 80
    - c. *Circumstantial Evidence Is Sufficient in All Cases*, 81
    - d. *Circumstantial Evidence is Equally Competent in Civil and Criminal Cases*, 82
    - e. *The Futility of Attempts to Discredit Circumstantial Evidence*, 82

## III. THE BEARING OF THE RULE AS TO THE PRODUCTION OF THE BEST EVIDENCE, 84

1. *Generally*, 84

2. *Bearing of This Rule on Proof of Corpus Delicti*, 84
3. *Proof of Want of Consent*, 84
4. *Inference to Be Drawn From Suppression of Direct Evidence*, 85

#### IV. PROOF OF THE CORPUS DELICTI BY CIRCUMSTANTIAL EVIDENCE, 85

1. *Necessity for Proof of the Corpus Delicti*, 85
2. *Proof of the Corpus Delicti in Poisoning Cases*, 86
3. *The New York Rule*, 87
4. *The Method of Proving Corpus Delicti by Circumstantial Evidence*, 88
  - A. *Generally*, 88
  - B. *In Adultery*, 89
  - C. *Bribery*, 91
  - D. *In Arson*, 91

#### V. THE TEST OF THE VALUE OF CIRCUMSTANTIAL EVIDENCE IN CRIMINAL CASES, 92

1. *The Facts Consistent With Guilt*, 92
2. *The True Test*, 92
  - A. *Statement of the Rule*, 92
  - B. *What the Rule Requires*, 95
  - C. *Result of the Rule*, 96
  - D. *Cautionary Suggestion as to Instructions*, 97

#### VI. THE NECESSITY FOR RELIANCE UPON CIRCUMSTANTIAL EVIDENCE, 99

1. *Reason for the Existence of the Necessity*, 99
2. *Illustrations*, 99
  - A. *Proof of Contracts*, 99
  - B. *Proof of Agency*, 100
  - C. *Proof of Liability of Ship to Condemnation*, 100
  - D. *Proof of the Fact of Survivorship*, 100
  - E. *Proof of Sale of Intoxicating Liquors*, 100
  - F. *Proof of Adultery*, 101
  - G. *Proof of Bribery*, 101
  - H. *Conspiracy*, 101
  - I. *Proof of Fraud*, 101
  - J. *Proof of Negligence*, 102
  - K. *Proof of Identity*, 104
  - L. *Proof of Venue*, 104
3. *Circumstances as Corroborating Evidence*, 104
  - A. *In General*, 104
  - B. *Corroboration of an Accomplice*, 104
  - C. *Corroboration of Prosecutrix in Rape*, 106
  - D. *Corroboration in Seduction Cases*, 107
  - E. *Corroboration in Prosecutions for Perjury Sufficient With a Single Witness*, 107
  - F. *Corroboration of Confessions*, 108
  - G. *What Included in Corroborating Circumstances*, 108

## VII. RELEVANCY, 109

1. *Latitude in Admission of Circumstantial Evidence*, 109
  - A. *In General*, 109
  - B. *In Proof of Conspiracy*, 119
    - a. *Acts of Party*, 119
    - b. *Acquaintance*, 119
    - c. *Business Relations*, 119
  - C. *In Proof of Fraud*, 121
2. *Facts Showing Motive*, 123
  - A. *Generally*, 123
  - B. *Revenge or Gain*, 123
  - C. *Jealousy*, 124
  - D. *Lack of Affection*, 124
  - E. *Collateral Crime*, 125
  - F. *Motive Disproportionate*, 125
3. *Facts Showing Intention*, 126
  - A. *Inferred From Acts*, 126
  - B. *When Evidence Admissible*, 126
  - C. *Each Case Must Depend Upon Its Own Facts and Circumstances*, 126
  - D. *Previous Acts of Same Kind*, 126
  - E. *Threats, Etc.*, 128
4. *Facts Showing Knowledge*, 129
5. *Facts Showing Preparation*, 130
  - A. *Precedent Acts*, 130
  - B. *Weapons, etc.*, 130
6. *Facts Showing Opportunity*, 130
  - A. *Generally*, 130
  - B. *Want of Opportunity*, 131
  - C. *Desire and Opportunity*, 131
  - D. *Opportunity Must Be Enforced by Circumstances*, 131
7. *Facts Bearing on Identity of Person*, 131
  - A. *In General*, 131
  - B. *Identification by Voice*, 133
  - C. *Footprints*, 134
  - D. *Bloodstains*, 136
  - E. *Marks or Wounds*, 136
  - F. *Possession of the Fruits of the Crime*, 137
  - G. *Property of Accused Near Scene of Crime*, 138
  - H. *Conduct and Demeanor*, 139
    - a. *In General*, 139
    - b. *Flight or Escape*, 140
    - c. *Fabrication of Evidence*, 145
    - d. *Suppression or Destruction of Evidence*, 147
    - e. *Silence*, 148
    - f. *False Explanations of Suspicious Circumstances*, 150

## I. DEFINITIONS AND DISTINCTIONS.

1. **What Is Circumstantial Evidence.**—Any evidence which is not direct and positive is circumstantial.<sup>1</sup> Circumstantial evidence, frequently termed indirect evidence, consists in reasoning from facts which are proved to establish such as are conjectured to exist.<sup>2</sup>

2. **Circumstantial Evidence and Direct Evidence Distinguished.** The distinction between circumstantial evidence and direct evidence is not one of degree, but of logical method. In the case of direct evidence, the facts apply directly to the *factum probandum*, while circumstantial evidence is proof of a minor fact, which, by indirection, logically or naturally demonstrates the *factum probandum*.<sup>3</sup>

**The Character of Evidence Does Not Change.**—It is hardly neces-

1. Stark. Ev. 838. And see Abbott's Law Dict.; Brown's Law Dict.; Whart. Law Lexicon.

2. Ruppert v. Brooklyn Heights R. Co., 154 N. Y. 90, 47 N. E. 971. People v. Kennedy, 32 N. Y. 141. And see Hickory v. U. S., 151 U. S. 303.

It has been defined as that which only tends to establish the issue by proof of various facts sustaining, by their consistency, the hypothesis claimed. Georgia Code, § 3,748. Or, more fully, as that which tends to establish the fact in dispute by proving another which, though true, does not of itself conclusively establish the fact in dispute, but affords an inference of its existence. Cal. Code Civ. Proc., § 1,832.

**Other Definitions.**—Evidence which inferentially proves the principal fact by establishing a condition of surrounding and limiting circumstances, whose existence is a premise, from which the existence of the principal fact may be concluded by necessary laws of reasoning. Black. Law Dict.

In State v. Avery, 113 Mo. 475, 21 S. W. 193, the following instruction was approved: "Circumstantial evidence is the proof of certain facts and circumstances in a given case from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind." See also a similar definition in State v. Evans, 1 Marv. (Del.) 477, 41 Atl. 136; State v. Goldsborough, Houst. Crim. Cas. (Del.) 302.

Circumstantial evidence, strictly speaking, consists of a number of

disconnected and independent facts, which converge towards the fact in issue as a common center. U. S. v. Searcey, 26 Fed. 435, per Dick, J.

**Circumstantial Evidence in Any Criminal Case** is the proof of such facts or circumstances connected with or surrounding the commission of the crime charged, as tend to show guilt or innocence of the accused. Cunningham v. State, 56 Neb. 691, 77 N. W. 60.

**Circumstantial Evidence Includes** not merely such marked and suggestive circumstances as usually attend a transaction and are often thought of as solely deserving the name, but all evidentiary facts whatsoever, other than human assertions, used as the basis of an inference to the truth of the assertion. Greenl. Ev. (16th ed.) 35.

**In a Criminal Case** the jurors were instructed that circumstantial evidence might consist of admissions by the defendant, plans laid for the commission of a crime, and any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. And this charge was approved. People v. Morrow, 60 Cal. 142.

3. **This Is Well Illustrated** by a reference to the case of the possession of goods which have been recently stolen. No witness sees the thief in the act of taking the property, but a witness may testify directly to the fact of seeing a person shortly after the crime in possession of the stolen property, who, when his possession is challenged, either de-

sary to say that evidence, circumstantial in character, cannot, during the progress of the case, acquire a positive nature.<sup>4</sup>

**Case Depending on Circumstantial Evidence.** — What constitutes circumstantial evidence is an entirely different thing from a case depending on circumstantial evidence. The distinction is important where the duty is imposed on the court of charging on circumstantial evidence where the case depends on such evidence. The charge is required to be given only where the case rests solely and alone upon circumstantial evidence; that is to say, where the main fact, or gravamen, of the offense or act of the crime rests upon circumstantial evidence alone.<sup>5</sup>

**3. Circumstantial Evidence Distinguished From Presumptive Evidence.** — A presumption is properly an inference as to the existence of one fact, from a knowledge of the existence of some other fact,

clines to explain the manner in which he obtained the goods, or gave an explanation which was false. From these circumstances the taking may be inferred, or deduced, by the process of reasoning. *Beason v. State*, (Tex.), 67 S. W. 96.

The great peculiarity of circumstantial evidence is its indirect character, it being made to bear upon the principal fact in question (the *factum probandum*) through other and minor or collateral facts; a fact of this last kind being distinguished as *factum probans*. *Burrill Law Dict.*

**To Look at the Distinction From Another Standpoint**, where direct evidence is employed, the *factum probandum* is directly attested by those who speak from their own actual knowledge of its existence, while in case of the latter, it is to be inferred from other facts satisfactorily proved. *Gates v. Hughes*, 44 Wis. 332, citing 1 Greenl. Ev., § 13; *Com. v. Goodwin*, 14 Gray (Mass.) 55.

**Illustration.** — For an illustration of evidence which was held direct rather than circumstantial, see *U. S. v. Douglass*, 2 Blatchf. 207, 25 Fed. Cas. No. 14,989, where counsel erroneously requested an instruction that the plaintiff relied on "purely circumstantial evidence."

**A Confession Is Not Circumstantial But Direct**, and therefore, where the defendant has made a confession, a request for a charge upon the law of circumstantial evidence, based upon the theory that there is no direct evidence, may be properly refused. *Perry v. State*, 110 Ga. 234, 36 S. E.

781; *Eberhart v. State*, 47 Ga. 598.

Where A was being tried for assault with intent to kill B, it was shown that a sorrel horse had been stolen from A, and that while he was hunting for the horse, B, while riding a sorrel horse, was shot by an unknown person. A, later on the same day, declared that he had shot at the man who had stolen his horse, and there being no evidence that he referred to B, it was held that this was not confession, but was in the nature of circumstantial evidence. *Eckert v. State*, 9 Tex. App. 105.

**4.** *Moughon v. State*, 57 Ga. 102, where this instruction was criticised: "Circumstantial evidence, when the circumstances are proven which point to a certain conclusion, is as sufficient to establish a fact as direct evidence, and both kinds of evidence then become of a positive nature."

**5.** *Beason v. State*, (Tex.), 67 S. W. 96, where it was said that the main fact where burglary is charged is not the intent with which the crime is committed. The intent may be to steal, to rob, to rape, to murder, or to commit some other felony. The main fact is the breaking and entering. So when the defendant is charged with burglary and a confession of theft of the property stolen is introduced, and there is no direct evidence as to the breaking and entering, this is a case of circumstantial evidence in which the charge is required.

On the trial of an indictment for forgery where there is no evidence of the making of the instrument, ex-



drawn solely by virtue of previous experience of the ordinary connection between the known and inferred facts, and independently of any process of reason in the particular instance.<sup>6</sup>

**Circumstantial and Presumptive Evidence Differ**, therefore, as genus and species, and any use of these terms which assumes or suggests that they are interchangeable is improper.<sup>7</sup>

**4. Inferences.** — A. DEFINITION. — An inference is a deduction which the reason of the jury makes from facts proved, without an express direction of law to that effect.<sup>8</sup>

**A Circumstance Which Tends to Prove a Fact Affords an Inference** as to the existence of such fact.<sup>9</sup>

B. "INFERENCE" DISTINGUISHED FROM "PRESUMPTION." — The strict meaning of the word "infer" is to bring a result or conclusion from something back of it; that is, from some evidence or data from which it may be logically adduced. "To presume" is to take, or assume, a matter beforehand, without proof; that is, to take it for granted.<sup>10</sup>

cept the fact of uttering, which is proven by direct evidence, this is a case of circumstantial evidence. *Hanks v. State*, (Tex.), 56 S. W. 922; *Nichols v. State*, 39 Tex. Crim. App. 80, 44 S. W. 1,091.

6. 1 Stark. Ev. (10th Am. ed.) 839. And see *U. S. v. Searcey*, 26 Fed. 435; *McCogg v. Heacock*, 34 Ill. 476, 85 Am. Dec. 327; *Cronan v. New Orleans*, 16 La. Ann. 374; *Tanner v. Hughes*, 53 Pa. St. 289.

**Circumstantial Evidence Distinguished From Presumptive Evidence.** The terms "presumptive evidence" and "presumption" have been frequently used when a reference to circumstantial evidence has been intended. For an instance of such misuse of the term "presumption" by the trial court, see *Grigsby v. Moffat*, 2 Humph. (Tenn.) 487.

7. Stark. Ev. 839.

**Circumstantial Evidence Is a "Species of Presumptive Evidence**, and it consists in this, that where there is no satisfactory evidence of the direct fact, certain facts which are *assumed* to have stood around, or been attendant on, the main facts, are proved, from the existence of which the direct fact may be inferred." *Bishop Crim. Proc.* (2d ed.) 1,067, approved in *Jenkins v. State*, 62 Wis. 49, 21 N. W. 232. In this case it was held particularly that no valid objection could be made to the word "assumed," which was evidently used

in the definition in the sense of "claimed."

8. Cal. Code Civ. Proc., § 958.

And see substantially the same definition in *Gates v. Hughes*, 44 Wis. 332, per Orton, J.; *Smith v. Western Union Tel. Co.*, 57 Mo. App. 259; *Tanner v. Hughes*, 53 Pa. St. 289.

9. In *State v. Anderson*, 10 Or. 448, the court was requested but refused to charge that "the jury should not find the defendant guilty in the first degree by reason of any occurrences happening after the supposed killing, which do not directly tend to prove premeditation and deliberation." This instruction was taken as an attempt to distinguish between "occurrences" which did, and those which did not "directly tend to prove premeditation." The court declared there was no difference between an occurrence "directly tending," and one simply "tending" to prove a fact. And there being no such distinction, "the instruction merely amounted to a direction to the jury not to find 'premeditation and deliberation' from subsequent occurrences unless they afforded inferences to that effect. A general instruction of this nature would hardly be deemed necessary in any case, as jurymen must be presumed to know their duty in this regard."

10. *Loomis, J.*, in *Morford v. Peck*, 46 Conn. 380. These defini-

"Inferred" and "Implied" are sometimes used as interchangeable terms.<sup>11</sup>

C. INFERENCE FOR THE JURY.—The process is for the jury alone.<sup>12</sup>

D. UPON WHAT MAY AN INFERENCE BE BASED.—Any inference which the jury are justified in acting upon as affecting the issues

tions were called forth by a misleading charge of the trial court, to the effect that the plaintiff must prove the fraud alleged, and that it could not be inferred. What was evidently intended was to convey to the jury the idea embodied in the maxim that "fraud can never be presumed."

An Inference of Fact, which, according to a rule of law, the jury are bound to infer, is a "presumption of fact." For example, "after twenty years, bonds and other instruments not within the statute of limitations are presumed, or inferred, to have been paid; but that is an inference which the jury must make, the court charging as to what is the rule of law." *Diehl v. Ihrie*, 3 Whart. (Pa.) 143, per Sergeant, J.

11. As where, in defining murder in the first degree, the trial court charged that intent might be "inferred" from the circumstances, and the supreme court held that there was no real distinction in the meaning between "inferred" as here used and "implied," as used in the statute. *State v. Millain*, 3 Nev. 409.

12. *Alabama*.—*Easterling v. State*, 30 Ala. 46; *Hollingsworth v. Martin*, 23 Ala. 591.

*California*.—*People v. Carillo*, 54 Cal. 63.

*Georgia*.—*Hunt v. State*, 81 Ga. 140, 7 S. E. 142; *Berry v. State*, 10 Ga. 511.

*Indiana*.—*Allison v. State*, 42 Ind. 354.

*Iowa*.—*Franks v. State*, 1 Greene 541.

*Maryland*.—*Howard v. Carpenter*, 22 Md. 10.

*Michigan*.—*People v. Stewart*, 75 Mich. 21, 42 N. W. 662.

*Missouri*.—*Mosby v. McKee, Z. & W. Comm. Co.*, 91 Mo. App. 500.

*Nebraska*.—*Brownell v. Fuller*, 60 Neb. 558, 83 N. W. 669; *Williams v. State*, 46 Neb. 704, 65 N. W. 783; *Habig v. Layne*, 38 Neb. 743, 57 N. W. 539.

*New York*.—*Landell v. Hotchkiss*, 1 Thomps. & C. 580.

*Pennsylvania*.—*Brown v. Schock*, 77 Pa. St. 471.

*South Carolina*.—*Izlar v. Manchester & A. R. Co.*, 57 S. C. 332, 35 S. E. 583.

*Virginia*.—*Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

*West Virginia*.—*State v. Cooper*, 26 W. Va. 338; *State v. Thompson*, 21 W. Va. 741.

*Enos v. St. Paul F. & M. Ins. Co.*, 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796, was an action on an insurance policy where the defense was that the plaintiff himself set fire to the property for the purpose of recovering the insurance money. Referring to the conduct and appearance of the plaintiff as giving rise to suspicions of guilt, a witness into whose shop the plaintiff went shortly before the fire was asked, after having testified as to the plaintiff's actions and appearance, "whether or not his talk and manner were such as to attract your attention and cause you all to comment upon it after he went out." This question was held to have been properly excluded. The witness had already stated that the plaintiff's manner was unusual, and could not know as a fact how it affected others, nor that it caused them to make comments. He could only infer the cause of the comments, if any were made, from what he saw and heard. Having fully stated the facts, the inferences were for the jury.

See for further illustrations, *infra* "RELEVANCY."

**The Court Must Not Usurp This Function.**—It is ground for reversal in a criminal case if the court, in its charge, argues the very facts of the case, although under the guise of an illustration of the meaning of circumstantial evidence, and takes up every material constituent of the prosecution's case, and deduces a conclusion and announces it to the

before them must be a reasonable deduction from the evidence. And the jury may make all legitimate inferences which all the testimony together will justify.<sup>13</sup>

Inferences from evidence may be drawn by the jury in view of the light furnished by common knowledge and experience.<sup>14</sup> And the truth or falsity of the principal proposition may be determined as the conclusion may follow the attested premises.<sup>15</sup>

E. THE PROCESS BY WHICH AN INFERENCE MUST BE REACHED. Inferences should be made upon common principles of logic,<sup>16</sup> and may be drawn from the evidence by probable deduction.<sup>17</sup>

jury. This is so though the jury are expressly told in the charge that the facts are for their decision alone. *Freidrich v. Territory*, 2 Wash. 358, 26 Pac. 976. This case was decided under a statutory provision contemplating a statement of all matters of law necessary for the information of the jury in finding a verdict, and only such "allusion" to the evidence as might be necessary. The trial judge in this case discussed, among other things, the claim that the deceased came to his death by his own hand, and declared: "From these circumstances we arrive at the conclusion that the man was shot by some one other than himself." This was held more of an "allusion" than the statute warranted, and an abuse of discretion.

But while the jury may not be instructed what inference they were to draw, it is not proper for the court to tell them, in effect, that it is for them to say whether they will draw a certain inference, if on consideration of the facts proven it seems to them a proper one to be drawn. *Com. v. Walsh*, 162 Mass. 242, 38 N. E. 436. And see *Dunbar v. U. S.*, 156 U. S. 185.

So the following instruction was no grounds for reversal: "In determining what facts are proved in the cause, you should carefully consider all the evidence given before you, together with all the circumstances of the transactions in question, detailed by the witnesses during the trial. You may find any fact to be proved which may be rightfully and rationally inferred from the evidence given in the case." *Binns v. State*, 66 Ind. 428.

13. *Brown v. Matthews*, 79 Ga. 1,

4 S. E. 13; *State v. Bickel*, 7 Mo. App. 572.

See also cases cited *infra*, "RELEVANCY."

**Statement of the California Code.** An inference must be founded (1) on a fact legally proved; and (2) on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature. Cal. Code Civ. Proc. Ch. V, § 1,960.

14. *Gunn v. Ohio R. R. Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 832; *U. S. v. Searcey*, 26 Fed. 435. The former was an action for damages for the killing of two children by the defendants' train. The children were killed by being knocked from a trestle by the engine, and it was claimed that the defendants' employees could have seen the children in time to have stopped the train before reaching them, if a proper lookout had been kept. The time when the children climbed upon the trestle, therefore, became important in the case. Said Holt, J.: "Common knowledge and common experience are parts of the trial of every civil issue, without special proof, so that the jury might reasonably infer from the facts proved that it would require a few seconds, at least, for these children to go upon the trestle and seat themselves." To the same effect, see *State v. Ferrer*, 1 Ohio Dec. 428.

15. *Gates v. Hughes*, 44 Wis. 332.

16. *O'Gara v. Eisenlohr*, 38 N. Y. 296.

17. *Gannon v. People*, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147.

But the Inference Drawn Should Be Clear and Strong, the natural and logical result of an open and visible connection between the principal and evidentiary facts.<sup>18</sup>

F. THE COURT DECIDES UPON THE PRESENCE OF EVIDENCE. Whether or not in a given case there is any evidence from which an inference can be drawn by the jury in respect to the issue to be determined is a question exclusively for the court.<sup>19</sup>

G. CAUTIONARY RULES AFFECTING THE INFERENCE. — a. *Considerations Demanding Caution.* — The process of inference and deduction applied to a combination of circumstances is liable to be in-

**The Process Is the Same in All Cases.** — The mode of reasoning and of drawing conclusions from facts is the same, whether the case is one involving property or affecting life. *People v. Thayers*, 1 Park. Crim. Rep. (N. Y.) 595, per Woolworth, J.

18. *United States*. — U. S. v. Ross, 92 U. S. 281; *Thompson v. Bowie*, 4 Wall. 463.

*Connecticut*. — *State v. Rome*, 64 Conn. 329, 30 Atl. 57.

*Massachusetts*. — *Durkee v. India Mut. Ins. Co.*, 159 Mass. 514, 34 N. E. 1,133.

*New Hampshire*. — *Cole v. Boardman*, 63 N. H. 580, 4 Atl. 572.

*New York*. — *Baird v. Gillett*, 47 N. Y. 186.

*Pennsylvania*. — *Douglass v. Mitchell*, 35 Pa. St. 440.

**To Illustrate.** — The inference of suicide is not a reasonable inference from the fact that the deceased, whose death is being investigated, was an infidel or an atheist. *Gibson v. American L. Ins. Co.*, 37 N. Y. 580.

*Ruppert v. Brooklyn Heights R. Co.*, 154 N. Y. 90, 47 N. E. 971, was an action for personal injuries alleged to have been caused by the presence of a paving stone in the street. The simple issue of fact was whether the defendant had negligently placed, or left, an obstruction in the highway which was the approximate cause of the injury. The only circumstance which the plaintiff proved in this case was that the defendant, about the time of the accident, was engaged in drawing paving stones over this street, and the inference which was sought to be drawn from that circumstance was that the granite paving block dropped into the highway from one of the carts, through the

negligence of the defendant's servants. But it appeared that while the defendant was so engaged in moving the paving stone, he was not using or moving any stone of this character, and that other parties were. Hence the reasoning process was defective, since it was at least as reasonable to suppose that the stone in question was left in the street by the careless act of the parties who were using and moving this kind of stone, as by the defendant, who was not.

19. *England*. — *Company of Carpenters v. Hayward*, 1 Doug. 373.

*United States*. — *Chandler v. Von Roeder*, 24 How. 224, per Campbell, J.; *U. S. v. Stockwell*, 4 Cranch C. C. 671, 27 Fed. Cas. No. 16,405.

*California*. — *McFadden v. Wallace*, 38 Cal. 51; *Thompson v. Lynch*, 29 Cal. 189.

*Connecticut*. — *Breed v. Hillhouse*, 7 Conn. 523.

*North Carolina*. — *Wittkowsky v. Wasson*, 71 N. C. 451, where it was said that this doctrine must have been a part of the law from the earliest times at which the respective functions of the judge and jury were discriminated.

*Ohio*. — *Berry v. State*, 31 Ohio St. 219, 27 Am. Rep. 506.

*Tennessee*. — *Ellis v. Spurgin*, 48 Tenn. 74.

*Texas*. — *Pridgen v. State*, 31 Tex. 420.

To warrant the submission of evidence to the jury it must be such as, in the judgment of the court, would reasonably warrant the jury in finding a verdict upon the issue submitted, affirmatively or negatively, according as they may view it in one light or another, and give it more or less weight or none at all. If, in a criminal case, the evidence produced

fluenced by the defects of the mind of the juror, upon whom rests the responsibility of the ultimate conclusion.<sup>20</sup>

It is one of the difficulties necessarily attending the investigation of a case when the proof is drawn from a large number of circumstances, that too much stress is frequently laid on trivial circumstances, when suspicion has once been aroused, and harsh and erroneous inferences frequently drawn against the accused.<sup>21</sup> Prejudice or partiality, or want of due deliberation and solemnity of judgment, may lead to hasty and false deductions.<sup>22</sup>

In view of these facts, therefore, it is a reasonable restriction that circumstantial evidence must always be acted upon with caution.<sup>23</sup> This is the only restriction attached to circumstantial evidence.<sup>24</sup>

**b. Falsehood Must Be Guarded Against.** — As a branch of the general rule as to caution, it is a subsidiary rule that the evidence must be scrutinized with the object of guarding, as far as possible, against false statements of witnesses.<sup>25</sup>

**Independence of Witnesses.** — In considering this question it is manifest that the reliance placed on the truth and existence of circum-

is so slight and inconclusive that in no view of it could the jury render a verdict of guilty, then there is no evidence to be submitted to them. *State v. White*, 89 N. C. 462.

**But the Court Will Never Hold That There Is No Evidence** to go to the jury, if, in view of all the circumstances presented, it being assumed that the jury believed the testimony in all its reasonable bearings, an inference can be drawn touching the facts in issue. *State v. Atkinson*, 93 N. C. 519. This case is an excellent illustration of the propositions of the text.

20. *Novum Organum* lib i, aph. 41, 45; *Best*, *Presumptions*, 255; 3 *Bentham*, *Jud. Ev.* V, Ch. XV, § 4.

The difficulty of fixing the line of distinction between legitimate inferences and bare conjectures was recognized in *Tailer v. Murphy Furn. Goods Co.*, 24 Mo. App. 420.

This inherent defect in the human mind has this bearing upon the subject under discussion, that, to use the language of a very eminent judge, "the mind is apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely is it, in considering such matters, to overreach and mislead itself,

to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." *Baron Alderson*, in *Reg. v. Hodges*, 2 *Lewin C. C.* 227.

21. *Moore v. State*, 2 *Ohio St.* 500.

22. *Com. v. Webster*, 5 *Cush.* (Mass.) 295, 52 *Am. Dec.* 711, per *Shaw*, C. J.

23. *Cook v. State*, (Miss.), 28 *So.* 833; *McCann v. State*, 21 *Miss.* 471; *Algheri v. State*, 25 *Miss.* 584; *Dean v. Com.*, 32 *Gratt.* (Va.) 912; *U. S. v. Martin*, 2 *McLean* (U. S.) 256.

Especially where public anxiety for the detection of a great crime creates an unusual tendency to exaggerate and draw rash inferences. *Pitts v. State*, 43 *Miss.* 472.

24. *Cook v. State*, (Miss.), 28 *So.* 833.

25. *Com. v. Twitchell*, 1 *Brewst.* (Pa.) 551.

**The Question Is Largely One of Credibility**, and depends upon the integrity, capacity and means of knowledge of the witness, or witnesses, who testify to facts from which other facts are to be inferred. *State v. Van Winkle*, 6 *Nev.* 340, citing *Stark. Ev.* 411.

And see *People v. Verenesenec-kockkockhoff*, 129 *Cal.* 497, 58 *Pac.* 156, 62 *Pac.* 111.

stances testified to will be increased in proportion as the witnesses have acted throughout the whole transaction independently of each other.<sup>26</sup>

**The Inference From Variations, Diversities or Omissions.**—The inference of fabrication or fraud cannot be drawn justly from the mere fact that there are variations, diversities or omissions in the attending circumstances of a transaction as related by several witnesses. The observation of a fact by some is entirely consistent with the failure of others to observe it, or with their forgetfulness of its occurrence.<sup>27</sup>

So the inference will depend upon the question whether, under the particular circumstances, the negative testimony can be attributed to inattention, error or defect of memory.<sup>28</sup>

**A Question of Fact.**—This whole question is one of fact and not of law.<sup>29</sup>

*c. Specious Arrangement by Others Must Be Guarded Against.* Again, in cases depending on evidence of this nature, care must be taken to see that the circumstances have not been arranged by others.<sup>30</sup>

*d. Facts Which Are the Basis of an Inference Must Be Clearly Proved.*—No inference being reliable which is drawn from premises which are themselves uncertain, whenever it is sought to establish a proposition by circumstantial evidence, the circumstances from which the inferences must be drawn must be themselves established by direct evidence, as if they were the very facts in issue, and must not be left to conjecture.<sup>31</sup>

26. *Rex v. Genge*, Camp. 13, where Lord Mansfield commented on the inference of accuracy arising from the fact that two reporters set out a case in substantial accord, though neither of them could usually be regarded as reliable.

27. The powers of observation and of memory of different persons being mostly dissimilar, it rarely happens that any two individuals who witness a transaction observe all, or the same, minute circumstances which attend it, or that, in relating the particulars of the transaction at a time a little remote therefrom, they will report in perfect accord all the attending details. See *Stitt v. Huidekopers*, 17 Wall. (U. S.) 384; *Horn v. Baltimore & O. R. Co.*, 54 Fed. 301; *Colt v. Rood*, 6 McLean 106, 6 Fed. Cas. No. 3,031.

28. *Cornell v. Hyatt*, 6 Fed. Cas. No. 3,237. And see *Railsback v. Patton*, 34 Neb. 490, 52 N. W. 277; *Hinkle v. Higgins*, 83 Tex. 615, 19 S. W. 147.

29. *State v. Van Winkle*, 6 Nev. 340. And see the following cases: *United States v. Candler*, 65 Fed. 308.

*Georgia*.—*Hunt v. State*, 81 Ga. 140, 7 S. E. 142; *Kinnebrew v. State*, 80 Ga. 232, 5 S. E. 56.

*Illinois*.—*Goddard v. People*, 42 Ill. App. 487.

*Massachusetts*.—*Com. v. Loewe*, 162 Mass. 518, 39 N. E. 192.

*Michigan*.—*People v. Duncan*, 104 Mich. 460, 62 N. W. 556.

*Missouri*.—*State v. Musick*, 71 Mo. 401.

*Pennsylvania*.—*McLain v. Com.*, 99 Pa. St. 86.

*Texas*.—*McDaniel v. State*, 5 Tex. App. 475.

And see, generally, *infra* title "CREDIBILITY."

30. *Brewster, J.*, in *Com. v. Twitchell*, 1 Brewst. (Pa.) 551.

31. *United States v. Manning v. John Hancock Mut. L. Ins. Co.*, 100 U. S. 693; *U. S. v. Ross*, 92 U. S.

281; citing *Best Ev.* 95; *Stark. Ev.* 80.

*Connecticut.* — *State v. Rome*, 64 Conn. 329, 30 Atl. 57.

*Iowa.* — *State v. Elsham*, 70 Iowa 531, 31 N. W. 66.

*Kansas.* — *Chicago, R. I. & P. R. Co. v. Rhoades*, 65 Kan. 553, 68 Pac. 58.

*Kentucky.* — *Wald v. Louisville E. & St. L. R. Co.*, 13 Ky. L. Rep. 853, 18 S. W. 850.

*Massachusetts.* — *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

*New York.* — *Ruppert v. Brooklyn Heights R. Co.*, 154 N. Y. 90, 47 N. E. 971.

*Pennsylvania.* — *Pennsylvania C. P. R. Co. v. Henrice*, 92 Pa. St. 431, 37 Am. Rep. 699; *Douglass v. Mitchell*, 35 Pa. St. 440.

*Texas.* — *Wroth v. Norton*, 33 Tex. 192.

**Collateral Facts Must Be Proved Directly.** — "It is obvious that the means of indirect proof must usually be supplied by direct proof, for no inference can be drawn from any collateral facts until these facts have themselves been first satisfactorily established, either by actual observation or information derived from others who have derived their knowledge from such observation." *Stark. Ev.* 17.

On a trial for murder, to reduce the grade of the offense after the prosecution had made out a *prima facie* case of murder in the first degree, the defendant attempted to show that at the time of the killing he was drunk and therefore incapable of deliberation. A witness was asked whether the prisoner was not generally drunk when out of work. It was also asked if the defendant did not move quicker when drunk than when sober, and it was intended to follow this with proof that he did move quickly on the occasion of the killing. And it was attempted to be shown that on the morning of the day on which the murder was committed the defendant's wife forbade a person from selling the defendant liquor, saying that he was drunk and abused her. There was no proof of actual intoxication at the time of the crime. The questions were held to have been properly rejected, the court saying, by Thompson, J.: "That he

generally got drunk when out of work was a matter of habit, not of fact. It did not prove either the fact of being drunk at the time, or that he had no work. It was the fact that was wanted—from that, the inference of want of deliberation might have been drawn. But it was asked here to infer that he was out of work, and therefore drunk, because he was generally so when out of work, and hence to infer from the inferred drunkenness that he could not act deliberately. This mode of proof the law will not sanction, and we need only state the proposition to demonstrate the fallacy of the attempt." *Warren v. Com.*, 37 Pa. St. 45.

**Illustrations.** — *Douglass v. Mitchell*, 35 Pa. St. 440, was an action of debt to recover money claimed to have been loaned by plaintiff to the defendant's testator. The defendant claimed there had been no such loan, and that the demand notes exhibited to evidence the loan were forgeries. The learned trial judge—Mr. Justice Thompson—illustrated the proposition of the text by showing how the contrary rule would operate on the facts of the case.

"Suppose the proof to be that the intestate was an accurate business man, and that he kept an account of everything in his books; the presumption claimed is, in such case, that if the particular transaction existed, it would have been in his books, and if not in his books, it is proof that it never existed. We think it would not. The books were not in evidence in this case, but we make use of this as an illustration of the principle. This instruction is applicable to the non-appearance of sums of money corresponding with the alleged loans of defendant to him; the habit of depositing every day is proved, and it is claimed from the fact that no money corresponding with the money loaned was found deposited, that none was loaned, or it would have been deposited. This would be a presumption arising from a presumption of accuracy, and we think is not a safe way to prove a fact. So in regard to the means claimed as proving that the intestate did not know Douglass in June, 1853. He did not condemn a title out of which ground-rent issued, which he sold for Mrs.

e. *In Criminal Cases*, resting on circumstantial evidence only, where the verdict is built on a series of facts connected logically together, and one fact succeeding the other in a certain order, and resting or depending on the preceding as a result of it, each adding strength or conviction to the other and the whole, and the whole complete a perfect and irresistible chain, each and every one must be established and proved beyond a reasonable doubt.<sup>32</sup> The ultimate conclusion of guilt is drawn from certain essential facts, from the existence of which the mind is logically and irresistibly forced to infer the main fact to be proved. And it is the law that every one of these facts essential to the conclusion reached must be established to the same degree of certainty as the main fact.<sup>33</sup>

But there is ever the distinction between the body of circumstances proven in a case and the necessary facts. It is not the law, therefore,

McCants to one of his employers, and which was derived through a deed made by Douglass without joining his wife: you will remember the evidence. It is insisted that as it is proved that the intestate was a competent conveyancer, he could not have known that Douglass had a wife, or he would not have allowed the title to pass; this being so, that the jury should presume that the acceptance for five thousand dollars (\$5,000) previously, in favor of Douglass' wife, was a forgery, for if not so, he would have known that he was a married man, which is contradicted by his act of approving the title. We think the law does not sustain such a mode of proving a fact."

*Philadelphia C. P. R. Co. v. Henrice*, 92 Pa. St. 431, 37 Am. Rep. 699, was an action for damages for injuries alleged to have been the result of the negligence of the car driver. The plaintiff proved that the company allowed its drivers an insufficient number of hours per day for sleep and rest, and from this suggested the inference that this particular driver was physically unable to perform his duties. Now if it had been shown that the driver was asleep, or intoxicated, at the time of the accident, negligence might be inferred. But it would not do to infer, from the evidence offered, that the driver was in such a condition, and from this inference deduct the further inference of his negligence. There was no evidence that the driver was rendered incompetent to perform his services in a proper and careful

manner. Judgment upon verdict for the plaintiff was therefore reversed.

<sup>32</sup>. *People v. Aiken*, 66 Mich. 460, 33 N. W. 821, 11 Am. Rep. 512.

<sup>33</sup>. *United States*.—U. S. v. Douglass, 2 Blatchf. 207, 25 Fed. Cas. No. 14,989.

*Alabama*.—*Riley v. State*, 88 Ala. 193; *Dick v. State*, 87 Ala. 61; *Ray v. State*, 50 Ala. 104.

*California*.—*People v. Ah Chung*, 54 Cal. 398; *People v. Brannon*, 47 Cal. 96; *People v. Phipps*, 39 Cal. 326.

*Florida*.—*Gavin v. State*, 42 Fla. 553, 29 So. 405.

*Indiana*.—*State v. Bush*, 122 Ind. 42, 23 N. E. 677.

*Iowa*.—*State v. Donahoe*, 78 Iowa 486, 43 N. W. 297.

*Michigan*.—*People v. Hare*, 57 Mich. 505, 24 N. W. 843.

*Nebraska*.—*Johnson v. State*, 27 Neb. 687, 43 N. W. 425.

*North Carolina*.—*State v. Fleming*, 130 N. C. 688, 41 S. E. 549; *State v. Messimer*, 75 N. C. 385.

*Ohio*.—*State v. Walsenberg*, 3 Ohio Leg. News 53.

*Texas*.—*Schnaubert v. State*, 28 Tex. Crim. App. 222, 12 S. W. 732 (where the only evidence at all to connect the defendant with the theft charged was that the brand upon the animal said to have been stolen had been altered so that it resembled a brand claimed by the defendant); *Hawkins v. State*, (Tex. Crim. App.), 12 S. W. 490; *Scott v. State*, 19 Tex. Crim. App. 325; *Harrison v. State*, 6 Tex. App. 42; *Black v. State*, 1 Tex. App. 368.

*Virginia*.—*Shipp v. Com.*, 86 Va.



that mere evidentiary and immaterial facts should be thus established.<sup>34</sup> And it is misleading and improper to declare that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances "relied upon" to establish defendant's guilt. An alleged circumstance may be "relied upon" by the prosecution, as tending to prove facts from which the inference of guilt is to be drawn, and yet may not be essential to that conclusion.<sup>35</sup>

**To Establish a Charge by Circumstantial Evidence** it is necessary that the proof should be not only consistent with the prisoner's guilt, but inconsistent with his innocence. For if a single material cir-

746, 10 S. E. 1,065; *Bristow v. Com.*, 15 Gratt. 634.

**But This Rule Does Not Require Any Such Instruction** as that the jury "should not only be satisfied from a consideration of the circumstances, both singly and as a whole, that guilt has been proven beyond a reasonable doubt, but that from each and all of the circumstances no reasonable hypothesis can be adduced consistent with innocence." *State v. Rome*, 64 Conn. 329, 30 Atl. 57.

In *State v. Hossack*, 116 Iowa 194, 89 N. W. 1,077, Waterman, J., said, in deciding that an instruction on this subject was covered by the charge: "While each essential fact in a case of this kind must be proved beyond a reasonable doubt, it is not necessary that each of such essentials, standing isolated and alone, be so proven, nor that it be established by independent evidence. The material circumstances, when given their respective places in the sequence of events, may strengthen and support each other to such an extent that on a consideration of the whole case the jury may be convinced beyond a reasonable doubt of defendant's guilt."

**"The Logic Upon Which Circumstantial Evidence Is Based** is this: We know, from our experience, that certain things are usual concomitants of each other. In seeking to establish the existence of one, where the direct proof is deficient or uncertain, we prove the certain existence of the co-relative fact, and thus establish with more or less certainty, according to the nature of the case, the reality of the principal fact. But the reasoning is a perfect fallacy, if the defect of proof which renders it necessary to call for the aid of the collateral circumstances equally attached to

such collateral circumstance." *Denio, C. J.*, in *People v. Kennedy*, 32 N. Y. 141. This was an indictment for burning a barn, and it was sought to connect the defendant with the crime by showing that about a week after the fire some matches of a kind in common use in the neighborhood, and of the same kind as the defendant has in his house, were found under a pile of kindlings in a wood house attached to a dwelling some distance from the fire. This evidence was held too uncertain and too remote from the point in issue to have any bearing.

<sup>34</sup> *Clare v. People*, 9 Colo. 122, 10 Pac. 799; *Jamison v. People*, 145 Ill. 357, 34 N. E. 486; *State v. House*, 108 Iowa 68, 78 N. W. 859; *Breck v. State*, 2 Ohio Civ. Dec. 477; *Early v. State*, 9 Tex. Crim. App. 476.

This results from the rule that it is not necessary to a conviction that every single fact proven to the satisfaction of the jury should be inconsistent with innocence. *People v. Willett*, 105 Mich. 110, 62 N. W. 1,115; *State v. Johnson*, 37 Minn. 493, 35 N. W. 373.

<sup>35</sup> *Marion v. State*, 16 Neb. 349, 20 N. W. 289.

In *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361, Reese, J., illustrated this proposition by supposing the case of a man accused of the murder of his wife by the administration of a deadly poison: "All the circumstances of the case point with almost absolute certainty to his guilt. The jury are satisfied of it beyond a reasonable doubt. He is proven to be devoid of affection for her, has been seen to cruelly maltreat her. His conduct toward another woman establishes the fact that she has supplanted his wife in his affections.

cumstance remains unproven, or, if proven, is inconsistent with the theory of guilt, the crime is not proven with that certainty which the law requires, and which such an instruction demands.<sup>36</sup>

"Circumstance" or "Fact." — These words generally interchange. While the latter is more frequently employed than the former in discussions of this nature, to denote the ultimate and essential matter, yet either accurately characterizes a given "action" or "thing done."<sup>37</sup>

H. INDEPENDENCY OF CIRCUMSTANCES AS AFFECTING THE INFERENCE. — If a number of facts are "so essential to the particular inferences to be derived from them, when established, that the failure in the proof of any one would destroy the inference altogether, they are dependent facts. If, on the other hand, notwithstanding the failure in proof of one or more of those facts, the rest would still afford the same inference or probability as to the contested

The poison has been found within the body of deceased in a sufficient quantity to produce death. He is shown to have recently purchased the same kind of poison for the alleged purpose of destroying a family dog which has been permanently injured, but which he wishes to kill without pain. It is shown he had no dog, and none had been injured. He has but recently caused the life of his wife to be heavily insured. He has been heard to make threats and insinuations which, in the light of subsequent events, show that he intended and confidently expected her death at an early day. A witness is called for the prosecution, who testifies that at a particular time he saw the accused in the company of the other woman under circumstances of very questionable propriety, and which, if believed, would establish illicit intercourse between them. This last fact is 'relied upon' as a 'link in the chain of circumstances' to establish the fact of his guilt of the crime charged. The jury are fully satisfied of his guilt, but from the conduct or demeanor of the witness, or from some other cause, do not believe the story of the illicit intercourse. Must they therefore find the accused not guilty? Clearly not. That circumstance, although 'relied upon,' should be disregarded."

36. *State v. Glass*, 5 Or. 73.

If the jury, in making up their minds from circumstantial evidence, have a rational doubt as to the existence of any one of the material

circumstances attempted to be proved, that circumstance ought not to have any weight with them in forming their opinion respecting the guilt or innocence of the defendant. The jury, in such a case, might discard that circumstance in making up their verdict. *Sumner v. State*, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561.

They cannot substitute their own judgment, or belief, or suspicion, in place of such proof of a material fact, and thereupon find a verdict of guilty. If they do this the verdict should be set aside. *Walbridge v. State*, 13 Neb. 236, 13 N. W. 209, where a conviction for robbery was reversed because, though the state relied upon the possession of money by the accused, there was no evidence to show that any of the bills which the defendant had in his possession had ever belonged to the person robbed. Moreover the defendant testified—and his testimony was not assailed—that he had received from various persons, whom he named, various sums, which, in the aggregate, exceeded the sum named by the state.

This Rule Applies to Proof of Venue equally as to any other essential fact in the case. *Franklin v. State*, 5 Baxt. (Tenn.) 613 (where it was shown merely that the crime was committed a certain distance from a building, and that the building was in the county alleged). *Sedberry v. State*, 14 Tex. App. 233.

37. *Clare v. People*, 9 Colo. 122, 10 Pac. 799.

fact which they did before, they would be properly termed independent facts."<sup>38</sup>

## II. NATURE AND VALUE OF CIRCUMSTANTIAL EVIDENCE.

**1. The Nature of Circumstantial Evidence in General.** — A. THE CHAIN SIMILE. — By writers and by judges circumstantial evidence has been frequently likened to a chain. Juries have been told sometimes that before they can find for the prosecution, or for the plaintiff, they must be satisfied that every link in the chain has been satisfactorily welded, and sometimes that it is not necessary that each link relied upon should be proved beyond a reasonable doubt. It is obvious that the chain simile may be inapplicable. A chain cannot be stronger than its weakest link, and if a mass of circumstantial evidence is to be considered as a chain, in which each link is an item of evidence, then if any one circumstance or link fail, the whole chain falls to the ground. This figure can be properly used only when there is a series of facts one succeeding the other, and each connected with and dependent upon the other.<sup>39</sup>

Either of such instructions as those expressed above cannot be otherwise than misleading and prejudicial if the circumstances relied upon by the prosecution are independent of one another.<sup>40</sup>

38. Stark. Ev. 851, where the learned author further says: "The force of a particular inference drawn from a number of dependent facts is not augmented, neither is it diminished, in respect of the number of such independent facts, provided they be established. But the probability that the inference itself rests upon sure grounds is generally weakened by the multiplication of the number of circumstances essential to the proof; for the greater the number of circumstances essential to the proof is, the greater latitude is there for mistake or deception."

When circumstantial evidence consists of a number of independent circumstances, coming from several witnesses and different sources, each of which is consistent and tends to the same conclusion, the probability of the truth of the fact in issue is increased in proportion to the number of such circumstances. *U. S. v. Searcey*, 26 Fed. 435.

And see *State v. Austin*, 129 N. C. 534, 40 S. E. 4; *State v. Young*, 9 N. D. 165, 82 N. W. 420.

39. *Bressler v. People*, 117 Ill. 422, 8 N. E. 62.

"There are cases of circumstantial

evidence," said Clark, J., in *State v. Shines*, 125 N. C. 730, 34 S. E. 552, "in which each circumstance depends upon the truth of the preceding one, in which case the evidence may be likened to a chain, but ordinarily that simile is inapplicable. Ordinarily the circumstances accumulate, each by itself being of no great weight."

**There Is No Rule of Law** which declares that circumstantial evidence necessarily consists of links, or prescribes any definite number of circumstances as necessary to the sufficiency of circumstantial proof. There may be, and are, cases where a single circumstance will justify the jury in finding the existence of an inferential fact. Unexplained possession of an article recently stolen is of this class, and from this single circumstance the jury may, and frequently do, draw the inference that the party thus found in the possession is the thief. *Tompkins v. State*, 32 Ala. 569.

40. *State v. Young*, 9 N. D. 165, 82 N. W. 420, where it was held that such an error was not cured by a proper statement elsewhere in the instruction as to the law of reasonable doubt,

A linked arrangement of facts is, it is true, frequently observable in a part or parts of the evidence in a given case, but it is much more in accordance with the situation, as a usual rule, to speak of a throng of circumstances.<sup>41</sup>

**B. THE VALUE OF CIRCUMSTANTIAL EVIDENCE.** — a. *The Relative Merits of Circumstantial Evidence and Direct Evidence.* **General Considerations.** — Instructions that circumstantial evidence is as good as any other kind of evidence;<sup>42</sup> that facts or circumstances cannot, or will not, lie;<sup>43</sup> that circumstantial evidence, not being liable to delusion or fraud, is often more satisfactory than direct;<sup>44</sup> that it loses nothing by the lapse of time, and may preponderate over the recollection of a credible witness,<sup>45</sup> are clearly confusing and fallacious.

**But on the Other Hand,** it cannot be laid down as a proposition of law that circumstantial evidence is inferior to direct and positive

See also the following cases:

*England.* — Reg. v. Exall, 4 F. & F. 922, per Pollock, C. B.

*Alabama.* — Grant v. State, 97 Ala. 35, 11 So. 915; Wharton v. State, 73 Ala. 366.

*Colorado.* — Graves v. People, 18 Colo. 170, 32 Pac. 63.

*Iowa.* — State v. Cohen, 108 Iowa 208, 78 N. W. 857, 75 Am. St. Rep. 213.

*Kansas.* — State v. Furney, 41 Kan. 115, 21 Pac. 213, 13 Am. St. Rep. 262.

*Montana.* — State v. Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.

*Nebraska.* — Marion v. State, 16 Neb. 349, 20 N. W. 289.

*New York.* — People v. Kerr, 6 N. Y. Crim. Rep. 406, 6 N. Y. Supp. 674.

*Virginia.* — Dean v. Com., 32 Gratt. 912.

*Washington.* — Leonard v. Territory, 2 Wash. Ter. 381, 7 Pac. 872.

41. "Escape from a crowd does not necessarily depend on the presence or absence of one or another, or even perhaps the greatest number of the individuals composing it." Leonard v. Territory, 2 Wash. Ter. 381, 7 Pac. 872, per Greene, C. J.

And such evidence has been very aptly likened to a cable in which, though one or several of the strands part, the cable yet remains so strong as to sustain all the weight which it is required to bear; and to a bundle of rods, from which each stick may be taken away and easily broken,

though the united bundle will successfully resist any strain that may be brought to bear upon it.

Clare v. People, 9 Colo. 122, 10 Pac. 799, per Helm, J., who, speaking of the chain metaphor, said: "This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to conviction in criminal cases, since if one be omitted, or be not proved beyond a reasonable doubt, an acquittal must follow. It is not true, however, that each and every of the minor circumstances introduced to sustain these ultimate facts must be proven with the same degree of certainty."

See also, as supporting the text, Rayburn v. State, 69 Ark. 177, 63 S. W. 356; Carroll v. Com., 84 Pa. St. 107.

42. West v. State, 76 Ala. 98.

43. As in State v. Moelchen, 53 Iowa 310, 5 N. W. 186; People v. Davis, 46 N. Y. St. 213, 19 N. Y. Supp. 781 (where, however, this language was properly qualified as to the force and direction of the circumstances); Rex v. Blandy, 18 St. Tr. 1, 187 (per Legge, B.)

44. Whitman, C. J., in State v. Thomas, (Me.), 6 Law Rep. 64.

45. Ridley v. Ridley, 1 Coldw. (Tenn.) 323. Here the question at issue was the payment of a balance due on a note. The "one credible witness" to whom the court referred testified positively that such payment was made seventeen years before.

evidence.<sup>46</sup> Direct evidence, however positive it may seem, may be neutralized by circumstances throwing suspicion on the claim made, or the fact sought to be established.<sup>47</sup>

And circumstantial evidence is often as strong and conclusive

46. *Cook v. State*, (Miss.), 28 So. 833.

And see *People v. Urquidas*, 96 Cal. 239, 31 Pac. 52; *People v. Morrow*, 60 Cal. 142.

Generally, however, it is considered that the testimony of living witnesses, personally cognizant of the facts of which they speak, given under the sanction of an oath, in open court, where they may be subjected to cross-examination, affords the greatest security for truth. *Mr. Justice Field in Chaffee v. U. S.*, 18 Wall. (U. S.) 516.

And see *People v. Daniels*, (Cal.), 34 Pac. 233, where it was said that circumstantial evidence may not be as satisfactory as the direct testimony of credible eyewitnesses would have been, and yet be sufficient to convict. To the same effect see *People v. Cronin*, 34 Cal. 191.

No human testimony is superior to doubt. Even in cases of direct proof the witness may err as to identity of person, or corruptly falsify, for reasons that are at the time unknown. *Burnett, C. L., of Scotland*, 524.

Striking illustrations of both of these possibilities are of daily occurrence in courts of justice. A magistrate of the courts of New York City has recently stated it to be the result of his experience that even the most positive identification by a woman should not be relied on without corroborative circumstances, and even the unqualified identification of the person by a witness of acute perception and accustomed to daily intercourse with men is not always to be depended upon. In *Rex v. Wood*, 28 St. Tr. 819, a practicing lawyer positively identified two men whom he charged with robbing him in broad daylight. The accused, however, established a satisfactory alibi, and a short time afterwards the robbers were arrested with the stolen property upon them. See also remarks of *Gibson, C. J.*, in *Com. v. Harman*, 4 Pa. St. 269; and of *Gray, J.*, in

*People v. Harris*, 136 N. Y. 423, 33 N. E. 65.

47. *Nelson v. U. S.*, Pet. C. C. 235, 17 Fed. Cas. No. 10,116. This was the case of an information founded upon a breach of the non-importation law, for importing into the United States from Havana a cargo of rum, sugar, coffee, molasses, and copper. With regard to the origin of the rum, it being alleged to have come from a British colony, several witnesses testified positively that it was manufactured in Havana by one witness and sold to another witness, by whom it was sold on board the ship whose condemnation was sought. *Washington, Circuit Justice*, said that if the direct evidence "were much stronger than it is, the case was crowded with circumstances of suspicion too violent to be overcome." Some of these circumstances were thus detailed: In the first place there was not on board of the vessel at the time of the seizure any of the ordinary muniments of property. There was no invoice, bill of lading, bill of parcels, accounts or paper of any kind, nor had any attempt been made to account for the absence of these documents. Second, another strong circumstance of suspicion was the false destination of the vessel and the consignment of the cargo. The manifest which was delivered by the master to the custom-house officer stated that the destination was Cadiz, and that the vessel put into port in distress for the purpose of repairs. The rum was also stated there to have been consigned to A of Cadiz. But A resided in Philadelphia. Again, from the time the vessel entered Delaware Bay, the entries in the log book ceased. To account for this omission, the mate assigned the absurd reason that the weather was so cold as to prevent him from writing. The rum and the vessel were forfeited.

See also the case of *La Nereyda*, 8 Wheat. (U. S.) 108.

upon the understanding as direct and positive evidence would be,<sup>48</sup> and is not to be lightly discredited.<sup>49</sup> In weight and probative force

48. *United States*.—*Kempner v. Churchill*, 8 Wall. 362; *The Robert Edwards*, 6 Wheat. 187; *The Struggle v. U. S.*, 9 Cranch 71; *U. S. v. Cole*, 5 McLean 513, 25 Fed. Cas. No. 14,832; *U. S. v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204; *U. S. v. Johns*, 1 Wash. C. C. 363, 26 Fed. Cas. No. 15,481.

*New York*.—*Jewett v. Banning*, 21 N. Y. 27.

*Pennsylvania*.—*Com. v. Burton*, 1 Leg. Chr. 66.

*Texas*.—*Law v. State*, 33 Tex. 37. **But a Charge in This Language is Improper** where by statute courts are forbidden to charge upon the weight of evidence. *Alonzo v. State*, 15 Tex. App. 378, 49 Am. Rep. 207; *Harrison v. State*, 9 Tex. App. 407.

**The Jury May Be so Instructed.** In *State v. Ward*, 61 Vt. 153, 17 Atl. 483, it was held proper to read to the jury the opinions of jurists and sages of the law, to the effect that circumstantial evidence may be as satisfactory as direct, and that the former is less likely than the latter to proceed from perjury.

49. *State v. Ferrer*, 1 Ohio Dec. 428, 9 West Law J. 513.

**So It Is Improper to Charge That Direct Evidence Is Always More Satisfactory.**—*People v. Johnson*, 140 N. Y. 350, 35 N. E. 604. Here the death and the violence which caused it were proved as alleged in the indictment by direct evidence and were put beyond controversy by the finding of the body. But the guilt of the prisoner was established by evidence wholly circumstantial in character, and which, as was held on appeal, was sufficient to banish any distrust as to the propriety of the conviction. The motive shown was sufficient and adequate, being revenge for a supposed injury and robbery. The accused, it was proved, considered that the deceased had wronged him by procuring his discharge from employment. The fact of robbery was predicated on the fact that money which had been paid to the deceased was not on the body when found. The prisoner had been employed in the same building with the deceased,

who was the engineer of the works, and was well acquainted with the premises, and probably knew of a safe place in which to hide until the other employees had quit for the day, leaving the engineer alone. This proof showed the necessary opportunity. The accused further had knowledge of the fact that tools and instruments suitable for his purpose were on the premises, and knew where they would be kept. Certain tools were found with blood and hair upon them near the body. The murderer was traced from the basement where the crime was committed, to the wash room on the fourth floor, by bloody finger marks on the doors through which it was necessary to pass on the way. He had attempted to remove the stains, as was shown by the marks on a towel. A pair of trousers which had been left on this floor were found the next day in the possession of the prisoner. Before the crime, the prisoner was known to have been destitute and unable to pay his rent. He was out of work and was constantly borrowing small sums and had pawned various articles of his clothes. He attempted to account for the possession of a sum similar to that which the deceased was known to have had, by lying as to the source from which he obtained it. He interposed an alibi, the particulars of which were shown to be false. When suspicion was first directed towards him he attempted to escape from the neighborhood. Bloodstains were found on the clothing which he had worn on the day of the crime. He attempted to give no explanation of his possession of stolen trousers, though he offered himself as a witness on his own behalf and strenuously denied his guilt. The fact that the money which the prisoner had displayed was not positively identified as that which had belonged to the deceased was held not to affect the force of the proof; that just before the crime the prisoner had none, and had no way of getting any, and was in distressing need of it, and that afterward he had in his possession almost the exact amount

it may even surpass direct evidence in its effect upon the jury.<sup>50</sup> A single isolated fact might be of no value as evidence; two or three more taken together might not make evidence in the eye of the law; but a multitude of slight facts or circumstances taken together as true may irresistibly compel the jury to a verdict of guilty in a case of the most serious moment.<sup>51</sup>

which the deceased had had, in denominations closely corresponding to the money of the latter. "All these incriminating facts," said Finch, J., "surrounded by and imbedded in others of less importance, point so surely to the prisoner as the author of the crime, and so exclude any other rational explanation, as to compel our concurrence with the verdict of the jury. Their probative force lies largely in their combined and aggregate strength, each separate fact lending to and receiving from all the others a conclusiveness beyond its own."

50. *Cook v. State*, (Miss.), 28 So. 833. And where the truth arises from the irresistible force of a number of circumstances which, if separately considered, might be altogether inconclusive, but which we cannot conceive to be fraudulently brought together to bear upon one point, that is less fallible than under some circumstances direct evidence may be.

*Rex v. Smith*, (Old Bailey, June 15, 1813.) *Gurneys Report*. And see *U. S. v. Isla de Cuba*, 2 Cliff. 295, 26 Fed. Cas. No. 15,447.

51. *State v. White*, 89 N. C. 462. And see *People v. Harris*, 136 N. Y. 423, 33 N. E. 65, where Gray, J., said: "When we are dealing with a number of established facts, if, upon arranging, examining, and weighing them in our mind, we reach only the conclusion of guilt, the judgment rests upon pillars as substantial and sound as though resting upon the testimony of eyewitnesses."

This is well illustrated by the case of *Mendum v. Com.*, 6 Rand. (Va.) 704, where the defendant was indicted for the murder of E, and where the individual circumstances were notably trivial and inconclusive. The state proved by a medical witness that a wound on the body of E had the appearance of having been made by a dagger or knife. Another

witness testified that a short time before the murder he had borrowed from the defendant a dirk having a metallic handle, and that upon the handle were the letters "J. C." or "J. H." He could not positively identify the dirk produced as the one which he had borrowed from and returned to the defendant. The prosecution proved that the dirk produced was found, without a cap, hidden under the boxing in a stable not far from the scene of the crime. A cap which fitted the dirk and which was produced with it, and upon which were engraved the letters "J. H.," was delivered to a witness some time after the crime and several miles from the scene thereof, by a colored man whose possession of it was not accounted for. The Commonwealth also proved that, about sixteen years before, a witness had purchased for one J. H., a half-brother of the prisoner, a dirk, upon which the letters "J. H." were engraved. J. H. died without children, and a witness had once seen a dirk, similar to that exhibited, in the possession of the prisoner, and the latter had said of it that it was the only property he had ever received which belonged to his brother. The conviction was sustained.

**How's Case.** — In 1824 David How was tried and convicted for the murder of Church. The conviction, which was on circumstantial evidence alone, was justified by the subsequent confession of the prisoner. The evidence on which the verdict was founded was in substance as follows: Church was aroused in the dead of night by some one whose voice was not recognized by any member of his family, and who shouted that he had a letter to deliver, and asked Church to come to the door to receive it. Church opened the door and was immediately shot without parley or struggle. He fell to the floor and expired in a few minutes

So the law cannot declare, as a general rule, which kind of evidence is the more satisfying; the question depends upon the minute and peculiar circumstances incident to each case.<sup>52</sup>

*b. Circumstantial Evidence and Direct Evidence Should Not Be Contrasted.* — The result of all the discussion and examination of authorities on this point is that direct and circumstantial evidence

without a sound aside from exclamations of pain. The assailant fled without having been seen by any member of the family. Suspicion immediately fastened upon the prisoner. He had complained to others that the deceased and third persons had combined to ruin him, that they had stripped him of his property, and he declared that he would be revenged in one way or another. On one occasion he had declared his intention of killing Church if the latter did not settle their business matters according to agreement. He had made overtures and promises to a witness under a vow of secrecy with a view to obtaining the latter's assistance in killing Church. Shortly before the killing the prisoner was seen with something under his overcoat which resembled a stick or a gun, and which he endeavored to conceal. On the night of the murder he left the neighboring village in time to have reached the house of the deceased by the time of the shooting. At the time when he was in the village he was unusually talkative, and his conduct was otherwise suspicious. On the morning after the crime when his neighbors, having learned of the shooting, called on him, his horse was found in the stable covered by a blanket and wet with sweat, while other horses standing in adjoining stalls were perfectly dry. He accounted for this by saying, falsely, as was proved, that the horse had been sick. A saddle was found in the house. A witness testified that during the night of, and at about the hour of, the murder he had seen a man of about the prisoner's size riding on horseback towards the house of the deceased, and shortly afterward had seen a person whom he supposed at the time to be the same man riding furiously back. The ball which killed Church passed through the body and was found in a joist in the house, and

corresponded in weight with a ball found in the prisoner's rifle box. The patch and wadding found at the scene of the crime near the body of the deceased corresponded with the patch found in the prisoner's rifle. A rifle which had been cut off and was unusually short, and which could have been concealed under the prisoner's coat, was found loaded in his house. The priming of the rifle when found was damp, as though it had been recently loaded without being cleaned. There was lint on the ramrod and a horse hair under the mounting. *People v. How, 2 Wheel. Crim. Cas. (N. Y.) 410.*

52. There is no rule of law which declares the relative value of direct and circumstantial evidence, therefore any constitutional or statutory provision that the judge shall not charge as to matters of fact, but may declare the law, is violated, if any charge is given that circumstantial evidence is not entitled to an inferior degree of credit, since whether circumstantial evidence is entitled to such credit or not is a question to be determined in each case by the jury from the evidence. *People v. Vereneseneckockockhoff, 129 Cal. 497, 58 Pac. 156, 62 Pac. 111.*

In *People v. Wilder, 134 Cal. 182, 66 Pac. 228*, the trial court had charged, "There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow." Commenting on this, *Garroute, J.*, said: "As to this instruction containing a declaration of law there may be grave doubt, but as to the statements there contained not being prejudicially erroneous there is no doubt. *People v. Vereneseneckockockhoff, 129 Cal. 497, 58 Pac. 156,*



ought not to be placed in contrast, since they are of equal dignity and are not mutually opposed,<sup>53</sup> all evidence being, as a matter of fact, more or less circumstantial, the difference being only in the degree.<sup>54</sup> Nevertheless it is error to charge that the law makes no distinction between these two classes of evidence.<sup>55</sup>

c. *Circumstantial Evidence Is Sufficient in All Cases.* — Considerations touching the relative merits of direct and circumstantial evidence, and cautionary suggestions regarding action upon the latter, must not be regarded as bearing at all upon the question of its admissibility. So circumstantial evidence may be resorted to whenever it is needed to establish a fact required to be proved. And there are certain issues which, from their very nature, are generally susceptible of proof by circumstantial evidence only.<sup>56</sup>

The reason for the admission of circumstantial evidence is the known and experienced connection subsisting between collateral facts or circumstances satisfactorily proved, and facts and circumstances such as these which are in controversy.<sup>57</sup> It is adopted the more readily on the one hand in proportion to the difficulty in proving the fact in issue by direct evidence, and on the other because

62 Pac. 111, does not go to the length of holding such an instruction reversible error."

53. *Territory v. Egan*, 3 Dak. 119; *Cook v. State*, (Miss.), 28 So. 833.

**Direct Evidence Not Cumulative as to Circumstantial Evidence.** — When at a trial only circumstantial evidence is introduced a new trial will not be refused on the ground that the newly discovered evidence, which is of a direct character, is cumulative. *Vardeman v. Byrne*, 7 How. (Mass.) 365.

54. *Com. v. Harman*, 4 Pa. St. 269, per Gibson, C. J.

"All evidence is, in a strict sense, more or less circumstantial, whether consisting in facts which permit the inference of guilt, or whether given by eyewitnesses of the occurrence; for the testimony of eyewitnesses is, of course, based upon circumstances more or less distinctly and directly observed. But, of course, there is a difference between evidence consisting in facts of a peculiar nature, and hence giving rise to presumptions, and evidence which is direct, as consisting in the positive testimony of eyewitnesses; and the difference is material according to the degree of exactness and relevancy, the weight of the circumstances, and the credibility of witnesses." *People v. Har-*

*ris*, 136 N. Y. 423, 33 N. E. 65, per Gray, J.

55. Such a charge may be construed as meaning that circumstantial evidence and positive evidence are in all respects identical, especially if the court omits to instruct the jury as to the caution necessary in applying such evidence. *Burt v. State*, 72 Miss. 408, 16 So. 342, 48 Am. St. Rep. 563.

**And So, for the Practical Purposes of a Trial,** an attempt, in instructions, to classify evidence as direct and circumstantial, making different rules applicable to each, may serve only to confuse and divert the minds of the jurors from the single question which they must decide, namely, whether or not they are satisfied beyond a reasonable doubt of the guilt of the accused. *State v. Rome*, 64 Conn. 329, 30 Atl. 59.

56. See *infra*, "NECESSITY."

**And Whether in Defense or in Attack** this evidence may be relied upon with confidence. *Ballou v. Humphrey*, 8 Kan. 220.

57. *Taylor Ev.* § 63, where that learned author further says: "This is merely the logical application of a process familiar in natural philosophy, namely, that of proving the truth of an hypothesis by showing its coincidence with existing phenomena. Such connections and coincidences may be either physical or moral, and

of the general ease with which it can be disproved, or with which other facts can be proved which are inconsistent with it if such fact never really occurred.<sup>58</sup>

d. *Circumstantial Evidence is Equally Competent in Civil and Criminal Cases.*—With regard to the reception of circumstantial evidence, there is no distinction between civil and criminal cases.<sup>59</sup> Though positive proof is always desirable, especially in a penal action, circumstantial evidence alone may always afford a just foundation for a conviction without regard to the supposed triviality or enormity of the offense under investigation.<sup>60</sup>

**But it Is Not Only Because it Is Necessary and Politic** that it should be resorted to, that circumstantial evidence is allowed to support a conviction, but because it is in its own nature capable of producing the highest degree of moral certainty in its application.<sup>61</sup>

e. *The Futility of Attempts to Discredit Circumstantial Evidence.* All attempts to show that circumstantial evidence ought not to be

the knowledge of them is derived from the known laws of matter and motion, from animal instincts, and from the physical, intellectual and moral constitution and habits of man." To the same effect see *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill. 538.

58. *State v. Fisher*, 1 Pen. (Del.) 303, 41 Atl. 208; *Simms v. State*, 10 Tex. App. 131.

And see *State v. Turner, Wright* (Ohio) 21.

59. *England.*—Reg. v. *Murphy*, 8 Car. & P. 297, per Coleridge, J.; *Rex v. Watson*, 2 Stark. 116, per Abbott, J.

*United States.*—U. S. v. *Britton*, 2 Mason 464.

*Delaware.*—*State v. Fisher*, 1 Pen. (Del.) 303, 41 Atl. 208.

*Massachusetts.*—Com. v. *Abbott*, 130 Mass. 472.

*New York.*—*People v. Thayers*, 1 Park. Crim. Rep. 595.

*Pennsylvania.*—*Brown v. Schock*, 77 Pa. St. 471.

*Tennessee.*—*McAdams v. State*, 76 Tenn. 456, construing a declaration to this effect in Tenn. Code, § 5,376.

**These Rules Cannot Be Set Aside With Impunity.**—The rules which govern the admission of evidence apply with equal authority and force in criminal and civil proceedings. These rules must be received in all cases as the surest guide which the law affords for ascertaining the truth of any alleged matter of fact, and

must be the same both on the criminal and civil side of the court, whatever the nature of the fact to be investigated. There can be no safe departure from them under the influence of a feeling of tenderness or humanity for persons charged with crime. Com. v. *Abbott*, 130 Mass. 472, per Colt, J.; citing *Roscoe Crim. Ev.* (9th ed.) 1; 3 Russ. *Crimes* (9th ed.) 212; U. S. v. *Britton*, 2 Mason 464, 1 Greenl. Ev. 65.

60. *United States.*—The Robert Edwards, 6 Wheat. 187; U. S. v. *Howell*, 56 Fed. 21; U. S. v. *Martin*, 2 McLean 256.

*Georgia.*—*Brantley v. State*, 115 Ga. 833, 42 S. E. 251.

*Indiana.*—*Morrison v. State*, 76 Ind. 335.

*Kansas.*—*State v. Asbell*, 57 Kan. 398, 46 Pac. 770.

*Mississippi.*—*James v. State*, 45 Miss. 572; *McCann v. State*, 21 Miss. 471.

*New York.*—*In re Canton*, 2 City Hall Rec. 149.

*Ohio.*—*State v. Snell*, 5 Ohio S. & C. Pl. Dec. 670.

*Pennsylvania.*—Com. v. *Kirkpatrick*, 15 Leg. Int. 268.

*Texas.*—*Law v. State*, 33 Tex. 37; *Horton v. State*, (Tex.), 19 S. W. 899.

61. Stark. Ev. 839. And see cases cited *infra*, next section.

**Denial of This by Juror Is Ground for Challenge.**—The principle of the text is recognized whenever the court

allowed to sustain a conviction for crime, especially in capital cases,<sup>62</sup> are without authority or influence so far as the courts are concerned.<sup>63</sup>

sustains a challenge because a juror admits conscientious scruples against convicting for crime, on circumstantial evidence alone.

*Alabama.*—Smith v. State, 55 Ala. 1.

*California.*—People v. Ah Chung, 54 Cal. 398.

*Illinois.*—Gates v. People, 14 Ill. 433.

*Louisiana.*—State v. Bunker, 14 La. Ann. 607.

*Mississippi.*—Jones v. State, 57 Miss. 684.

*Missouri.*—State v. West, 69 Mo. 401, 33 Am. Rep. 506.

*Nevada.*—State v. Pritchard, 15 Nev. 74.

62. This, to use the language of an eminent judge, is "The favorite dogma of those who are too timid or too weak to exercise the reasoning faculties with which a kind Providence has endowed them."

*Com. v. Twitchell*, 1 Brewst. (Pa.) 551, where Mr. Justice Brewster convincingly showed the folly of such claims by attempting to set forth the conditions of human life if man were debarred from reliance on circumstantial evidence.

"Suppose for a moment," said he, "that this was the rule of our being, and that we had been so constituted that we could believe nothing unless it were demonstrated to us by our own senses, or by the statement of an eyewitness. What would then be our condition? Of course, we could not punish any crime unless it were perpetrated in the presence of spectators. All secret murders, arsons, burglaries, forgeries and other offenses could be committed with impunity. Nor would the mischief stop there. Few civil controversies could be settled by juries. No book of original entries could be received in evidence; no note or obligation would avail, unless there were a subscribing witness. Indeed, this would not be sufficient, for if he died before trial the claim would expire with him. An insurance on the life of the witness would not even avoid the difficulty, for the policy would die with

its attesting witness. For the same reason, all receipts would perish with those who saw them signed, and all our deeds and muniments of title would be swept away by the death of the subscribing witnesses and the magistrates before whom they were acknowledged. All proof of handwriting by comparison being annihilated, commerce would be destroyed, or remitted to its infancy in barbarous ages. With the abolition of legal punishment for crime, mob laws and vigilance committees would supersede the use of courts and juries, and the whole frame-work of society would be impaired, if not destroyed.

. . . Not only do business men answer letters, pay drafts, and credit others to the extent of millions daily upon the testimony of circumstances alone, but they commendably carry this faith, as the evidence of things unseen, into the reasoning which connects them with the world beyond our own. A trifling circumstance—the fall of an apple—has proved to the satisfaction of philosophers the great laws of gravitation which control the motions of the universe. . . . The same kind of testimony is the prop of our belief in all the great truths of revelation. If we turn from the world without, to the great mechanism within us, we see again that no rational man pauses for one instant to doubt the force of circumstantial testimony. What evidence have we that it is a heart that beats or a brain that throbs within us, except from the fact that those organs exist in all similarly constituted beings? And we accept remedies for all the ills that flesh is heir to, upon precisely the same faith in circumstantial evidence."

See also the remarks of Gibson, C. J., in *Com. v. Harman*, 4 Barr. (Pa.) 69 [quoted with approval by the trial judge in a recent case which was affirmed by the supreme court. *Com. v. Schmous*, 162 Pa. St. 326, 29 Atl. 644].

63. See *State v. McKiernan*, 17 Nev. 224, 30 Pac. 831; *People v. Videto*, 1 Park. Crim. Rep. (N. Y.)

### III. THE BEARING OF THE RULE AS TO THE PRODUCTION OF THE BEST EVIDENCE.

1. **Generally.** — No general discussion of the rule as to the exclusion of secondary evidence will be attempted here.<sup>64</sup> It has been said by a great authority that evidence of a *circumstantial* and secondary nature can never be justifiably resorted to, except where evidence of a direct, and therefore of a superior, nature is unattainable.<sup>65</sup>

2. **Bearing of This Rule on Proof of Corpus Delicti.** — Under this rule circumstantial evidence has been held in some states to be insufficient to establish the *corpus delicti* when direct evidence can be had.<sup>66</sup>

3. **Proof of Want of Consent.** — If want of consent is an essential element of the offense charged, which must be proved affirmatively by

603; *Com. v. Twitchell*, 1 Brewst. (Pa.) 551; *Brown v. State*, 23 Tex. 195; *U. S. v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204.

**Views of the Supreme Court of the United States.** — In *Hickory v. U. S.*, 151 U. S. 303, the trial court in referring to the necessity of determining the condition of the mind of the accused, said: "Some say we cannot do it by circumstantial evidence, because it is cruel and criminal, they say, to convict a man upon circumstantial evidence. This is a declaration of either fools or knaves, sympathetic criminals, or men who have not ability enough to know what circumstantial evidence is, or to perform the ordinary duties of citizenship. When you consider that these two mental conditions, the fact that the act was done willfully, and done with malice aforethought, can never in any case be found in any other way than by circumstantial evidence, you can see the potency in every case of that class of testimony. Circumstantial evidence means simply that you take one fact that has been seen, that is produced before you by evidence, and from that fact you reason to a conclusion." An exception to this instruction was held by the supreme court of the United States to be destitute of merit.

64. For a general discussion of the rule as to Best and Secondary Evidence, see article "BEST AND SECONDARY EVIDENCE."

65. Stark. Ev. (10th Am. ed.) 874.

There are cases which appear to hold that there can be no resort to circumstantial evidence until the failure to produce direct evidence is accounted for, when it appears that the latter is in existence. *Chisolm v. State*, 45 Ala. 66; *Gabrielsky v. State*, 13 Tex. Crim. App. 428.

In *Williams v. East India Co.*, 3 East 192, the party failed on this ground to recover. The fact to be proved was, that the defendants had put on board of the plaintiff's ship a quantity of oil and varnish of an inflammable nature, without giving him any notice of it, by reason of which the ship was burnt. Two persons only knew whether notice of the inflammable nature of the varnish was given, namely, the mate who received it, who was dead, and the military conductor who delivered it, and who was alive and in the power of the party to produce. The evidence to prove that fact (upon which the plaintiff's action depended) arose from the presumption that it was so, because no person who was on board of, or belonged to the ship, had any such notice of the inflammable nature of the material. But that was justly held to be evidence less satisfactory than could be given by the military conductor, who knew certainly how the fact was.

66. In *Porter v. State*, 1 Tex. App. 394, this question came up directly for solution. The prosecution was for assault committed in the dead of night and in a lonely and deserted

the prosecution, circumstantial evidence will be sufficient only when the positive testimony of the party whose consent was necessary is not obtainable.<sup>67</sup>

**4. Inference to Be Drawn From Suppression of Direct Evidence.** — When it appears that a party has suppressed or failed to produce evidence which it was in his power to produce, and which presumably would bear more directly on the question at issue, the jury are authorized to draw the inference, which has been referred to as a presumption of fact as distinguished from a presumption of law, that its production would tend rather to overthrow than to support the contention of the party so withholding it.<sup>68</sup>

It may happen that under the peculiar facts of a case circumstantial evidence is the best evidence. Thus the execution and contents of a lost deed may be proved by circumstantial evidence.<sup>69</sup> And it certainly is not the law that a conviction cannot be had on circumstantial evidence if positive is attainable.<sup>70</sup>

#### IV. PROOF OF THE CORPUS DELICTI BY CIRCUMSTANTIAL EVIDENCE.

**1. Necessity for Proof of the Corpus Delicti.** — If only direct evidence could be employed to establish the existence of the criminal fact, a murderer might cast his victim into the sea, or consume the body with fire or with chemicals, and go free.<sup>71</sup>

situation. The party upon whom the assault was committed was not called on as a witness to testify as to the identity of the guilty party, nor was any reason or excuse assigned for his absence, and it was held that in view of this, circumstantial evidence was not sufficient to fix the guilt of the accused, and that resort to it alone could not be had when the very nature of the evidence strongly presupposed the existence of better. But the court did not hold the circumstantial evidence inadmissible, but merely that the state was bound to produce the eyewitness shown to be within the power of the state to produce.

<sup>67</sup>. *Alabama*. — *Chisolm v. State*, 45 Ala. 66.

*California*. — See *People v. Davis*, 97 Cal. 194, 31 Pac. 1,109.

*Texas*. — *Dixon v. State*, 15 Tex. Crim. App. 480; *Clayton v. State*, 15 Tex. Crim. App. 348; *Wilson v. State*, 12 Tex. App. 481.

*Wisconsin*. — *State v. Moon*, 41 Wis. 684; *State v. Morey*, 2 Wis. 494, 60 Am. Dec. 439.

**Relaxation of the Rule in Certain**

**Cases.** — The force of this rule, however, does not exist where the witness is kept out of the way by the other party, or if he is beyond the jurisdiction of the court. *Scott v. State*, 19 Tex. Crim. App. 325; *Love v. State*, 15 Tex. Crim. App. 563.

<sup>68</sup>. See *Porter v. State*, 1 Tex. App. 394; *U. S. v. Gilbert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204.

And see *infra* "SUPPRESSION OF EVIDENCE."

<sup>69</sup>. *Crain v. Huntington*, 81 Tex. 614, 17 S. W. 243; *Bounds v. Little*, 75 Tex. 316, 12 S. W. 1,109.

<sup>70</sup>. *Welch v. State*, 124 Ala. 41, 27 So. 307.

See *State v. Thompson*, 69 Conn. 720, 38 Atl. 868.

For, as has been pointed out, circumstantial evidence is admissible not only because it is necessary, but because it is capable of producing in itself the highest degree of conviction.

See 1 Tayl. Ev. § 63; see also *supra* "VALUE," Part II.

<sup>71</sup>. See *People v. Alviso*, 55 Cal. 230 (where the body of the victim was burned, and nothing was found

**2. Proof of the Corpus Delicti in Poisoning Cases.** — The inquiry as to the cause of death is especially difficult of solution in many cases of criminal poisoning. This normal difficulty is intensified if no chemical analysis of the alleged poisonous material or examination of the body is possible.<sup>72</sup>

The Difficulties of Proof Are Solved by the rule which allows a resort to the only kind of evidence which in many cases could be effectual.<sup>73</sup>

It is the undoubted law that the *corpus delicti*, in charges of even the gravest offenses, may be established like any other fact by circumstantial evidence.<sup>74</sup>

**3. The New York Rule.** — In early cases in New York it was held that there could be no conviction in a murder trial unless one

but a few fragments of bones which could not be identified as human); *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Smith v. Com.*, 21 Gratt. (Va.) 809; *U. S. v. Williams*, 1 Cliff. (U. S.) 5.

An Exception Exists in Texas, where it is a provision of the Penal Code that "no person shall be convicted of any grade of homicide unless the body of the deceased, or portions of it, were found." Texas Penal Code (1901) article 654. See *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247; *Puryear v. State*, 28 Tex. App. 73, 11 S. W. 929.

Remains having been found, identification may be had by circumstantial evidence. *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247; *Clark v. State*, 29 Tex. App. 357, 16 S. W. 187.

<sup>72</sup>. See *Polk v. State*, 36 Ark. 117, 76 Am. Dec. 320; *Hatchett v. Com.*, 76 Va. 1,026.

<sup>73</sup>. *Colorado*. — *Graves v. People*, 18 Colo. 170, 32 Pac. 63.

*Florida*. — *Joe v. State*, 6 Fla. 591, 65 Am. Dec. 579.

*Georgia*. — *Brown v. State*, 88 Ga. 257, 14 S. E. 578.

*Kansas*. — *State v. Cook*, 17 Kan. 392.

*Michigan*. — *People v. Millard*, 53 Mich. 63.

*New York*. — *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Stephens v. People*, 4 Park. Crim. Rep. 396; *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846.

*North Carolina*. — *State v. Best*, 111 N. C. 638, 15 S. E. 930.

<sup>74</sup>. Sir Matthew Hale declared his

intention never to "convict any person of murder or manslaughter unless the facts were proved to be done, or the body found." 2 Hale, P. C. Ch. 39.

Lord Stowell, in *Evans v. Evans*, 1 Hagg. Con. 105, said: "If you have a criminal fact ascertained, you may then take presumptive proof to show who did it, to fix the criminal, having then an actual *corpus delicti*. But to take presumption in order to swell an equivocal fact, a fact that is absolutely in its own nature ambiguous, into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine."

This language was referred to by Lord Chief Justice Coleridge in *Reg. v. Stephens*, 16 Cox C. C. 387, as being valuable only as a piece of legal literature, and was further discredited in *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433.

Circumstantial Evidence Is Sufficient to Prove the Corpus Delicti, notwithstanding some language of eminent jurists indicating an unwillingness to receive anything but direct evidence in proof of this essential fact.

*England*. — *Rex v. Clewes*, 4 Car. & P. 221; *Rex v. Burdett*, 4 Barn. & A. 95; *Rex v. Hindmarsh*, 2 Leach C. C. 648; *Reg. v. Unkles*, 8 Ir. L. T. 38.

*United States*. — *St. Clair v. U. S.*, 154 U. S. 134, (where murder by drowning at sea was alleged); *Wilson v. U. S.*, 162 U. S. 613, (where bloodstains were to be considered in determining whether there had been

branch or the other of the *corpus delicti* were proved by direct evidence.<sup>75</sup> And by statute in that state it is provided that "No person can be convicted of murder or manslaughter until the death of the person alleged to have been killed, and the fact of killing by the defendant as alleged, are each established as independent facts, the former by direct proof, and the latter beyond a reasonable doubt."<sup>76</sup>

But if there is positive evidence of facts bearing directly by way of inference on the ultimate fact, this satisfies the call of the statute for direct proof.<sup>77</sup> The result of these cases is to limit the statutory

a murder); U. S. v. Brown, 24 Fed. Cas. No. 14,656a.

*Alabama*.—Martin v. State, 125 Ala. 64, 28 So. 92.

*Arkansas*.—Cavaness v. State, 43 Ark. 331; Polk v. State, 36 Ark. 117, 76 Am. Dec. 320 (where the death was alleged to have been produced by poison, and the court said that there might be proof to the requisite degree of certainty without a chemical analysis).

*California*.—People v. Alviso, 55 Cal. 230.

*Florida*.—Anderson v. State, 24 Fla. 139, 3 So. 884.

*Georgia*.—Glover v. State, 114 Ga. 828, 40 S. E. 998.

*Illinois*.—Campbell v. People, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134; Carlton v. People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346 (a trial for arson).

*Indiana*.—Stocking v. State, 7 Ind. 326 (where it was held not essential to produce the body, or show that it had been found).

*Iowa*.—State v. Millmeier, 102 Iowa 692, 72 N. W. 275; State v. Keeler, 28 Iowa 551; State v. Novak, 109 Iowa 717, 79 N. W. 465.

*Kansas*.—State v. Hunter, 50 Kan. 302, 32 Pac. 37; State v. Winner, 17 Kan. 298.

*Kentucky*.—Johnson v. Com., 81 Ky. 325.

*Missouri*.—State v. Crabtree, 170 Mo. 642, 71 S. W. 127; State v. Dickson, 78 Mo. 438.

*Nevada*.—State v. Cardelli, 19 Nev. 319, 10 Pac. 433; State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530.

*North Carolina*.—State v. Williams, 52 N. C. 446, 78 Am. Dec. 248.

*Texas*.—Willard v. State, 27 Tex. Crim. App. 386, 11 Am. St. Rep. 197; Brown v. State, 1 Tex. Crim. App. 154.

*Washington*.—State v. Gates, 28 Wash. 689, 69 Pac. 385; Timmerman v. Territory, 3 Wash. 445, 17 Pac. 624.

See also the cases cited *infra* this section.

In Smith v. State, 133 Ala. 145, 31 So. 806, 91 Am. St. Rep. 21, the indictment was for the larceny of meat and lard from a wholesale warehouse. One of the owners testified that meat and lard had been stolen, but he could not state definitely when the articles were taken, nor could he identify the meat and lard found in the possession of the accused as his firm's property, nor could he say that that particular meat and lard had been stolen from their warehouse. It was held that this was some proof tending to establish the *corpus delicti*, the sufficiency of which was for the jury.

In People v. Walker, 38 Mich. 156, the defendant claimed that he was entitled to an acquittal as matter of right, because there was no evidence of the *corpus delicti*. The supreme court rejected this view. It was not disputed that the defendant was found with the money on him. He had an opportunity to steal it. He made inconsistent statements as to the manner in which he obtained the money. And he was seen to make motions indicating an attempt to pick the pocket of the prosecuting witness at a time when the latter had the money on him.

<sup>75</sup> People v. Bennett, 49 N. Y. 137; People v. Ruloff, 18 N. Y. 179.

<sup>76</sup> New York Penal Code, § 181.

<sup>77</sup> In People v. Beckwith, 108 N. Y. 67, 15 N. E. 53, the person supposed to have been murdered disappeared. Near where he was last seen, fragments of a human body were found on which were indications

requirements of "direct proof" to the establishment of evidentiary facts, and to allow every element of the *corpus delicti* to be made out by circumstantial evidence.

**4. The Method of Proving Corpus Delicti by Circumstantial Evidence.** — A. GENERALLY. — When the *corpus delicti* is proved, a foundation is laid for the introduction of any legal and sufficient evidence that the act was committed by the accused, and that it was done with a criminal intent.<sup>78</sup>

**Order of Introduction.** — But while it is the general rule that until the *corpus delicti* is established evidence cannot be received to show the criminal agency of the defendant,<sup>79</sup> often the order in which the evidence is introduced is matter of preference with counsel, who promise to furnish the necessary preliminary proof at a later stage of the trial.<sup>80</sup> For example, the acts and declarations of a co-conspirator, though not properly admissible until the existence of the corrupt combination has been established, may be introduced in the first instance, in the discretion of the court, where the urgency

pointing to violence as the probable means of his death, and the clothing found was testified to as that worn by the missing man. These circumstances and others, established by direct evidence, all pointing to the existence of the ultimate fact sought for, it was said that there was direct proof within the meaning of the statute.

See also *People v. Palmer*, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423, where it was said that the rule requiring direct proof of the *corpus delicti* never required such proof as to the identity of the victim.

78. *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; *Sam v. State*, 33 Miss. 347.

79. See cases cited *infra* this section.

**This Is Well Illustrated in Conspiracy Cases**, where, before the acts and declarations of a co-conspirator in furtherance of the conspiracy can be admitted to involve the defendant, *prima facie* proof of the existence of the conspiracy must be made to the satisfaction of the court.

*England.* — *Reg. v. Blake*, 6 Q. B. 126.

*United States.* — *U. S. v. McKee*, 3 Dill. 546, 26 Fed. Cas. No. 15,685.

*Alabama.* — *McAnally v. State*, 74 Ala. 9.

*Arizona.* — *Territory v. Turner*, (Ariz.), 37 Pac. 368.

*Illinois.* — *Spies v. People*, 122 Ill.

1, 12 N. E. 865, 3 Am. St. Rep. 320.  
*Massachusetts.* — *Dole v. Wool-dredge*, 142 Mass. 161, 7 N. E. 832; *Com. v. Wakeman*, 122 Mass. 43.

*Mississippi.* — *Browning v. State*, 30 Miss. 656; *Street v. State*, 43 Miss. 1.

*Nebraska.* — *Brown v. Winterstein*, 21 Neb. 113, 31 N. W. 246.

*New Hampshire.* — *Page v. Packer*, 40 N. H. 47.

*New York.* — *People v. Kerr*, 6 N. Y. Crim. Rep. 406, 6 N. Y. Supp. 674.

*North Carolina.* — *State v. Anderson*, 92 N. C. 732.

*Ohio.* — *Goins v. State*, 46 Ohio St. 457, 21 N. E. 476; *Fouts v. State*, 7 Ohio St. 472.

*Pennsylvania.* — *Com. v. O'Brien*, 140 Pa. St. 555, 21 Atl. 385.

*Tennessee.* — *Owens v. State*, 84 Tenn. 1.

*Vermont.* — *State v. Thibeau*, 30 Vt. 100.

*Virginia.* — *Williamson v. Com.*, 4 Gratt. 547.

See title "CONSPIRACY."

80. *Iowa.* — *Work v. McCoy*, 87 Iowa 217, 54 N. W. 140.

*Nevada.* — *State v. Ward*, 19 Nev. 297, 10 Pac. 133.

*New York.* — *Place v. Minster*, 65 N. Y. 89.

*North Carolina.* — *State v. Anderson*, 92 N. C. 732.

*Wyoming.* — *Haines v. Territory*, 3 Wyo. 167, 13 Pac. 8.



of the circumstances require it.<sup>81</sup>

There can be no reversal because a certain order is not followed in the introduction of testimony, if, by all the evidence, all the elements of the crime are proven to the satisfaction of the jury.<sup>82</sup> When the evidence is all in, then its legal application and force, as bearing on the subject of *corpus delicti*, may be challenged and tested, as well as on other elements of the crime charged against the respondent.<sup>83</sup>

**A Caution.**—This liberal rule of practice should be exercised with caution. The regular order should be observed as far as possible, even in civil cases.<sup>84</sup>

Often the evidence that tends to show the *corpus delicti* tends also to show that the act was done by the party charged. Such evidence would be admissible, notwithstanding of itself it would not be sufficient to establish the *corpus delicti*. If other evidence in the case, when supplemented by that, would show the *corpus delicti* and the criminal act of the respondent in causing it, the utmost requirement of the law in this respect would be answered.<sup>85</sup>

**B. IN ADULTERY.**—Necessarily the same circumstances which

81. *England*.—Reg. v. Brittain, 6 Cox C. C. 78.

*Canada*.—Reg. v. Connolly, 12 Can. L. T. 171.

*United States*.—Drake v. Stewart, 76 Fed. 140, 22 C. C. A. 104.

*Connecticut*.—State v. Thompson, 69 Conn. 720, 38 Atl. 868.

*Kansas*.—State v. Miller, 35 Kan. 328, 10 Pac. 865.

*Michigan*.—People v. Saunders, 25 Mich. 119.

*North Carolina*.—State v. Jackson, 82 N. C. 565.

*Texas*.—Luttrell v. State, 31 Tex. Crim. App. 493, 21 S. W. 248; Loggins v. State, 12 Tex. App. 65.

82. State v. Alcorn, (Idaho), 64 Pac. 1,014.

Willard v. State, 27 Tex. Crim. App. 386, 11 Am. St. Rep. 197, where a confession and corroborating circumstances were all considered by the jury on the *corpus delicti*.

83. State v. Potter, 52 Vt. 33.

84. See People v. Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. St. Rep. 477, where on a trial for wife murder, evidence as to the improper relations of the defendant with other women, bearing on the motive, was held to have been admitted out of its order. See also People v. Millard, 53 Mich. 63.

85. In State v. Novak, 109 Iowa 717, 79 N. W. 465, the defendant was on trial for the killing of one Mur-

ray. The theory of the state was that the defendant, who, at the time of the alleged killing, was insolvent and carried life insurance of \$27,000, had killed Murray and burned the latter's house in the hope that the latter's body would be taken for that of defendant. The following were the main facts of the evidence: In addition to the showing as to insolvency and insurance, it was shown that defendant met Murray on a certain day and was with him in the latter's store until half-past eleven in the evening, at which time the two were seen there alone. Murray was not thereafter seen alive. His store burned that night, and in the ruins were found the remains of a human body. The defendant also disappeared the same night without preparation or previous intention so far as was known. He was later arrested in Alaska. When arrested, and before he was told of the reason, he denied his name and denied that he had resided or done business in the town from which he had fled. Later, after admitting his identity, he said that Murray, on the night of the fire, was on a cot in the building; that he, the defendant, made no effort to save him or the building. Murray's body was found on a cot in the basement on a bank of coal under conditions indicating that it was there before the fire. It appeared that the skull

was fractured before death and that the injuries therefrom were sufficient to cause death. Under, or near the cot, were found articles of personal property belonging to the defendant. Among these were a pair of scissors and an identification check describing the defendant. These articles were of such a nature that it was improbable they would be where they were found unless they had been put there by design. These facts, when considered with other minor details, were held amply sufficient to establish the body of the offense.

In *Reg. v. Stephens*, 16 Cox C. C. 387, the accused was charged with embezzling money received by him from the sale of tickets, while he was acting as a booking clerk for a steamship company. Packages of tickets numbered consecutively had been kept in a case of which he alone had the key. He had turned over no money to his employer. Certain numbered tickets were missing, but whether he had received money for them or not was not known. Soldiers and sailors who were in the habit of getting tickets on presenting government warrants had taken some tickets. But it was shown that some of the missing tickets had not been issued on government warrants. Before the prisoner could be found guilty it had to be shown that he had received money for tickets which he had wrongfully appropriated. It was said that the receipt of money by the prisoner was merely a presumption. "No doubt," said the Lord Chief Justice, "it was merely a presumption. It is difficult to conceive a case in which there can be only ocular demonstration; and if the contention on behalf of the prisoner were right, it would always be possible whenever ocular demonstration is wanting, to say that the inference the jury drew might have been wrong, and that if it was wrong there was, therefore, no proof of the offense. But that is a fallacy, for it is for the jury to consider whether the inference they draw is correct or not. There are no facts here to show or raise an inference that money never passed into the prisoner's possession, and, on the other hand, there are facts from which reasonable men might draw the presumption that

money did pass, and the jury drew that presumption."

In *Reg. v. Mockford*, 11 Cox C. C. 16, the defendant was on trial for stealing four fowls. It appeared that a constable had met him on the highway between the prisoner's house and the premises of the prosecutor, about midnight. The defendant was going toward his house, and on meeting the constable, threw the fowls on the ground dead, but warm and bleeding, and ran off in the direction of his house. Snow had been falling, and by it his footprints were plain from the prosecutor's premises all the way to the defendant's home. When the witness found him at the house the snow was still unmelted on his boots and his hat and clothes were wet. There were cobwebs on his hat, and on the knees of his trousers and on the elbows of his coat sleeves were traces of the wet dung of fowls. The next morning in the fowl house under the roosts were found the marks of the knees of the trousers and of the elbows of a man leaning on the ground. Cobwebs hung from the roof to within a few feet of the ground, and feathers on the floor corresponded to the feathers on one of the fowls thrown down by the prisoner, from the neck of which feathers had been plucked. The prosecuting witness testified that from the general appearance and breed of the fowls he had no doubt that they were his, but that as he had from seventy to eighty, and was not certain as to the exact number, he could not say that any were missing and therefore could not positively identify them. It further appeared that the stable man on going out in the morning found the doors of the fowl house open which he had closed the night before. There was a conviction.

Exactly the same principle was recognized in *State v. Loveless*, 17 Nev. 424, 30 Pac. 1,080, where the defendant was convicted of the crime of grand larceny for stealing a calf. The jury was instructed that the owner need not testify positively that he had "lost such a calf, or any calf." It was competent for the jury to consider the circumstances, that the ear-marks and brand on the hide were cut out and burned by the defendant, in connection with other facts, in or-

lead the mind to the conclusion that the offense has been committed also point out the individuals involved.<sup>86</sup>

C. BRIBERY. — Proof of the *corpus delicti* where bribery is charged is the same thing as proof of the defendant's connection with the crime. The one cannot exist without the other.<sup>87</sup>

D. IN ARSON. — The circumstances relied on to show the malicious burning are generally the same as those which connect the defendant with the commission of the crime.<sup>88</sup>

der to determine whether the calf had been stolen.

In Reg. v. Burton, 6 Cox C. C. 293, a conviction was had for the theft of pepper from a warehouse where pepper was kept in bulk. It could not be shown that any pepper was missing, but the prisoner was seen coming out of the warehouse carrying a quantity of pepper of the same kind as the bulk, and on being accosted threw it down with the exclamation, "I hope you won't be hard on me."

86. This is illustrated equally well by the nature of the evidence in civil and in criminal cases.

England. — Williams v. Williams, 2 Hag. Com. 299; Loveden v. Loveden, 2 Hag. Con. 3.

District of Columbia. — Gibson v. Gibson, 18 App. D. C. 72.

Illinois. — Crane v. People, 168 Ill. 395, 48 N. E. 54; Stiles v. Stiles, 167 Ill. 576, 47 N. E. 867; Cooke v. Cooke, 152 Ill. 286, 38 N. E. 1,027; Blake v. Blake, 70 Ill. 618.

Massachusetts. — Com. v. Clifford, 145 Mass. 97, 13 N. E. 345.

Michigan. — Fischer v. Fischer, (Mich.), 91 N. W. 633.

New Jersey. — White v. White, (N. J.), 53 Atl. 23; Graham v. Graham, 50 N. J. Eq. 701, 25 Atl. 358; Patterson v. Patterson, (N. J.), 20 Atl. 347; Mayer v. Mayer, 21 N. J. Eq. 246.

New York. — Pollock v. Pollock, 71 N. Y. 137.

Vermont. — State v. Kimball, 74 Vt. 223, 52 Atl. 430; State v. Brink, 68 Vt. 659, 35 Atl. 492; State v. Potter, 52 Vt. 33.

Wisconsin. — Monteith v. State, 114 Wis. 165, 89 N. W. 828; Freeman v. Freeman, 31 Wis. 235.

87. People v. O'Neil, 109 N. Y. 251, 16 N. E. 68.

88. Carlton v. People, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346.

Among *indiciae* which go to establish at once the *corpus delicti* and the guilt of the defendant in cases of this nature, there may be named these: That the fire broke out suddenly; that the house was uninhabited; that the accused had cause of ill-will against the owner, or had been heard to threaten him, and that the fire broke out simultaneously in different parts of the building.

See the following cases: Brooks v. State, 51 Ga. 612; People v. Eaton, 59 Mich. 559, 26 N. W. 702; Sawyers v. Com., 88 Va. 356, 13 S. E. 708; State v. Halleck, (Wis.), 26 N. W. 572.

In State v. Millmeier, 102 Iowa 692, 72 N. W. 275, the following facts were relied on, principally, to prove the *corpus delicti*: The building was uninhabited and stood some distance from any building in which fire was used. Early in the evening of the night of the fire a rainstorm came up, which changed to sleet and later to snow. The defendant had been making threats against both the owner and the occupant of the building, and had shown his hostility to both. He made contradictory statements as to his whereabouts on the night of the fire. About 10 o'clock in the evening he was seen at a town, in coming from which to his home he would have to pass near the building burned. Early on the day of the fire while passing this building he had spoken of it to a companion, and said he was going to get even with the man who was using it. Within a week after the fire the snow went off and footprints similar to those made by defendant were found leading from near the burned building almost to the defendant's gate. After the preliminary examination of the defendant he attempted to intimidate witnesses who had testified against

## V. THE TEST OF THE VALUE OF CIRCUMSTANTIAL EVIDENCE IN CRIMINAL CASES.

**1. The Facts Consistent With Guilt.**—To justify a conviction of one charged with a criminal offense the facts and circumstances proved must be consistent with the prisoner's guilt.<sup>89</sup> This, however, is only an auxiliary rule. It is not the true test. The facts proven may all be consistent with the supposition of guilt and yet a conviction not be warranted.<sup>90</sup>

**2. The True Test.**—A. STATEMENT OF THE RULE. — In a criminal case circumstantial evidence, to justify the inference of guilt, must exclude to a moral certainty every other reasonable hypothesis.<sup>91</sup> Circumstantial evidence in a criminal case is of no value if the circumstances are consistent with either the hypothesis of innocence

him. These circumstances were held sufficient to establish the commission of a crime.

**89. United States.**—U. S. *v.* Douglass, 2 Blatchf. 207, 25 Fed. Cas. No. 14,989; U. S. *v.* Martin, 2 McLean 256, 26 Fed. Cas. No. 15,731; U. S. *v.* Vanranst, 3 Wash. C. C. 146, 28 Fed. Cas. No. 16,608.

*Alabama.*—Gilmore *v.* State, 99 Ala. 154, 13 So. 536; Howard *v.* State, 108 Ala. 571, 18 So. 813.

*Louisiana.*—State *v.* Vinson, 37 La. Ann. 792.

*Massachusetts.*—Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

*Missouri.*—State *v.* Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556.

*Nebraska.*—Smith *v.* State, 61 Neb. 296, 85 N. W. 49.

*South Carolina.*—State *v.* Hudson, (S. C.), 44 S. E. 968; State *v.* Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199.

*Texas.*—Galloway *v.* State, (Tex. App.), 70 S. W. 211; Blount *v.* State, (Tex. Crim. App.), 64 S. W. 1,050; Smith *v.* State, 35 Tex. Crim. App. 618, 33 S. W. 339, 34 S. W. 960; Johnson *v.* State, 18 Tex. App. 385.

*Utah.*—State *v.* Williamson, 22 Utah 248, 62 Pac. 1,022.

*Virginia.*—Sutton *v.* Com., 85 Va. 128, 7 S. E. 323.

**90.** Horne *v.* State, 1 Kan. 42, 81 Am. Dec. 499; Binns *v.* State, 66 Ind. 428. And see further cases cited in the next section.

**91. United States.**—The Jane *v.* U. S., 7 Cranch 363.

*Alabama.*—Riley *v.* State, 88 Ala. 193; Yarborough *v.* State, 105 Ala. 43, 16 So. 758; *Ex parte* Acree, 63 Ala. 234.

*California.*—People *v.* Nelson, 85 Cal. 421, 24 Pac. 1,006; People *v.* Anthony, 56 Cal. 397; People *v.* Strong, 30 Cal. 151; People *v.* Shuler, 28 Cal. 490.

*Delaware.*—State *v.* Miller, 9 Houst. 564, 32 Atl. 137.

*Indiana.*—Cavender *v.* State, 126 Ind. 47, 25 N. E. 875; Beavers *v.* State, 58 Ind. 530; Binns *v.* State, 66 Ind. 428.

*Iowa.*—State *v.* Johnson, 19 Iowa 230.

*Kansas.*—State *v.* Brown, 55 Kan. 611, 40 Pac. 1,001.

*Massachusetts.*—Com. *v.* Cobb, 14 Gray 57; Com. *v.* Webster, 5 Cush. 295, 52 Am. Dec. 711.

*Michigan.*—People *v.* Lambert, 5 Mich. 349.

*Mississippi.*—James *v.* State, 45 Miss. 572.

*Missouri.*—State *v.* Moxley, 102 Mo. 374, 14 N. W. 969.

*Nebraska.*—Casey *v.* State, 20 Neb. 138, 29 N. W. 264.

*Nevada.*—State *v.* Ah Kung, 17 Nev. 361, 30 Pac. 995.

*New York.*—People *v.* Cunningham, 6 Park. Crim. Rep. 398; Jeffers *v.* People, 5 Park. Crim. Rep. 522.

*Pennsylvania.*—Kehoe *v.* Com., 85 Pa. St. 127.

*South Carolina.*—State *v.* Milling, 35 S. C. 16, 14 S. E. 284.

or the hypothesis of guilt;<sup>92</sup> nor is it enough that the hypothesis of

*Tennessee*. — *Turner v. State*, 4 Lea 206.

*Texas*. — *Baldez v. State*, 37 Tex. Crim. App. 413, 35 S. W. 664; *Smith v. State*, 35 Tex. Crim. App. 618, 33 S. W. 339, 34 S. W. 960; *Jones v. State*, 34 Tex. Crim. App. 490, 30 S. W. 1,059, 31 S. W. 664; *Chitister v. State*, 33 Tex. Crim. App. 635, 28 S. W. 683.

**An Equivalent Expression** of the rule, and one that is, perhaps, more frequently used, is that before the jury can convict they must be satisfied of the prisoner's guilt beyond a reasonable doubt.

*Alabama*. — *Williams v. State*, 52 Ala. 411; *Turbeville v. State*, 40 Ala. 715.

*California*. — *People v. Kerrick*, 52 Cal. 446.

*Georgia*. — *Bryan v. State*, 74 Ga. 393; *Houser v. State*, 58 Ga. 78.

*Illinois*. — *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; *Schoolcraft v. People*, 117 Ill. 271, 7 N. E. 649; *Marlatt v. People*, 104 Ill. 364.

*Indiana*. — *Hipp v. State*, 5 Blackf. 149, 33 Am. Dec. 463.

*Iowa*. — *State v. Porter*, 64 Iowa 237, 20 N. W. 168; *State v. Tweedy*, 5 Iowa 433.

*Kentucky*. — *Sowder v. Com.*, 8 Bush 432 (where attention was directed to the fact that this rule applies to all classes of offenses); *Payne v. Com.*, 58 Ky. 370.

*Massachusetts*. — *Com. v. Costley*, 118 Mass. 1.

*Michigan*. — *Hall v. People*, 39 Mich. 717.

*Nebraska*. — *Kaiser v. State*, 35 Neb. 704, 53 N. W. 610; *Heldt v. State*, 20 Neb. 492, 30 N. W. 626.

*North Carolina*. — *State v. Frank*, 50 N. C. 384.

*Pennsylvania*. — *Com. v. Devine*, 18 Pa. Super. Ct. 431.

*South Carolina*. — *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1,021, 42 Am. St. Rep. 877.

*Tennessee*. — *Phipps v. State*, 3 Coldw. 344.

*Texas*. — *Law v. State*, 33 Tex. 37; *Black v. State*, 1 Tex. App. 368.

*Virginia*. — *Goldman v. Com.*, (Va.), 42 S. E. 923.

*West Virginia*. — *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676; *State v. Abbott*, 8 W. Va. 741.

*Wisconsin*. — *Kollock v. State*, 88 Wis. 663, 60 N. W. 817; *Ryan v. State*, 83 Wis. 486, 53 N. W. 836.

92. *Andrews v. State*, (Ga.), 42 S. E. 476 (where the accused might be innocent though every circumstance were admitted to be true); *Casey v. State*, 20 Neb. 138, 29 N. W. 264; *State v. Flanagan*, 26 W. Va. 116.

**An Interesting Application of This Test** was made in the case of *Pogue v. State*, 12 Tex. App. 283. The circumstances supporting the hypothesis of the defendant's guilt were assembled by the court, in order the better to explain the decision. They were these: The defendant was the last person seen with the deceased, so far as known, on the night of the crime. The deceased was heard talking to the defendant on the night of the murder at, or near, the place where the body of the former was found, after the time when, according to the theory of the prosecution, the deceased was killed; and during the same night the defendant was seen alone, and seemed lost, and talked to the witness as though he were drunk. Two days before the crime, a witness and defendant had exchanged knives and the defendant sharpened the knife thus acquired by him. The body of the deceased showed wounds, one of which was mortal, and appeared to have been inflicted by a sharp instrument. The body was found near the place where deceased and defendant were last known to have been together. Deceased and defendant were known to have been on horseback on the evening of the killing, and when the body was found, the tracks of two horses were observed near it, the appearance being that the riders had been engaged in a struggle. The defendant, when examined as a witness before the jury of inquest, was asked where he had left the deceased, and answered, "I thought I left him over yonder; I might have left him

guilt will account for all the facts proven.<sup>93</sup> Much less does it afford a just ground for conviction that unless a verdict of guilty is returned, the evidence in the case will leave the crime shrouded in mystery.<sup>94</sup>

**Circumstances Are of no Value That Merely Arouse Suspicion.** — That the circumstances justify a suspicion of guilt is not enough,<sup>95</sup>

along here. I was pretty drunk." A witness testified to a conversation between a third party and the defendant, in which the latter said, "Money is the end of the law, and I've got it." The witness didn't know what the conversation was about, and it did not appear when or where the conversation occurred. Another witness testified that, while defendant was drinking and talking in a joking manner, he had said he would not take \$1000 for his horse, and would not have him to talk for \$1000. Whether this remark was made before or after the killing did not appear.

"On the other hand," said the court, "we have the counter hypothesis of the defendant's innocence supported by the following circumstances: 1. Defendant and deceased were friends, and defendant had no motive to kill deceased. 2. Defendant was drunk, and this might account for his otherwise singular conduct, and for his want of knowledge as to where he had left deceased. 3. Deceased might have killed himself. 4. Some other person may have come up with deceased and killed him, after defendant had left him, as it was testified by Mrs. Pogue that she heard a voice talking with deceased at or about the place where he was killed, and did not think it was defendant's voice. 5. If defendant did kill him, he might have been acting in self-defense, as deceased was armed with an iron rod, and there were evidences on the ground of a struggle, and he was heard talking in a loud tone of voice at that place. 6. Defendant had no bloodstains on his clothes. 7. Defendant did not attempt to flee the country, but attended the inquest on the next day. 8. When he was informed of Harbowe's death he appeared surprised."

The court was also influenced, with-

out doubt, by the failure of the witnesses who testified to the prisoner's remarks about his horse, and about his money and the law, to specify the time when such remarks were made. It was possible that they were made at a time when they could not possibly have had any bearing on the crime. Announcing its conclusion, the court said that, taking all the testimony together, and applying to it the tests provided for this character of evidence, it did not come up to the standard of moral certainty, and did not exclude every reasonable hypothesis save the one of defendant's guilt. "The hypothesis of defendant's innocence is consistent with every fact in the case, and is reasonable, and supported by testimony equally as satisfactory as that of guilt."

**Under an Indictment for Selling Intoxicating Liquors** without a license, where the case of the prosecution depended on proving that the defendant was the agent of another, a judgment of conviction was reversed because the evidence was consistent with the theory that he was not such agent, and therefore consistent with the theory of innocence. *Black v. State*, 112 Ga. 29, 37 S. E. 108.

<sup>93</sup>. *Pope v. State*, 56 Miss. 790.

<sup>94</sup>. *State v. Fahey*, (Del.), 54 Atl. 690; *Schusler v. State*, 29 Ind. 394; *Webb v. State*, 73 Miss. 456, 19 So. 238.

<sup>95</sup>. *United States*. — *U. S. v. McKenzie*, 35 Fed. 826.

*Arkansas*. — *France v. State*, 68 Ark. 529, 60 S. W. 236.

*Georgia*. — *Laws v. State*, 114 Ga. 10, 39 S. E. 883.

*Iowa*. — *State v. Clouser*, 69 Iowa 313, 28 N. W. 615.

*South Carolina*. — *Silvey v. State*, (S. C.), 36 S. E. 608.

*Virginia*. — *Davis v. Com.*, 99 Va.

though it be a "strong" suspicion,<sup>96</sup> nor that there arises from them a probability of guilt.<sup>97</sup>

**Preponderance of Evidence.** — Preponderance of evidence against the accused is not sufficient.<sup>98</sup>

**B. WHAT THE RULE REQUIRES.** — It is not the "circumstances pointing to" guilt that are to be proved beyond a reasonable doubt, but the guilt itself which is to be so inferred from the circumstances.<sup>99</sup> Evidence may point to guilt and yet be insufficient to produce the required certainty.<sup>1</sup> It is not necessary that the circumstances should be "absolutely incompatible" with the innocence of the accused.<sup>2</sup>

838, 38 S. E. 191; *Branch v. Com.*, (Va.), 41 S. E. 862.

**A Verdict Rendered on Conjecture** cannot be sustained. *Leisenberg v. State*, 60 Neb. 628.

**Indictment for Poisoning a Well.** Davis was indicted for poisoning a well. The accused and his wife were not on good terms, and she was living with her uncle, a man named Stewart, whose house was situated about 250 yards from the prisoner's store. It was Stewart's well in which the poison was found. The prisoner lived over his store, and was not on good terms with the Stewart family. The prisoner's wife testified that on a certain night she had been asleep in her bed at her uncle's house, but awoke about ten or eleven o'clock and heard the door close at the prisoner's store; that she recognized him in his efforts to close the door; that she knew it was the prisoner; that afterward she heard footsteps walk across the porch and come toward the house; that she thought he was coming after his clothes, as he had still some clothes in the house; that after listening a while she heard a peculiar noise at the well; that she recognized his footsteps because she had many times heard him leave the store. She believed it was the prisoner from the further fact that the dogs at the house didn't bark, and she "didn't think they would bark at the prisoner," as they knew him and one "would follow him to the store." Her opinion was all there was in the case to connect the prisoner with the offense, and the above facts were all the basis there was for that opinion. The evidence was held to be of a doubtful and inconclusive char-

acter, and the judgment of conviction was reversed. *Davis v. Com.*, 99 Va. 838, 38 S. E. 191.

<sup>96.</sup> *People v. Maxwell*, 86 Hun 620, 63 N. Y. Supp. 794.

<sup>97.</sup> *Alabama*. — *Wharton v. State*, 73 Ala. 366, 12 So. 661.

*California*. — *People v. Dick*, 32 Cal. 213.

*Delaware*. — *State v. Fahey* (Del.), 54 Atl. 690; *State v. Goldsborough*, *Houst. Crim. Cas.* 302.

*Mississippi*. — *Algheri v. State*, 25 Miss. 584.

*Missouri*. — *State v. Taylor*, 110 Mo. 538, 20 S. W. 239.

*Nebraska*. — *Dreesen v. State*, 38 Neb. 375, 56 N. W. 1,024.

*New York*. — See *People v. Nileman*, 8 N. Y. St. 300.

<sup>98.</sup> *Arkansas*. — *Gill v. State*, 29 Ark. 422.

*California*. — *People v. Gossett*, 93 Cal. 641, 29 Pac. 246; *People v. Ah Sing*, 51 Cal. 372.

*Delaware*. — *State v. Fahey*, (Del.), 54 Atl. 690.

*Florida*. — *Gantling v. State*, 40 Fla. 237, 23 So. 857.

*Illinois*. — *Stanley v. People*, 104 Ill. App. 294.

*Iowa*. — *State v. Red*, 53 Iowa 69.

*Montana*. — *State v. Felker*, (Mont.), 71 Pac. 668.

*Nebraska*. — *Walbridge v. State*, 13 Neb. 236, 13 N. W. 209.

*Nevada*. — *State v. Pierce*, 8 Nev. 291.

<sup>99.</sup> *North Carolina*. — *State v. Oscar*, 52 N. C. 305; *Otmer v. People*, 76 Ill. 149.

<sup>1.</sup> *Patton v. State*, 117 Ga. 230.

<sup>2.</sup> *People v. Murray*, 41 Cal. 66; *State v. Rover*, 13 Nev. 17. Nor that

**Circumstances Need Not Equal Testimony of a Witness.** — It is not the law that the circumstances which the jury have before them should be equal in force to the positive testimony of an eyewitness.<sup>3</sup> And a charge that they should produce nearly the same degree of certainty as that which arises from direct testimony<sup>4</sup> has been discountenanced as being misleading, if not positively erroneous.<sup>5</sup>

**Mathematical Certainty Not Required.** — The force of the evidence pointing to guilt need not amount to a mathematical certainty.<sup>6</sup>

**Absolute Moral Certainty Not Required.** — The court should refuse to give an instruction which substitutes for "moral certainty" "absolute moral certainty."<sup>7</sup>

**Not Every Hypothesis.** — Nor need every hypothesis but that of guilt be excluded.<sup>8</sup> It is the exclusion of every other *reasonable* hypothesis that the rule calls for.<sup>9</sup>

**C. RESULT OF THE RULE.** — Any reasonable doubt which the jury may entertain as to the guilt of the accused calls imperatively for

they should be such that the defendant cannot be innocent in the light of their existence. *State v. Mandich*, 24 Nev. 336, 54 Pac. 516.

3. *Alabama*. — *Banks v. State*, 72 Ala. 522; *Faulk v. State*, 52 Ala. 415.

*Louisiana*. — *State v. Coleman*, 22 La. Ann. 455.

*Massachusetts*. — *Com. v. Tuttle*, 12 Cush. 502.

*Nevada*. — *State v. Slingerland*, 19 Nev. 135, 57 Pac. 280.

*North Carolina*. — *State v. Carson*, 115 N. C. 743, 20 S. E. 384; *State v. Allen*, 103 N. C. 433, 9 S. E. 626; *State v. Gee*, 92 N. C. 756; *State v. Norwood*, 74 N. C. 247.

*Tennessee*. — *Rea v. State*, 8 Lea 356.

**Invading the Province of the Jury.** Such an instruction was held in *Buchanan v. State*, 109 Ala. 7, 19 So. 410, to be an invasion of the province of the jury.

4. *People v. Eckenman*, 72 Cal. 582, 14 Pac. 359. See *People v. Padillia*, 42 Cal. 535; *People v. Cronin*, 34 Cal. 191.

5. *People v. Sansome*, 84 Cal. 449, 24 Pac. 143; *State v. Dotson*, 26 Mont. 305, 67 Pac. 938; *State v. Ryan*, 12 Mont. 297, 30 Pac. 78.

6. *Giles v. State*, 6 Ga. 276.

"Absolutely and to a Demonstration." — Any such charge as that the inference of guilt is not justified unless the inculpatory facts are

"established absolutely and to a demonstration incompatible with the innocence of the accused," is clearly erroneous. *People v. Bellamy*, 109 Cal. 610, 42 Pac. 236.

7. *People v. Davis*, 64 Cal. 440, 1 Pac. 889; *Sumner v. State*, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561; *State v. Hogard*, 12 Minn. 293; *State v. Glass*, 5 Or. 73.

8. *Alabama*. — *Horn v. State*, 102 Ala. 144, 15 So. 278; *Garrett v. State*, 97 Ala. 18, 14 So. 327; *Mose v. State*, 36 Ala. 211.

*Missouri*. — *State v. Paxton*, 126 Mo. 500, 29 S. W. 705; *State v. Schenwald*, 31 Mo. 147.

*North Carolina*. — *State v. Matthews*, 66 N. C. 106.

9. *United States*. — *U. S. v. McKenzie*, 35 Fed. 826; *U. S. v. Douglass*, 2 Blatchf. 207, 25 Fed. Cas. No. 14,989.

*Alabama*. — *Walker v. State*, 134 Ala. 86, 32 So. 703; *Baldwin v. State*, 111 Ala. 11, 20 So. 528; *Little v. State*, 89 Ala. 99, 8 So. 82; *Chisholm v. State*, 45 Ala. 66.

*California*. — *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *People v. Nelson*, 85 Cal. 421, 24 Pac. 1,006.

*Florida*. — *Kennedy v. State*, 31 Fla. 428, 12 So. 858.

*Georgia*. — *Shigg v. State*, 115 Ga. 212, 41 S. E. 694; *Martin v. State*, 38 Ga. 293.

*Indiana*. — *Wantland v. State*, 145 Ind. 38, 43 N. E. 931.



an acquittal.<sup>10</sup> An acquittal is not called for because the jury can reconcile the evidence with some theory of innocence.<sup>11</sup> And a conviction may be justified though it is possible that the crime was committed by another than the accused.<sup>12</sup>

D. CAUTIONARY SUGGESTION AS TO INSTRUCTIONS. — What circumstances will amount to proof can never be matter of general definition.<sup>13</sup> But in submitting a case in which the question of guilt is to be decided entirely on circumstantial evidence, the jury should be carefully instructed as to the rule of law by which they are to be guided in reaching their conclusion.<sup>14</sup>

There is no Arbitrary Form in which this instruction must be couched. It is sufficient if the jury can clearly gather from the language used the precise requirements of the law.<sup>15</sup>

*Kansas.* — *State v. Hunter*, 50 Kan. 302, 32 Pac. 37.

*Louisiana.* — *State v. Vinson*, 37 La. Ann. 792.

*Mississippi.* — *Kendrick v. State*, 55 Miss. 436.

*Missouri.* — *State v. Schoenwald*, 31 Mo. 147.

*North Carolina.* — *State v. Matthews*, 66 N. C. 106.

*Ohio.* — *State v. Summons*, 1 Ohio Dec. 416.

*Texas.* — *Williams v. State*, 41 Tex. 209; *Barrett v. State*, (Tex. Crim. App.), 33 S. W. 1,085.

10. See the cases cited *supra* this section, and also:

*Alabama.* — *Dain v. State*, 74 Ala. 38.

*Indiana.* — *State v. Bush*, 122 Ind. 42, 23 N. E. 677.

*Kentucky.* — *Lowder v. Com.*, 8 Bush 432; *Prather v. Com.*, 10 Crim. L. Mag. 890.

*Mississippi.* — *McGuire v. State*, 37 Miss. 369.

*Missouri.* — *State v. Crawford*, 34 Mo. 200.

*Wisconsin.* — *Crilley v. State*, 20 Wis. 44, 91 Am. Dec. 397.

11. *Black v. State*, 112 Ga. 29, 37 S. E. 108; *Padfield v. People*, 146 Ill. 660, 35 N. E. 469; *Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431.

12. *United States.* — *U. S. v. Cassidy*, 67 Fed. 698.

*Alabama.* — *Pate v. State*, 94 Ala. 14, 10 So. 665.

*California.* — *People v. Padillia*, 42 Cal. 535; *People v. Murray*, 41 Cal. 66.

*Georgia.* — *Smith v. State*, 63 Ga. 168; *Houser v. State*, 58 Ga. 78.

*Illinois.* — *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346.

*Indiana.* — *Sumner v. State*, 5 Blackf. 579, 36 Am. Dec. 561.

*Massachusetts.* — *Com. v. Leach*, 156 Mass. 99, 30 N. E. 163.

*Michigan.* — *People v. Foley*, 59 Mich. 553, 26 N. W. 699.

*Mississippi.* — *James v. State*, 45 Miss. 572.

*New York.* — *People v. Riley*, 3 N. Y. Crim. Rep. 374; *Murphy v. People*, 4 Hun 102, 6 Thomps. & C. 369.

*Oklahoma.* — *Dossett v. U. S.*, 3 Okla. 591, 41 Pac. 608.

*Vermont.* — *State v. Dale*, 41 Vt. 564.

13. *Myers v. State*, (Fla.), 31 So. 275; *Browning v. State*, 33 Miss. 47; *Com. v. Corrigan*, 1 Pittsb. Rep. (Pa.) 292; *Hampton v. State*, 1 Tex. App. 652.

14. *State v. Brady*, (Iowa), 91 N. W. 801.

15. *McCoy v. State*, (Tex. Crim. App.), 73 S. W. 1,057; *Rye v. State*, 8 Tex. App. 153.

"Hypothesis," "Conclusion," "Supposition." — As illustrating the text it will be seen that in the most approved form of charge the term "hypothesis" is used. See cases cited *infra*. But it has been held perfectly proper to substitute for this term the word "conclusion," (*State v. Willingham*, 33 La. Ann. 537), or the word "supposition." *State v. Andrews*, (Kan.), 61 Pac. 808; *State v. Davenport*, 38 S. C. 348, 17 S. E. 37.

**Adherence to the Standard Form Is the Safest Practice.**—It is, however, much the better and safer practice to give this charge in the usual and approved form, as to the adequacy and correctness of which no doubt can arise.<sup>16</sup> It is not within the purpose of the law that any guilty person should escape, or that any innocent one should be convicted. There is no policy of the law upon the subject for the consideration of the jury. The question for them to decide is whether the accused is guilty or innocent, not what it is politic to do.<sup>17</sup> It is improper, in declaring the correct test, to refer to it as the "humane provision of the law." From such a characterization the jury are "very apt to conclude that the case before them

16. *Siberry v. State*, 133 Ind. 677, 33 N. E. 681; *Williams v. Com.*, 80 Ky. 313; *Turner v. State*, 4 Lea (Tenn.) 206. Though remarks added thereto by way of illustration and explanation may be of considerable aid to the jury in a complicated case. *Hopt. v. Utah*, 120 U. S. 430. By a careful adherence to this rule the danger of confusing and misleading the jury by excessive verbiage will be avoided, on the one hand.

*Alabama*.—*Pate v. State*, 94 Ala. 14, 10 So. 665; *Cooper v. State*, 88 Ala. 107, 7 So. 47.

*California*.—*People v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310.

*Minnesota*.—*State v. Dineen*, 10 Minn. 407.

*Mississippi*.—*Burt v. State*, 72 Miss. 408, 16 So. 342, 4 Am. St. Rep. 563.

*Pennsylvania*.—*Fife v. Com.*, 29 Pa. St. 429.

And see also the cases cited *supra* this section.

And, on the other, the chance of sending them to the performance of their most important duty with an entirely inadequate idea of the rules by which they must be governed. See *Williamson v. State*, 30 Tex. App. 330, 17 S. W. 722; *Bookser v. State*, 26 Tex. App. 593, 10 S. W. 219.

**Inadequate Charges.**—It is entirely insufficient to make to the jury a mere statement that "the proof of guilt must be inconsistent with any other rational supposition," (*State v. Brady*, [Iowa], 91 N. W. 801), or that the circumstances must be so connected as to exclude every reasonable hypothesis but the guilt of the defend-

ant." *Bryant v. State*, 16 Tex. App. 144.

**Language to Be Avoided.**—Such language as that "it is the policy of the law that it is better to allow ninety-nine, or an indefinite number of, guilty men to escape than to convict an innocent man," or as that "justice never requires the sacrifice of a victim," though found in text-books and homilies from the time of Sir Mathew Hale to the present day, is the language of argument, and should not be used in instructing the jury as to the test to be applied in estimating the value of circumstantial evidence.

17. *Alabama*.—*Barnes v. State*, 111 Ala. 56, 20 So. 565; *Lowe v. State*, 88 Ala. 8, 7 So. 97; *Carden v. State*, 84 Ala. 417, 4 So. 823; *Ward v. State*, 78 Ala. 441; *Hughes v. State*, 75 Ala. 31; *Farrish v. State*, 63 Ala. 164.

*Illinois*.—*Seacord v. People*, 121 Ill. 623, 13 N. E. 194.

*Indiana*.—*Coleman v. State*, 111 Ind. 563, 13 N. E. 100.

*Montana*.—*Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

*Nebraska*.—*Parrish v. State*, 14 Neb. 60, 15 N. W. 357.

In *People v. Travers*, 88 Cal. 223, 26 Pac. 88, an instruction was condemned for its hostility to the defendant. The court told the jury that while it was true that there were instances of innocent persons being condemned, "there is no proof in this case of any such fact, and you are not justified in considering such matters." And further: "The guilt or innocence of this defendant must be determined from the evidence admitted in the case, and not from sympathy or preju-

is one which calls for the application of the principle."<sup>18</sup> And the relative number of probabilities on the one side or the other, whether expressed in words or arguments, or by figures, or letters, affords no just basis for a decision.<sup>19</sup>

## VI. THE NECESSITY FOR RELIANCE UPON CIRCUMSTANTIAL EVIDENCE.

**1. Reason for the Existence of the Necessity.**—To require the testimony of eyewitnesses in all cases would result in granting immunity to the most atrocious offenders, and in the denial of protection to society.<sup>20</sup> Hence the rule of practice which rejects a juror who says he would not on such evidence convict, even upon the most serious charge.<sup>21</sup>

**2. Illustrations.**—**A. PROOF OF CONTRACTS.**—An Implied Contract must be proved by circumstances.<sup>22</sup> And even an express contract may be established by circumstantial evidence.<sup>23</sup> Every fact material to the plaintiff's claim in an action on a contract may be so proved.<sup>24</sup>

dice. If all criminals must go free because there is a possibility of jurors making mistakes, society might as well disband."

**18.** *Dennis v. State*, 112 Ala. 64, 20 So. 925; followed in *Oakley v. State*, 135 Ala. 29, 33 So. 693; *Bohlman v. State*, 135 Ala. 45, 33 So. 44, which *disapproved*; *Gilmore v. State*, 99 Ala. 154, 13 So. 536; *Shepperd v. State*, 94 Ala. 102, 10 So. 663, where such a charge was condemned as an argument. See *Gantling v. State*, 40 Fla. 237, 23 So. 857.

**19.** *People v. Dilwood*, 94 Cal. 89, 29 Pac. 420; and see *State v. Fahey*, (Del.), 54 Atl. 690.

**20.** See the observations of the courts in the following cases:

*England.*—*King v. Thurtill*, cited and quoted in *People v. Jones*, 2 Wheel. Crim. Cas. 451 note.

*United States.*—*U. S. v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204.

*California.*—*People v. Morrow*, 60 Cal. 142.

*Illinois.*—*Schoolcraft v. People*, 117 Ill. 271, 7 N. E. 649.

*Massachusetts.*—*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

*New York.*—*People v. Harris*, 136 N. Y. 423, 33 S. E. 65; *People v. Kerr*, 6 N. Y. Crim. Rep. 406, 6 N. Y. Supp. 674.

*Pennsylvania.*—*Com. v. Cullen*, 36 Leg. Int. 252.

*Virginia.*—*Hickman v. Trout*, 83 Va. 478, 3 S. E. 131; *Dean v. Com.*, 32 Gratt. 912.

**21.** *People v. Ah Chung*, 54 Cal. 398; *State v. Leabo*, 89 Mo. 247, 1 S. W. 288; *State v. West*, 69 Mo. 401, 33 Am. Rep. 506.

**22.** *Duffey v. Duffey*, 44 Pa. St. 399; *Bash v. Bash*, 9 Pa. St. 260; *Hartman's Appeal*, 3 Grant (Pa.) 271; *Marzetti v. Williams*, 1 Barn. & A. 415, 20 Eng. C. L. 451.

**23.** *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583 (contract for services rendered by member of family); *Ridler v. Ridler*, 93 Iowa 347, 61 N. W. 994; *Wells v. Perkins*, 43 Wis. 160; *Tyler v. Burrington*, 39 Wis. 376 (where Ryan, C. J., after quoting some doubtful language of Gibson, C. J., in *Bash v. Bash*, 9 Pa. St. 260, which seemed to squint in a contrary direction, said: "So far as this passage appears to exclude circumstantial evidence of an express contract, we do not adopt it.")

**24.** *Harrison v. Bridges*, 49 N. C. 77, which was an action on a contract whereby defendant agreed to distill and carry off all turpentine plaintiff would make and deliver, plaintiff being unable to state the precise num-

And even the terms of a lost contract may be thus established.<sup>25</sup>

B. PROOF OF AGENCY. — So it is very frequently the case that circumstantial evidence must be resorted to to establish the existence of the relation of principal and agent, and the authority of the agent.<sup>26</sup>

C. PROOF OF LIABILITY OF SHIP TO CONDEMNATION. — In a libel in admiralty a condemnation may be had on circumstantial evidence, since positive evidence is rarely attainable.<sup>27</sup>

D. PROOF OF THE FACT OF SURVIVORSHIP. — Where several members of a family lost their lives in a fire, and the title to real estate under the will of one of them depended upon the question of survivorship, it was held in view of the facts and circumstances, such as the habit of the testator, the location of the rooms in the house destroyed, the direction of the wind at the time of the fire, etc., that the inference was deducible that the testator died first.<sup>28</sup>

E. PROOF OF SALE OF INTOXICATING LIQUORS. — On a charge of selling intoxicating liquors in violation of law, the fact that the liquor sold was intoxicating may be inferred from circumstances.<sup>29</sup>

ber of barrels of turpentine delivered by him, but having offered evidence to show that he had cultivated a sufficient number of trees and employed enough help to produce six hundred barrels, and also to show how many gallons of spirits could be distilled from six hundred barrels of turpentine, it was not error to instruct the jury that plaintiff had to satisfy them as to the quantity of turpentine delivered, and this they were at liberty to collect from the facts and circumstances in evidence.

**The Execution of a Contract.** If there are no attesting witnesses by whom the execution of the contract may be established, and no other evidence of execution, then it is allowable to show any facts or circumstances from which the jury may infer the execution.

*Colorado.* — *Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195.

*Pennsylvania.* — *Sigfried v. Levan*, 6 Serg. & R. 308, 9 Am. Dec. 427; *Taylor v. Meekley*, 4 Yeates 79.

*Tennessee.* — *Hill v. Scales*, 7 Yerg. 410.

*Texas.* — *Houston, Tex.*, Cent. R. Co. v. *Chandler*, 51 Tex. 416.

25. *Biederbecke v. Merchants' Despatch Transp. Co.*, 39 Iowa 500; *Bradbury v. Dwight*, 3 Metc. (Mass.)

31; *Whitney v. Sprague*, 23 Pick. (Mass.) 198.

And if, by reason of the death of the other party, the defendant is precluded from testifying, and the contract is denied, every fact and circumstance may go to the jury which would have a tendency to show that the contract never existed. *Webster v. Sibley*, 72 Mich. 630, 40 N. W. 772 (where a verbal contract was claimed.)

26. *Stetson v. Brigg*, 114 Cal. 511, 46 Pac. 603; *Puget Sound Lumber Co. v. Krug*, 89 Cal. 237, 26 Pac. 902 (where it was held properly inferable from circumstances that the husband was the wife's agent); *Geylin v. De Villeroi*, 2 Houst. (Del.) 311; *Westgate v. Munroe*, 100 Mass. 227; *Bickford v. Dane*, 58 N. H. 185. And see *Gardes v. Schroeder*, 17 La. Ann. 142.

27. *The Slavers*, 2 Wall. (U. S.) 383, where it was sought to libel the vessel because of the violation of laws against the slave trade. See also *The Meta*, 88 Fed. 21; *The Brig Napoleon*, Olc. Adm. 208, 17 Fed. Cas. No. 10,015.

28. *Estate of Ehle*, 73 Wis. 445, 41 N. W. 627. See article "DEATH."

29. *Georgia.* — *Johnson v. Atlanta*, 79 Ga. 507, 4 S. E. 673.

*Indiana.* — *Dant v. State*, 83 Ind. 60.

F. PROOF OF ADULTERY. — Adultery may be inferred from such circumstances as convince a careful and just mind.<sup>30</sup>

G. PROOF OF BRIBERY. — The financial condition of one charged with receiving a bribe,<sup>31</sup> as well as preliminary negotiations,<sup>32</sup> and other acts of the defendant,<sup>33</sup> such as offers made to the same officer at a time later than the offense charged,<sup>34</sup> are generally relied upon. And it may be shown that a corporation which would profit by the action sought to be influenced, raised a sum not needed for legitimate expenses, and not shown to have been used in proper ways.<sup>35</sup>

H. CONSPIRACY. — Generally speaking, this fact must be proved by the acts of the persons charged.<sup>36</sup>

I. PROOF OF FRAUD. — Fraud is the subject of legitimate inference

*Massachusetts.* — *Com. v. Brothers*, 158 Mass. 200, 33 N. E. 386; *Com. v. Meaney*, 151 Mass. 55, 23 N. E. 730; *Com. v. Gillon*, 148 Mass. 15, 18 N. E. 584; *Com. v. Wallace*, 123 Mass. 400; *Com. v. Dowdican*, 114 Mass. 257; *Com. v. Maloney*, 82 Mass. 20.

*Michigan.* — *People v. Berry*, 107 Mich. 256, 65 N. W. 98.

*Wisconsin.* — *Fossdahl v. State*, 89 Wis. 482, 62 N. W. 185. See article "INTOXICATING LIQUORS."

30. *Alabama.* — *Blackman v. State*, 36 Ala. 295; *Mosser v. Mosser*, 29 Ala. 313; *Richardson v. Richardson*, 4 Port. 467.

*California.* — *Evans v. Evans*, 41 Cal. 103.

*District of Columbia.* — See *Gibson v. Gibson*, 18 App. D. C. 72.

*Illinois.* — *Cooke v. Cooke*, 152 Ill. 286, 38 N. E. 1,027; *Chestnut v. Chestnut*, 88 Ill. 548; *Bast v. Bast*, 82 Ill. 584, 25 Am. Rep. 341; *Levy v. Levy*, 16 Ill. App. 35.

*Iowa.* — *State v. Chaney*, 110 Iowa 199, 81 N. W. 454; *Aitchison v. Aitchison*, 99 Iowa 93, 68 N. W. 573; *State v. Hart*, 94 Iowa 749, 64 N. W. 278; *Inskeep v. Inskeep*, 5 Iowa 204.

*Louisiana.* — *Mehle v. Lapeyrolerie*, 16 La. Ann. 4.

*Massachusetts.* — *Com. v. Gray*, 129 Mass. 474, 37 Am. Rep. 378.

*Maryland.* — *Kremelberg v. Kremelberg*, 52 Md. 553.

*New Jersey.* — *Ewing v. Ewing* (N. J.) 4 Atl. 651; *Day v. Day*, 4 N. J. Eq. 444.

*New York.* — *Chase v. Chase*, 44 N. Y. St. 766, 19 N. Y. Supp. 268; *Mullock v. Mullock*, 1 Edw. Ch. 14.

*North Carolina.* — *State v. Chaney*, 110 N. C. 507, 14 S. E. 780; *State v. Eliason*, 91 N. C. 564; *State v. Poteet*, 30 N. C. 23.

*Ohio.* — *Bryant v. Bryant*, Wright 156.

*Pennsylvania.* — *Com. v. Mosier*, 135 Pa. St. 221, 19 Atl. 943; *Com. v. Manock*, 2 Crim. L. Mag. 239; *Matchin v. Matchin*, 6 Pa. St. 332, 47 Am. Dec. 466.

*Tennessee.* — *Cole v. State*, 6 Baxt. 239.

*Texas.* — *Stewart v. State*, (Tex. Crim. App.), 43 S. W. 979, where the fact of intercourse was inferred from the fact that defendant had traveled around the country in a peddler's wagon, having with him a woman whom he represented to be his wife.

*Virginia.* — *Moore v. Ullman*, 80 Va. 307.

See article "ADULTERY."

31. *People v. O'Neil*, 48 Hun 36, 5 N. Y. Crim. Rep. 302, affirmed in 109 N. Y. 251, 16 N. E. 68; *State v. Smalls*, 11 S. C. 262.

32. *State v. Durnam*, 73 Minn. 150, 75 N. W. 1,127; *State v. Smith*, 72 Vt. 366, 48 Atl. 647.

33. *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68, affirming 48 Hun 36, 5 N. Y. Crim. Rep. 302.

34. *Rath v. State*, 35 Tex. Crim. App. 142, 33 S. W. 229. See also *Guthrie v. State*, 16 Neb. 667, 21 N. W. 455.

35. *People v. Kerr*, 6 N. Y. Crim. Rep. 406, 6 N. Y. Supp. 674. See article "BRIBERY."

36. *England.* — *Mulcahy v. Reg.*, L. R. 3 H. L. 306.

from facts, and in most cases can be brought to light only by circumstantial evidence.<sup>37</sup>

J. PROOF OF NEGLIGENCE. — That negligence may be inferred from circumstances there is no doubt either in reason or upon

*Canada.* — Reg. v. Connolly, 25 Ont. 151.

*Arkansas.* — Glory v. State, 13 Ark. 236.

*Colorado.* — Solander v. People, 2 Colo. 48.

*California.* — People v. Bentley, 75 Cal. 407, 17 Pac. 436.

*Connecticut.* — State v. Gonnon, (Conn.), 52 Atl. 727; Gardner v. Preston, 2 Day 205, 2 Am. Dec. 91.

*Massachusetts.* — Com. v. Meserve, 154 Mass. 64, 27 N. E. 997.

*Texas.* — Cox v. State, 8 Tex. App. 254, 34 Am. Rep. 746.

So, from the very nature of the case, this fact may always be established by circumstantial evidence.

*England.* — Mulcahy v. Reg., L. R. 3 H. L. 306; Reg. v. Blake, 6 Q. B. 126; Reg. v. Murphy, 8 Car. & P. 297; King v. Parsons, 1 W. Bl. 392.

*Canada.* — Reg. v. Connolly, 25 Ont. 151; Reg. v. Fellowes, 19 U. C. Q. B. 48.

*United States.* — Reilly v. U. S., 106 Fed. 896, 46 C. C. A. 25; U. S. v. Newton, 52 Fed. 275; The Mussel Slough Case, 5 Fed. 680; U. S. v. Sacia, 2 Fed. 754; U. S. v. Smith, 27 Fed. Cas. No. 16,322; U. S. v. Hutchins, 26 Fed. Cas. No. 15,430; U. S. v. Hamilton, 26 Fed. Cas. No. 15,288; U. S. v. Babcock, 24 Fed. Cas. No. 14,487.

*Alabama.* — Martin v. State, 89 Ala. 115, 8 So. 23, 18 Am. St. Rep. 91.

*Connecticut.* — State v. Thompson, 69 Conn. 720, 38 Atl. 868; State v. Spalding, 19 Conn. 233, 48 Am. Dec. 158; Gardner v. Preston, 2 Day 205, 2 Am. Dec. 91.

*Georgia.* — Dixon v. State, 116 Ga. 186, 42 S. E. 357.

*Illinois.* — Ochs v. People, 124 Ill. 399, 16 N. E. 662; O'Donnell v. People, 41 Ill. App. 23.

*Indiana.* — Musser v. State, 157 Ind. 423, 61 N. E. 1; Tucker v. Hyatt, 151 Ind. 332, 51 N. E. 469; Archer v. State, 106 Ind. 426, 7 N. E. 225.

*Iowa.* — State v. Sterling, 34 Iowa 443.

*Massachusetts.* — Com. v. Meserve, 154 Mass. 64, 27 N. E. 997.

*Michigan.* — Grimes v. Bowerman, 92 Mich. 258, 52 N. W. 751.

*Minnesota.* — Redding v. Wright, 49 Minn. 322, 51 N. W. 1,056.

*Nebraska.* — Farley v. Peebles, 50 Neb. 723, 70 N. W. 231.

*New York.* — People v. Peckens, 153 N. Y. 576, 47 N. E. 883; People v. McKane, 143 N. Y. 455, 48 N. E. 950; Kelly v. People, 55 N. Y. 585; Jones v. Baker, 7 Cow. 445; *In re Storm*, 1 City H. Rec. 169.

*Pennsylvania.* — Com. v. Ridgway, 2 Ashm. 247.

*Texas.* — Hudson v. State, (Tex. Crim. App.), 66 S. W. 668; Mason v. State, 31 Tex. Crim. App. 306, 20 S. W. 564; Smith v. State, 21 Tex. App. 107.

*Wisconsin.* — Patnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467; Horton v. Lee, 106 Wis. 439, 82 N. W. 360.

.See article "CONSPIRACY."

37. *United States.* — Rea v. Missouri, 17 Wall. 532; Castle v. Bullard, 23 How. 172.

*California.* — Casey v. Leggett, 125 Cal. 664, 58 Pac. 264; Maxson v. Llewellyn, 122 Cal. 195, 54 Pac. 732; Hall v. Susskind, 120 Cal. 559, 53 Pac. 46 (where the fact to be proven was the fraudulent concealment of his property by a bankrupt); Levy v. Scott, 115 Cal. 39, 46 Pac. 892.

*Georgia.* — Hoffer v. Gladden, 75 Ga. 532.

*Illinois.* — Vigus v. O'Bannon, 118 Ill. 334, 8 N. E. 778.

*Kentucky.* — Rudy v. Katz, (Ky.), 66 S. W. 18.

*Michigan.* — Gunberg v. Trench, 103 Mich. 543, 61 N. W. 872; Hough v. Dickinson, 58 Mich. 89, 24 N. W. 809.

*Missouri.* — Zeikel v. Douglass, 88 Mo. 382; Hopkins v. Sievert, 58 Mo. 201; Gordon v. Ismay, 55 Mo. App. 323.

*New York.* — Devoe v. Brandt, 53

authority.<sup>38</sup> As an example the plaintiff may show the defendant's habit, at or about the time of the injury, as to the manner or fact of performance of the act complained of.<sup>39</sup> And the due care of the plaintiff suing for personal injuries may be proved by circumstances.<sup>40</sup>

N. Y. 462; *Hennequin v. Naylor*, 24 N. Y. 139; *Clark v. Baird*, 9 N. Y. 183.

*Pennsylvania*. — *Kaine v. Weighey*, 22 Pa. St. 179.

*Virginia*. — *Musick v. Musick*, 88 Va. 12, 13 S. E. 302; *Hickman v. Trout*, 83 Va. 478, 3 S. E. 131.

*West Virginia*. — *Sturm v. Chalfant*, 38 W. Va. 248, 18 S. E. 451; *Core v. Cunningham*, 27 W. Va. 206; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Lockhard v. Beckley*, 10 W. Va. 87.

*Wisconsin*. — *Barndt v. Frederick*, 78 Wis. 1, 47 N. W. 6, 11 L. R. A. 199.

See article "FRAUD."

**38. United States.** — *The Joseph B. Thomas*, 81 Fed. 578; *Gulf C. & S. F. R. Co. v. Ellis*, 54 Fed. 481, where it was said that the other evidence in the case — circumstantial in nature — was rendered more cogent, if not conclusive, by the failure of the defendant to produce as a witness its engineer, in whose knowledge rested the facts in dispute.

*Alabama*. — *Alabama & V. R. Co. v. Barrett*, (Ala.), 28 So. 820.

*Florida*. — *Jacksonville T. & K. W. R. Co. v. Peninsular Land T. & M. Co.*, 27 Fla. 1, 9 So. 661.

*Illinois*. — *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177.

*Indiana*. — *Cincinnati H. & D. R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. Rep. 60, 20 N. E. 287.

*Iowa*. — *Garrett v. Chicago & N. W. R. Co.*, 36 Iowa 121; *Gandy v. Chicago N. W. R. Co.*, 30 Iowa 420, 6 Am. Rep. 682.

*Kansas*. — *Atchison, T. & S. F. R. Co. v. Brassfield*, 51 Kan. 167, 32 Pac. 814.

*Michigan*. — *Alperu v. Churchill*, 53 Mich. 607, 19 N. W. 549.

*New York*. — *Lyons v. Rosenthal*, 11 Hun (N. Y.) 46.

*Pennsylvania*. — *Philadelphia & R. R. Co. v. Schultz*, 93 Pa. St. 341; *Allen v. Willard*, 57 Pa. St. 374.

**39. Alabama.** — *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49.

*Indiana*. — *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

*Kentucky*. — *Kentucky Cent. R. Co. v. Barrow*, 89 Ky. 638, 20 S. W. 165.

*Minnesota*. — *Davidson v. St. Paul M. & M. R. Co.*, 34 Minn. 51, 24 N. W. 324.

*Missouri*. — *Gurley v. Missouri and Pac. R. Co.*, 122 Mo. 141, 26 S. W. 953.

*New Hampshire*. — *Parkinson v. Nashua & L. R. Co.*, 61 N. H. 416; *State v. Manchester & L. R. Co.*, 52 N. H. 528.

*New York*. — *Sheldon v. Hudson R. R. Co.*, 14 N. Y. 218, 67 Am. Dec. 155.

*Virginia*. — *Alexandria & F. R. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289.

*Wisconsin*. — *Mayer v. Milwaukee St. R. Co.*, 90 Wis. 522, 63 N. W. 1048.

**When Property Is Destroyed by Fire** which it is claimed was set by sparks escaping from the defendant's locomotive, and the circumstances of the escape of sparks are such as common experience, or the known efficiency of spark arresters in common use, tell us would not exist if such appliances were properly used, these circumstances of themselves suggest negligence. *Jacksonville T. & K. W. R. Co. v. Peninsular Land T. & M. Co.*, 27 Fla. 1, 9 So. 661.

The inference of negligence arises where sparks of unusual size escape, or where they escape in unusual quantity, *a fortiori* where both circumstances are present. *Jackson v. Chicago & N. W. R. Co.*, 31 Iowa 176, 7 Am. Rep. 120.

**40. Indiana.** — *Indianapolis P. & C. R. Co. v. Thomas*, 84 Ind. 194; *Pittsburgh C. & St. L. R. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1,033.

*Iowa*. — *Gorman v. Minneapolis & St. L. R. Co.*, 78 Iowa 509, 43 N. W. 393.

K. PROOF OF IDENTITY. — Identity may be decided in any case on circumstances.<sup>41</sup>

L. PROOF OF VENUE. — Venue need not be proved, and very often cannot be proved by direct and positive testimony.<sup>42</sup> The whole evidence may be scanned for facts and circumstances from which the venue may be fairly deducible.<sup>43</sup> And those circumstances alone from which the guilt of the accused is established may be sufficient for this purpose.<sup>44</sup>

3. Circumstances as Corroborating Evidence. — A. IN GENERAL. In the numerous instances where corroboration is required, the evidence furnished by circumstances is frequently all that can be obtained.<sup>45</sup>

B. CORROBORATION OF AN ACCOMPLICE. — So it is always suf-

*Maine.* — French v. Brunswick, 21 Me. 29, 38 Am. Dec. 248.

*Massachusetts.* — Walsh v. Boston & M. R. Co., 171 Mass. 52, 50 N. E. 453; Maguire v. Fitchburg R. Co., 146 Mass. 379, 15 N. E. 504.

*Minnesota.* — Lillstrom v. N. P. Co. 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 587.

*New York.* — Chisholm v. State, 141 N. Y. 246, 36 N. E. 184.

*Texas.* — Texas & N. O. R. Co. v. Crowder, 63 Tex. 502.

As to the proof of negligence, see article "NEGLIGENCE."

41. Edmonds v. State, 34 Ark. 720; Rooker v. Rooker, 3 Sw. & Tr. 526.

Whether a particular individual perpetrated a fraud or a crime, or is entitled to certain rights, or owes certain duties or liabilities, is an inquiry precisely the same in all cases. Brown v. Schock, 77 Pa. St. 471; Udderzook v. Com., 76 Pa. St. 340.

42. Alabama. — Tinney v. State, 111 Ala. 74, 20 So. 597.

Colorado. — Brooke v. People, 23 Colo. 375, 48 Pac. 502.

Florida. — Warrace v. State, 27 Fla. 362, 8 So. 748; Andrews v. State, 21 Fla. 598; Bryan v. State, 19 Fla. 864.

Indiana. — Harlan v. State, 134 Ind. 339, 33 N. E. 1, 102; Croy v. State, 32 Ind. 384.

Missouri. — State v. Sanders, 106 Mo. 188, 17 S. W. 223; State v. Chamberlain, 89 Mo. 129, 1 S. W. 145; State v. West, 69 Mo. 401, 33 Am. Rep. 506; State v. Burns, 48 Mo. 438; State v. Roach, 64 Mo. App. 413.

Nebraska. — Hawkins v. State, 60 Neb. 380, 83 N. W. 198; Weincke v. State, 34 Neb. 14, 51 N. W. 307.

Oklahoma. — Harvey v. Territory, 11 Okla. 156, 65 Pac. 837.

South Carolina. — Florence v. Berry, 61 S. C. 237, 39 S. E. 389; State v. Gossett, 9 Rich. L. 428.

Texas. — Abrigo v. State, 29 Tex. App. 143, 15 S. W. 408; Brown v. State, 23 Tex. App. 214, 4 S. W. 588; Hoffman v. State, 12 Tex. App. 406.

Virginia. — Richardson v. Com., 80 Va. 124.

43. People v. Manning, 48 Cal. 335; State v. Bailey, 73 Mo. App. 576; Territory v. Hicks, 6 N. M. 596, 30 Pac. 872.

Illustration. — In Bloom v. State, 68 Ark. 336, 58 S. W. 41, the venue was inferred from proof which showed that the cattle charged to have been stolen ranged in the county of venue; that they were missed from the range in the latter part of September, and that they were sold by the defendant in another county on October 2nd, following.

See for a somewhat similar state of evidence Moore v. State, 2 Tex. App. 350, where the hide of the stolen animal was found in possession of the accused. Here, however, some of the elements of the former case were wanting, and the evidence was held insufficient.

44. Burst v. State, 89 Ind. 133; State v. Thomas, 58 Kan. 805, 51 Pac. 228.

45. Corroborative Circumstances



ficient, even under statutes requiring corroboration, if the confirmation is supplied by circumstances,<sup>46</sup> which, though of slight value in themselves,<sup>47</sup> strengthen the narrative of the accomplice in a material part.<sup>48</sup> And the jury may test the truth of the accomplice testimony by looking into the motive which prompted it, and into the testimony of other witnesses, and by considering any other circumstances which may be before them in the evidence.<sup>49</sup>

**Included in "Evidence."**—In *Lamb v. State*, (Neb.), 95 N. W. 1,050, the counsel contended that an instruction concerning the testimony of an impeached witness was incorrect, in that it ignored the element of corroboration by circumstances; but it was held that this criticism was without force, because the court had told the jury to disregard the testimony of impeached witnesses, except in so far as they had been corroborated by other trustworthy evidence. "Corroborative circumstances" are covered by the term "evidence," which includes all the means by which an alleged matter or fact is established or disproved.

See article "CORROBORATION."

46. *State v. Miller*, 65 Ia. 60, 21 N. W. 181; *State v. Stanley*, 48 Ia. 221 (construing Iowa Code, 1873, § 4,559); *Boyce v. People*, 55 N. Y. 644.

47. *Crittenden v. State*, 134 Ala. 145, 32 So. 273; *Lumpkin v. State*, 68 Ala. 56; *People v. Melvane*, 39 Cal. 614; *Evans v. State*, 78 Ga. 351.

48. *United States*.—U. S. v. Troax, 3 McLean, 224, 28 Fed. Cas. No. 16,540.

*Alabama*.—*Montgomery v. State*, 40 Ala. 684.

*Delaware*.—*State v. Lowber*, 1 Houst. Crim. Cas. 324.

*District of Columbia*.—U. S. v. Neverson, 1 Mackey 152.

*Georgia*.—*Dixon v. State*, 116 Ga. 186, 42 S. E. 357.

*Iowa*.—*State v. Blain*, 92 N. W. 650.

*Louisiana*.—*State v. Cellahan*, 47 La. Ann. 444, 17 So. 50.

*Massachusetts*.—*Com. v. Grant*, Thach. Crim. Cas. 438.

*New York*.—*People v. Everhardt*, 4 N. Y. St. 518.

*Pennsylvania*.—*Cox v. Com.*, 125 Pa. St. 94.

*Vermont*.—*State v. Howard*, 32 Vt. 380.

49. *Canada*.—*Reg. v. Fellowes*, 19 W. C. Q. B. 48.

*United States*.—U. S. v. Logan, 45 Fed. 872; U. S. v. Lancaster, 44 Fed. 885; U. S. v. Sacia, 2 Fed. 754.

*Alabama*.—*Bonner v. State*, 107 Ala. 97, 18 So. 226 (testimony as to a conversation between two defendants, before the crime, showing ill-feeling against family of deceased); *Malachi v. State*, 89 Ala. 134, 8 So. 104 (possession by defendant of property belonging to deceased.)

*California*.—*People v. Sternberg*, 111 Cal. 3, 43 Pac. 198 (attempt to suppress testimony); *People v. McLean*, 84 Cal. 480, 24 Pac. 32 (while, among other circumstances, it was shown that defendant tried to induce his accomplice to fly, and that he made contradictory statements as to his whereabouts at the time of the crime).

*Iowa*.—*State v. Hall*, 97 Iowa 400, 66 N. W. 725; *State v. Wart*, 51 Iowa 587, 2 N. W. 405.

*Massachusetts*.—*Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421; *Com. v. Chase*, 147 Mass. 597, 18 N. E. 565 (threats.)

*Minnesota*.—*State v. Brin*, 30 Minn. 522, 16 N. W. 406, where it was shown that defendant attempted to procure false testimony, and gave contradictory explanations as to his possession of the stolen property.

*New York*.—*People v. Elliott*, 106 N. Y. 288, 12 N. E. 602; *People v. Christian*, 78 Hun 28, 29 N. Y. Supp. 271; *Lindsay v. People*, 67 Barb. 548, affirmed in 63 N. Y. 143 (where blood was found at place where accomplice said murder was committed); *People v. Kerr*, 6 N. Y. Crim. Rep. 406, 6 N. Y. Supp. 674.

*Texas*.—*Garrett v. State*, 41 Tex. 530; *Cohea v. State*, 11 Tex. App. 153.

C. CORROBORATION OF PROSECUTRIX IN RAPE. — **Circumstantial Evidence** may be received to furnish the requisite corroboration.<sup>50</sup> So evidence may be introduced as to the personal appearance and conduct of the prosecutrix shortly after the commission of the alleged offense, as that she showed signs of suffering from distress or physical pain, that her apparel was in disorder, or that her clothing was stained, and that she made complaint of the alleged assault soon after its commission.<sup>51</sup> So the essential fact of penetration ought to be, and may be, inferred from such circumstances as the physical condition of the female, marks of violence upon her, and her complaints of pain.<sup>52</sup>

50. *California*. — *People v. Rango*, 112 Cal. 669, 44 Pac. 1,071 (where it was shown that the defendant came out of the room of the prosecutrix at 5 o'clock in the morning); *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506.

*Iowa*. — *State v. Watson*, 81 Iowa 380, 46 N. W. 868; *State v. Comstock*, 46 Iowa 265, where the defendant had said, soon after the crime, that he would get clear if he were a Mason.

*New York*. — *People v. Croucher*, 2 Wheel. Crim. Cas. (N. Y.) 42.

*South Carolina*. — *State v. Le Blanc*, 3 Brev. 339.

51. *Alabama*. — *Griffin v. State*, 76 Ala. 29; *Scott v. State*, 48 Ala. 420.

*Arizona*. — *Kirby v. Territory*, (Ariz.), 28 Pac. 1,134.

*Arkansas*. — *Pleasant v. State*, 15 Ark. 624.

*California*. — *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202; *People v. Stewart*, 97 Cal. 238, 32 Pac. 8; *People v. Mayes*, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

*Florida*. — *Ellis v. State*, 25 Fla. 702.

*Georgia*. — *Stephens v. State*, 11 Ga. 225.

*Idaho*. — *State v. Anderson*, (Idaho), 59 Pac. 180.

*Indiana*. — *Thompson v. State*, 38 Ind. 39.

*Iowa*. — *State v. Montgomery*, 79 Iowa 737, 45 N. W. 292; *State v. Clark*, 69 Iowa 294, 28 N. W. 606; *State v. McLaughlin*, 44 Iowa 82.

*Louisiana*. — *State v. Langford*, 45 La. Ann. 1,177, 14 So. 181, 40 Am. St. Rep. 277; *State v. Robertson*, 38 La. Ann. 618, 58 Am. Rep. 201.

*Minnesota*. — *State v. Shettleworth*, 18 Minn. 208.

*Missouri*. — *State v. Armstrong*, 167 Mo. 257, 66 S. W. 961; *State v. Murphy*, 118 Mo. 7, 25 S. W. 95.

*Nebraska*. — *Mathews v. State*, 19 Neb. 330, 27 N. W. 234.

*New Mexico*. — *Territory v. Edie*, 6 N. Mex. 555, 30 Pac. 851.

*New York*. — *People v. Garner*, 169 N. Y. 585, 62 N. E. 1,099; *People v. Crowley*, 102 N. Y. 234, 6 N. E. 384; *People v. McKeon*, 64 Hun 504, 19 N. Y. Supp. 486; *People v. O'Connell*, 58 Hun 609, 12 N. Y. Supp. 477; *People v. Batterson*, 50 Hun 44, 2 N. Y. Supp. 376.

*North Carolina*. — *State v. Freeman*, 100 N. C. 429, 5 S. E. 921.

*Oklahoma*. — *Sowers v. Territory*, 6 Okla. 436, 50 Pac. 257.

*Texas*. — *Reddick v. State*, 35 Tex. Crim. App. 463, 34 S. W. 274, 60 Am. St. Rep. 56; *Grimmet v. State*, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630; *Lights v. State*, 21 Tex. App. 308, 17 S. W. 428.

*Vermont*. — *State v. Carroll*, 67 Vt. 477, 42 Atl. 235.

*Wisconsin*. — *Proper v. State*, 85 Wis. 615, 55 N. W. 1,035; *Hannon v. State*, 70 Wis. 448, 36 N. W. 1.

52. *Indiana*. — *Taylor v. State*, 111 Ind. 279, 12 N. E. 400.

*Iowa*. — *State v. Tarr*, 28 Iowa 397.

*Nebraska*. — *Comstock v. State*, 14 Neb. 205, 15 N. W. 355.

*Nevada*. — *State v. Depoister*, 21 Nev. 107, 25 Pac. 1,000.

*Wisconsin*. — *Brauer v. State*, 25 Wis. 413.

See article "RAPE."

D. CORROBORATION IN SEDUCTION CASES may consist of proof of such matters as attentions, correspondence, frequent visits and familiarities.<sup>53</sup>

E. CORROBORATION IN PROSECUTIONS FOR PERJURY SUFFICIENT WITH A SINGLE WITNESS. — It is no longer necessary that there shall be the positive testimony of two witnesses. It is sufficient if the direct testimony of one witness is corroborated by circumstances. Such corroboration may proceed from letters or documents or any evidence of other circumstances having a tendency to establish the charge.<sup>54</sup>

So Under Statutes by Express Provision. — This rule permitting corroboration by circumstances is incorporated in the statutes of several states.<sup>55</sup> By corroborating evidence under such a statute it has been

53. See the following cases:

*Alabama.* — *Suther v. State*, 118 Ala. 88, 24 So. 43.

*Indiana.* — *Hinkle v. State*, 157 Ind. 237, 61 N. E. 196.

*Minnesota.* — *State v. Timmens*, 4 Minn. 325.

*Mississippi.* — *Ferguson v. State*, 71 Miss. 805, 15 So. 56, 42 Am. St. Rep. 492.

*New York.* — *Boyce v. People*, 55 N. Y. 644.

*North Carolina.* — *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574.

*Oklahoma.* — *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837.

*Virginia.* — *Mills v. Com.*, 93 Va. 815, 22 S. E. 863.

See article "SEDUCTION."

54. *England.* — *Reg. v. Virrier*, 12 A. & E. 317; *Reg. v. Hare*, 13 Cox C. C. 174; *Reg. v. Towey*, 8 Cox C. C. 328; *Reg. v. Owen*, 6 Cox C. C. 105.

*United States.* — *U. S. v. Wood*, 14 Pet. 430; *U. S. v. Hall*, 44 Fed. 864.

*Kentucky.* — *Williams v. Com.*, 24 Ky. L. Rep. 465, 68 S. W. 871.

*Massachusetts.* — *Com. v. Butland*, 119 Mass. 317; *Com. v. Parker*, 2 Cush. 212.

*Missouri.* — *State v. Faulkner*, (Mo.), 75 S. W. 116; *State v. Heed*, 57 Mo. 252; *State v. Miller*, 44 Mo. App. 159.

*Montana.* — *State v. Gibbs*, 10 Mont. 213, 25 Pac. 289.

*Nebraska.* — *Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108.

*North Carolina.* — *State v. Peters*, 107 N. C. 876, 12 S. E. 74.

*Ohio.* — *State v. Courtright*, 66 Ohio St. 35, 63 N. E. 590.

55. See *State v. Buckley*, 18 Or. 228, 22 Pac. 838; *Beach v. State*, 32 Tex. Crim. App. 240, 22 S. W. 976; *Aguiere v. State*, 31 Tex. Crim. App. 519, 21 S. W. 256; *Waters v. State*, 30 Tex. App. 284, 17 S. W. 411; *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295.

**Evidence Virtually Direct But Technically Circumstantial.**—Though under the statutory provisions in Texas the corroborating evidence must be virtually positive in its nature, it has been held that there may be evidence technically circumstantial which would be amply sufficient to establish perjury. For example, said the court, in *Mains v. State*, 26 Tex. App. 14, 9 S. W. 51, "B is on trial for the murder of A. C swears that he was at a certain time at a certain place in Travis county, Tex.; that B and A were present at that time and place, and that no other person was present; that he saw B shoot and kill A, giving the circumstances. B is convicted and executed. Subsequent facts lead to the conclusion that C perjured himself, and he is indicted for that offense. Upon the trial it is evident that the prosecution cannot adduce direct evidence against C, but by one or more witnesses it can be shown that he was, at the time of the homicide, and on the day of the homicide specified by him, in the city of New York. Technically speaking, this would be circumstantial evidence, but of such character as to be vir-

held that evidence *aliunde* is meant; that is to say, evidence which tends to show perjury independent of the prisoner's declarations.<sup>56</sup> But if the accused goes on the stand in his own behalf his manner while testifying may furnish all the corroboration that the jury requires.<sup>57</sup>

F. CORROBORATION OF CONFESSIONS. — The corroboration which both by common law<sup>58</sup> and under statutes<sup>59</sup> is necessary before a conviction is justified in a case where an extra-judicial confession by the prisoner is introduced may be supplied by circumstances. Such corroborating circumstances may be sufficient for the purposes of the case, though they are of little value in themselves,<sup>60</sup> and apparently innocent in their import, and rendered sinister only when viewed in connection with the confession.<sup>61</sup>

G. WHAT INCLUDED IN CORROBORATING CIRCUMSTANCES. — What is required is not proof of such circumstances *aliunde* as would be sufficient for conviction independent of the confession, but such as will, when considered in connection with the confession, tend to render the latter more probable and satisfy the jury of the commission of the crime by the defendant.<sup>62</sup> Proof of any of the facts which

tually positive, or direct evidence. There would be no room for inferences or presumptions, for, if the jury believed the witnesses, guilt would result without any process of reasoning or presumptions."

56. *State v. Buckley*, 18 Or. 228, 22 Pac. 838.

57. *State v. Miller*, 24 W. Va. 802.

58. *England*. — *Rex v. Fisher*, 1 Leach 286; *Rex v. White*, R. & R. 508; *Rex v. Falkner*, R. & R. 481.

*California*. — *People v. Jones*, 123 Cal. 65, 55 Pac. 698.

*Colorado*. — *Roberts v. People*, 11 Colo. 213, 17 Pac. 637.

*Georgia*. — *Davis v. State*, 105 Ga. 808, 32 S. E. 158.

*Mississippi*. — *State v. Strongfellow*, 26 Miss. 157, 59 Am. Dec. 247.

*Missouri*. — *State v. Patterson*, 73 Mo. 695.

*New York*. — *People v. Ruloff*, 18 N. Y. 179; *People v. Hennessey*, 15 Wend. 147; *People v. Porter*, 2 Park. Crim. Rep. 14.

*Texas*. — *Strait v. State*, 43 Tex. 486.

See article "CONFESSIONS."

The English Cases above cited are frequently named to support the contrary proposition. There seem, however, to have been corroborative cir-

cumstances. See, however, *Reg. v. Sutcliffe*, 4 Cox C. C. 270, note.

59. *Georgia*. — *Johnson v. State*, 86 Ga. 90, 13 S. E. 282; *Murray v. State*, 43 Ga. 256.

*Kentucky*. — *Greenwade v. Com.*, 11 Ky. L. Rep. 340, 12 S. W. 131; *Cunningham v. Com.*, 9 Bush 149.

*Minneapolis*. — *State v. New*, 22 Minn. 76.

*New York*. — *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676; *People v. Kelly*, 37 Hun (N. Y.) 160.

And see the various state statutes.

60. *U. S. v. Williams*, 1 Cliff. 5, 28 Fed. Cas. No. 16,707; *State v. Patterson*, 73 Mo. 695; *People v. Badgley*, 16 Wend. 53; *Willard v. State*, 27 Tex. Crim. App. 386, 11 Am. St. Rep. 197.

61. *Mose v. State*, 36 Ala. 211 (where the fact that shot of a certain size were found in a tree near the scene of the crime was given value by the prisoner's confession that he had used such shot); *Rusher v. State*, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175; *People v. Jaehne*, 4 N. Y. Crim. Rep. 478.

62. *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404. This case was an indictment for the murder of one Catherine Beakes. The accused declared

usually attend upon, or are incidentally connected with, the commission of the crime, and which are consistent with the truth of the confession, or to the discovery to which the confession has led, and which would not have existed, in all probability, if the crime had not been committed, necessarily corroborates it.<sup>63</sup>

**Proof of the Corpus Delicti** is of course corroborative of a confession of the commission of the crime.<sup>64</sup>

## VII. RELEVANCY.

**1. Latitude in Admission of Circumstantial Evidence. — A. IN GENERAL.** — The rule confining the evidence strictly to the point in issue is more rigidly applied in criminal than in civil cases.<sup>65</sup> But

he had gone to the house of deceased to borrow a gun. It was proved that there had been a gun in the house, and the prisoner knew it. He declared that the deceased refused to lend him the gun, and charged him with having done mischief to her pig and pigeons. It was shown that she believed that the prisoner had been guilty of doing such mischief. He said he had struck her with a yoke. The witness who first saw the deceased after the crime found a yoke with blood on it, lying near her. The defendant, in his confession, declared that as he was going out, after she had refused his request, he saw the yoke by the door, picked it up and went back. A witness who lived in the house testified that when he went to work about noon the yoke was standing by the side of the door. The prisoner stated the deceased was on the hearth. A witness found her lying in a corner of the fireplace. The prisoner declared she was starching a cap. A cap, declared the witness who first found her, was lying on the hearth beside her. Four wounds were found on the body, corresponding to the number of strokes which the prisoner, by his own story, inflicted. In no particular was the confession contradicted, or found inconsistent with the facts, in even the slightest detail.

<sup>63</sup>. *Bergen v. People*, 17 Ill. 426.

<sup>64</sup>. *England. — Reg. v. Sutcliffe*, 4 Cox C. C. 270.

*United States. — Flower v. U. S.*, 116 Fed. 241.

*Alabama. — Martin v. State*, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844.

*Delaware. — State v. Miller*, 9 Houst. 564, 32 Atl. 137.

*Georgia. — Schaefer v. State*, 93 Ga. 117, 18 S. E. 552; *Williams v. State*, 69 Ga. 11.

*Illinois. — Bartley v. People*, 156 Ill. 234, 40 N. E. 831.

*Kentucky. — Mullins v. Com.*, 14 Ky. L. Rep. 569, 20 S. W. 1,035.

*Minnesota. — State v. Grear*, 29 Minn. 221, 13 N. W. 140.

*Mississippi. — Sam. v. State*, 33 Miss. 347.

*New York. — People v. Deacons*, 109 N. Y. 374, 16 N. E. 676; *People v. Badgley*, 16 Wend. 53.

*Ohio. — State v. Leuth*, 5 Ohio Cir. Ct. 94.

*Pennsylvania. — Gray v. Com.*, 101 Pa. St. 380, 47 Am. Rep. 733.

*Texas. — Attawa v. State*, 35 Tex. Crim App. 403, 34 S. W. 112; *Dunn v. State*, 34 Tex. Crim. App. 257, 30 S. W. 227, 53 Am. St. Rep. 705.

<sup>65</sup>. *Austin v. State*, 14 Ark. 555; *Dyson v. State*, 26 Miss. 362, citing 2 Russ. Crim. 772; *Hudson v. State*, 3 Cold. (Tenn.) 355.

**Rule as to Solving Doubts in Favor of Life and Liberty.** — It is sometimes said that a doubt as to admissibility of evidence in a criminal cause ought to be solved in favor of life and liberty. *Pharr v. State*, 9 Tex. App. 129.

**But This Proposition Is Discouraged.** — In *State v. Dart*, 29 Conn. 153, 76 Am. Dec. 596, the defendant was indicted for the mur-

neither in civil nor in criminal cases is certain evidence to be excluded because it does not bear directly upon the issue.<sup>66</sup>

Greater Latitude Is Allowed in the presentation of evidence where it is purely circumstantial than would be admissible where it is sought to establish the contention upon direct and positive testimony.<sup>67</sup> In the reception of circumstantial evidence great latitude must be allowed. The jury should have before them every fact which will enable them to elucidate the transaction and to come to a satisfactory conclusion.<sup>68</sup> However remote or insignificant a fact

der of a woman who was found dead with her face in a pool of water. A witness was introduced who testified that about a year before her death the deceased had said that she was subject to fits and had several times fallen upon her face when alone. It was held that this was too remote, the court taking occasion to express its disapproval of the suggestion that in a criminal cause the rules of evidence ought to be relaxed in favor of life and liberty.

66. In *Austin v. State*, 14 Ark. 555, where, to establish malice, it was said that the state was not bound "to rely exclusively upon the malice that the law presumes from the killing, and the evidences of it which were otherwise shown by the circumstances at the point of time when the killing occurred, but had the right to add any other evidence, as former grudges, former threats, previous lying in wait, cumulative of the former, and thus effectually to repel any inferences that might be drawn in favor of the defense from the circumstances that transpired at the time of the killing. In like manner, antecedent facts and circumstances, from which any reasonable presumption could arise, or inference be drawn, that the course of conduct, pursued by the prisoner at the time of the killing had been previously premeditated and resolved upon by him, in reference to a probable effort to bring him back into perfect subordination to the lawful authority of his master, although without any reference to the particular individual slain, tended at once, not only to elucidate the intention of the slave at the time of striking the fatal blow, but the state and condition of his heart, both as to evil design in gen-

eral, and in being resolved, in pursuance of the dictates of such wicked, depraved and malignant evil design in general, to do the particular, unlawful act of resisting the rightful authority of his master at all hazards, including that of taking human life in general, regardless of social duty and without respect to persons."

67. *Sims v. State*, 10 Tex. App. 131; *Ballew v. State*, 36 Tex. 98.

68. *United States*.—*Holmes v. Goldsmith*, 147 U. S. 150, 37 L. ed. 118; *Davis v. U. S.*, 107 Fed. 753; *U. S. v. Cole*, 5 McLean 513, 25 Fed. Cas. No. 14,832.

*Georgia*.—*Sample v. Lipscomb*, 18 Ga. 687; *Johnson v. State*, 14 Ga. 55.

*Indiana*.—*Newell v. Downs*, 8 Blackf. 523.

*Iowa*.—*Chew v. O'Hara*, 110 Iowa 81, 81 N. W. 157; *Work v. McCoy*, 87 Iowa 217, 54 N. W. 140.

*Louisiana*.—*Webb v. Drake*, 52 La. Ann. 290, 26 So. 791.

*Massachusetts*.—*Emmons v. Alvord*, 177 Mass. 466, 59 N. E. 126; *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189.

*Mississippi*.—*McCann v. State*, 13 Smed. & M. 471.

*North Carolina*.—*State v. Rhodes*, 111 N. C. 647, 15 S. E. 1,038.

*Pennsylvania*.—*Com. v. Spink*, 137 Pa. St. 255, 20 Atl. 680.

*Texas*.—*Cooper v. State*, 19 Tex. 449; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; *Bouldin v. State*, 8 Tex. App. 332.

*Vermont*.—*Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607, 76 Am. St. Rep. 746.

*Virginia*.—*Hanriot v. Sherwood*, 82 Va. 1.

When a crime has been concealed, the discovery of the guilty party is generally ascertained by the conduct,

acts and sayings of the perpetrator himself. From our knowledge of the human mind and its workings we expect with almost positive certainty that when it is the sole repository of so dreadful a secret it will affect the conduct and sayings of the person. Hence the mind naturally looks to these with the most anxious scrutiny and would require for its satisfaction, if such a thing were possible, a complete transcript of the person's conduct and sayings.

No rule can be laid down as to the particular manner in which this secret in the mind of the guilty party will influence his conduct and sayings. Acts which in themselves are of no importance, except as they show the state of mind of the party, are admissible. Acts may in themselves show no disposition to do mischief, but if they are unnatural, if they tend to the conclusion that they are produced by a mind conscious of its guilt, they are provable against the accused.

So the existence of certain features of conduct and of certain physical facts may be shown. This is not because the facts, taken by themselves, tend to prove guilt, but from the fact that they more frequently happen to innocent persons than to guilty ones, the inference abstractly taken is that they are not proof of crime. They are admitted, however, on the ground that they are a part of the conduct, a part of the history, of the party accused, that may connect itself with the transaction and cast light upon it, and may become important in connection with other facts and circumstances.

Take the very familiar instance of a few drops of blood being found on the person. Almost every person, at some time in his life, has, by accident, got blood on his clothing when he was not engaged in the commission of any offense. So with a tear of the clothing of the accused, when a scuffle appears to have been engaged in between the assailed and the assailant. If appearing about the time of a transaction, it is always permitted to be proved, although all persons are subject to such accidents. So of a person's locality. The whereabouts of the accused may be

proved, although taken abstractly there is nothing suspicious about it. He may have been in that particular place in the pursuit of occupations which frequently required his presence there, both before and after the time of the commission of the particular offense under investigation. *Caldwell, J., in Moore v. State, 2 Ohio St. 500.*

See also *State v. Evans, 1 Marv. (Del.) 477, 41 Atl. 136.*

Evidence that a hair ornament of deceased was found at scene of alleged crime is admissible to corroborate prosecutrix on a trial for rape. *State v. Armstrong, 167 Mo. 257, 66 S. W. 961.*

On the trial of one accused of making an assault on his sister-in-law, it having been shown that he had several times made indecent advances toward her, and was outraged over the rejection of his advances, it was proper to admit in evidence, though a remote circumstance, the fact that a short time prior to the assault the woman found machine oil poured on her dresses and that the defendant had been around the house the day before she had made this discovery. *McCoy v. State, (Tex. Crim. App.), 73 S. W. 1,057.*

In a case where the indictment charged the defendant with producing the death of deceased by strangulation, and it was shown that a witness and the defendant, with other persons, were in a store a few days after the killing when a row occurred between other parties; that shortly thereafter, on the same day, the defendant said in the presence of the witness that he could have stopped the row quick enough and that he could very easily kill a man by throwing him on the ground, jamming his knees into him, and knocking the breath out of him, and then grasping him by the throat, when his breath would never return, it was held that from this an inference might be drawn as to the working of defendant's mind, the evidence going to show that at the time the mind of the accused was running on the subject of producing death by strangling. Whether such a remark was a mere casual remark, or resulted from anxiety of the defend-

may be, if it tends to establish a probability or improbability of a fact in issue, to make it more or less probable, it is admissible.<sup>69</sup>

**Proof of Adultery.** — The rule is well illustrated in cases involving proof of the act of adultery. The rule as to the admissibility of evidence is the same whether in criminal prosecutions for adultery, in actions upon the case for damages, or in actions for divorce.<sup>70</sup>

ant's mind to unburden itself by giving out its workings as far as it could with safety, was held a matter for the jury to determine. That it might have been produced by a contemplation of the homicide was sufficient to admit it as evidence. *Moore v. State*, 2 Ohio St. 500.

Where the defendant on a murder trial had shaved off his mustache, and it was important to know whether this had been done before or after the murder, a witness was allowed to testify that it was done the day after a row at a certain store, and another witness then fixed the day of such a row as the date of the killing. *Com. v. Chance*, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.

In an action for indemnity against the co-surety on the question whether the defendant had made a promise of indemnity, testimony that the estate of defendant when the executor qualified, on whose bonds the parties were sureties, exceeded very considerably the whole amount of the testator's estate, and was nearly if not quite equal in value with the joint estates of the other sureties should be admitted. "The inference deducible from these facts might be," said the court, "that as the defendant would have been regarded as sufficient security himself in the executor's bond, there existed no motive to induce him to make application to the other sureties to become jointly bound with him, under a promise on his part to indemnify them on account of their liability, and therefore they would furnish ground for a presumption that no such promise had been made." *Jones v. Letcher*, 13 B. Mon. (Ky.) 363.

69. *United States*. — *Polk v. Wendell*, 5 Wheat. 293.

*Arkansas*. — *Ward v. Young*, 42 Ark. 542; *Tucker v. West*, 29 Ark. 386.

*Kansas*. — *Ballou v. Humphrey*, 8 Kan. 153.

*Kentucky*. — *Shannon v. Kinney*, 1 A. K. Marsh. 3, 10 Am. Dec. 705; *Mason v. Bruner*, 10 Ky. L. Rep. 155. *Maine*. — *Trull v. True*, 33 Me. 367.

*Michigan*. — *Passmore v. Passmore*, 50 Mich. 626, 16 N. W. 170.

*Missouri*. — *De Arman v. Taggart*, 65 Mo. App. 82.

*New York*. — *People v. O'Neil*, 6 N. Y. Crim. 274, 4 N. Y. Supp. 119.

*Ohio*. — *Findlay Brwg. Co. v. Bauer*, 50 Ohio St. 560, 35 N. E. 55, 40 Am. St. Rep. 686.

**Setting Other Fires.** — In an action for damages where the destruction of property by fire was alleged to have been caused by flying sparks from a smoke stack of the defendant's factory, it may be shown that sparks escaping from the smoke stack had previously set fire to trees and other property in the vicinity of the plaintiff's house. *Carpenter v. Laswell*, 23 Ky. L. Rep. 686, 63 S. W. 609.

So in a civil suit for damages for destroying plaintiff's barn by fire, it may be shown that the defendant was seen in the neighborhood of the barn while the fire was in progress. *Mead v. Husted*, 49 Conn. 336.

In *State v. Kruger*, (Idaho), 61 Pac. 463, the fact that a piece of cloth found at a place where the defendant was supposed to have stopped in his flight fitted into a rent and agreed in quality and texture with the lining of defendant's coat, though of slight importance, it was nevertheless admitted.

**Proof of Agency.** — For example, where circumstantial evidence is resorted to to establish the existence of agency, all facts and circumstances showing the relation of the parties and throwing light upon its character may be shown to the court. *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 511, 46 Pac. 738; *Ellis v. Crawford*, 39 Cal. 523.

70. *Illinois*. — *Crane v. People*, 168 Ill. 395, 48 N. E. 54; *Carter v.*



**Time and Details.** — The fact that the transactions extend over a considerable period of time and embrace innumerable details does not render them inadmissible,<sup>71</sup> if the facts shown have some bearing upon, and tendency to prove, the ultimate fact in issue. It is not necessary that the evidence should be essential,<sup>72</sup> and it may be cumulative.<sup>73</sup> All the circumstances of a transaction may be admitted for the consideration of the jury, so far as they afford any fair inference as to the matter in issue.<sup>74</sup>

**Value or Strength.** — The question is not as to the value or strength of the testimony, but whether it can afford any rational inference in connection with the other evidence in the case, as to the point under investigation.<sup>75</sup> Though certain testimony offered may appear to be vague by itself, and altogether inconclusive, and apparently irrelevant, it may be made certain in its character, and plainly relevant, by other facts in proof.<sup>76</sup>

**Seemingly Unimportant Circumstances.** — If a case turns on a great variety of circumstances, facts seemingly unimportant when separately considered may assume importance when considered in connection with others.<sup>77</sup> And so no evidence relevant to the issue can be rejected on the ground that, unassisted by other testimony, it will not establish the point in issue.<sup>78</sup>

Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669.

*Maryland.* — Kremelberg v. Kremelberg, 52 Md. 553.

*Massachusetts.* — Com. v. Clifford, 145 Mass. 97, 13 N. E. 345.

*Michigan.* — Fischer v. Fischer, (Mich.), 91 N. W. 633.

*New Jersey.* — White v. White, (N. J.), 53 Atl. 23.

*New York.* — Warren v. Warren, 8 Misc. 189, 29 N. Y. Supp. 313; Auld v. Auld, 40 N. Y. St. 904, 16 N. Y. Supp. 803.

*Vermont.* — State v. Kimball, 74 Vt. 223, 52 Atl. 430.

*Wisconsin.* — Monteith v. State, 114 Wis. 165, 89 N. W. 828.

See generally title "ADULTERY."

71. Vardeman v. Byrne, 7 How. (Miss.) 365; U. S. v. Wilson, 60 Fed. 890.

72. State v. Cowell, 12 Nev. 337, citing 1 Phil. Ev. 622.

73. State v. Cowell, 12 Nev. 337.

74. *Georgia.* — Kenner v. State, 18 Ga. 194, 63 Am. Dec. 269, citing Roscoe Ev. 74; Stark. Ev. 39.

*Kansas.* — Holman v. Raynesford, 3 Kan. App. 676, 44 Pac. 910.

*Maryland.* — Davis v. Calvert, 5 Gill & J. 269, 25 Am. Dec. 282.

*New York.* — Platner v. Platner, 78 N. Y. 90.

*Texas.* — Hanrick v. Cavanaugh, 60 Tex. 1 (a civil suit involving a question of forgery).

*Vermont.* — Richardson v. Royalton & W. Tpke Co., 6 Vt. 496. See also cases cited *supra* this section.

75. Rodgers v. Stophel, 32 Pa. St. 111, 72 Am. Dec. 775.

76. Gantling v. State, 40 Fla. 237, 23 So. 857; Mosely v. Gordon, 16 Ga. 384; U. S. v. Isle de Cuba, 2 Cliff. 295, 26 Fed. Cas. No. 15,447.

77. Passmore v. Passmore, 50 Mich. 626, 16 N. W. 170, where a widow presented a claim against the estate of her deceased husband. The claim was contested as baseless, it being contended that the note presented as evidence had been paid. It was held proper to show what the claimant had said to a witness as to her financial embarrassment.

See also Frost v. Brown, 2 Bay (S. C.) 133.

78. Schuchardt v. Allen, 1 Wall. 359, 17 L. ed. 642. And see Belden v. Lamb, 17 Conn. 441; Willoughby v. Dewey, 54 Ill. 266.

**Testimony Apparently Irrelevant.** But if evidence is proposed which of

**Must Be Relevant.** — To render circumstantial evidence admissible it must be a statement of a relevant fact.<sup>79</sup> No possible accumulation of irrelevant facts could satisfy the jury.<sup>80</sup>

**Objections to Relevancy Not Favored.** — Since the force and effect of circumstantial facts usually and almost necessarily depend on the connection of such facts with each other, whenever the necessity arises for a resort to circumstantial evidence either from the nature of the inquiry, or the failure of direct proof, objections to the testimony on the ground of irrelevancy are not favored.<sup>81</sup> But if it were allowed to introduce facts which, when proved, would not be a base for any reasonable inference regarding any material fact involved in the issue, the court would be called upon to decide many embarrassing questions which, when solved, would not advance the material inquiry a step, and the attention of the jury would probably be diverted from the matter in dispute.<sup>82</sup>

itself appears to be foreign to the issue on trial, and it is objected to, it is incumbent on the party offering it to show its relevancy, either by explanation to the court as to its bearing on the case, or by introducing other evidence connecting it with the *res gestae*, and opening the door to its admission. *Dyson v. State*, 26 Miss. 362.

So two letters which had been written by the defendant more than six months before the commission of the offense charged, and which threatened other persons than the prosecuting witnesses, were held not to have any tendency to prove the intent on a charge of threatening certain dealers in milk. *Com. v. White*, 162 Mass. 403, 38 N. E. 707.

**Defendant Not Connected With Conspiracy.** — On an indictment for assault with intent to kill, evidence was admitted to show that the brother of the defendant was a leader in a company of robbers and to show the character of the band, and also to show that the defendant was connected with this band. But there was no proof that defendant and his brother were associated with the band at the same time. The effect of such testimony being to prejudice the jury against the defendant and not tending to connect defendant with the crime, it was held improperly admitted. *Hudson v. State*, 3 Cold. (Tenn.) 355.

If *prima facie* irrelevant, it may be rejected by the court, unless the party

offering it states its connection with the other facts, in order that its relevancy may be seen by the court. *Cuthbert v. Newell*, 7 Ala. 457, citing *Innerarity v. Byrne*, 8 Port. (Ala.) 176; *Bell & Rhea v. Conner & Co.*, 1 Ala. 83; *Mardis' Adm'r v. Shackelford*, 4 Ala. 493; *Crenshaw v. Davenport*, 6 Ala. 390, 41 Am. Dec. 56.

79. *State v. Rome*, 64 Conn. 329, 30 Atl. 57.

80. In *State v. Austin*, 129 N. C. 534, 40 S. E. 4, the defendant was on trial for the larceny of money. It appeared that on the second day after defendant was arrested, and while he was lying in jail, a shot-sack containing money was found in a public lot which had been used as a camping ground. There was no evidence to show how it got there, nor anything to connect the defendant with putting it there. The loss of the money was generally known, and, after the defendant's arrest, anyone of the general public had greater facility for putting it there than he had, and from the situation of the lot it seemed unlikely that money could lie there unobserved for even a day. There was evidence which seemed to connect the defendant with the theft, but the finding of this bag did not in any way corroborate such evidence. It was therefore held irrelevant.

81. *Moore v. U. S.*, 150 U. S. 57; *Castle v. Bullard*, 23 How. (U. S.) 172.

82. *State v. Campbell*, 17 Ala. 566.

**Facts Proximate or Remote.**—No definite line of demarkation can be drawn between facts proximate and facts remote.<sup>83</sup>

**Relevancy Has No Reference to Weight.**—The question of relevancy is to be determined entirely without reference to the weight which may be attached to the circumstance by the jury. For while the importance of a fact as to which testimony is offered may be problematical, and may depend on a number of the circumstances already in or to be put in evidence, the court may be able to see clearly that it may have some bearing on the question to be decided.<sup>84</sup> Any pertinent and legitimate facts conducing to the proof of the litigated fact are evidence of such fact, weaker or stronger according to the entire complexion of it, or as opposed or unopposed by conflicting evidence.<sup>85</sup>

**Should Be Admitted if Jury May or May Not Draw Inference.**—If the facts are such that the jury may or may not draw from them an inference pertinent to the issue, then they ought in general to be admitted.<sup>86</sup> The task of distinguishing between the important and the insignificant fact must be left largely to the jury.<sup>87</sup> If the circumstances are so remote, or if it is apparent that they can cast no light on the subject, though the evidence be that of the conduct of the party himself, the court is bound to reject it.<sup>88</sup>

83. *Simms v. State*, 10 Tex. App. 131.

84. *Sanders v. Stokes*, 30 Ala. 432.

**Strength of Accused.**—This is well illustrated by a trial for murder, where it was shown that the body of the deceased had been found with the head almost severed from the body. An expert introduced by the prosecution testified that the wound had been inflicted with one stroke of a knife and that only one of great physical strength could have accomplished it. Thereupon it was proper for the state to show further that the accused was a man of great physical strength. This was a slight circumstance, and its weight would be increased or diminished, according to the number of strong persons shown to have been in the neighborhood at the time when the crime was committed, but of its relevancy there could be no doubt. *People v. Thiede*, 11 Utah 241, 39 Pac. 837.

85. *Miles v. Edelen*, 1 Duv. (Ky.) 270.

In *Grimsinger v. State*, (Tex. Crim. App.), 69 S. W. 583, a man was charged with the murder of his wife, and it was held proper to show that in a locked wardrobe in the

house where the deed was committed, there was found an ax with blood and hair on it. Such evidence was admissible notwithstanding the fact that the defendant had not been in the house for two or three days prior to the finding of the ax, and other parties had been. Such fact goes not to the question of admissibility, but to the probative force.

**In a Prosecution for Rape** it is a circumstance proper to be shown in corroboration of identification by the prosecutrix that the prisoner had scratches and marks on his face the day after the crime which were not there the day before. *State v. Flemming*, 130 N. C. 688, 41 S. E. 549.

86. *Causey v. Wiley*, 27 Ga. 444; *Walker v. Roberts*, 20 Ga. 15.

87. *People v. Bemis*, 51 Mich. 422, 16 N. W. 794.

88. **Inference Too Weak.**—*Morrissey v. Ingham*, 111 Mass. 63 (an action for carnally knowing the plaintiff by force and giving her a venereal disease, where it was held not competent to show that some months before the defendant slept all night in a house of ill-fame). *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38; *Hawkins v. James*, 69 Miss. 274,

**Much Discretion Is Left to the Trial Court**, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact. The question must be decided in view of the facts and circumstances of the case under consideration.<sup>89</sup> And a court of errors will not interfere unless it manifestly appear

13 So. 813 (where the question at issue was whether the defendant had become a tenant of the plaintiff by executing a written contract to pay rent for a certain year, and it was held improper to show that at and before the date of the supposed contract she was in possession of the land under an executory contract of purchase). *Patrick v. State*, 16 Neb. 330, 20 N. W. 121 (where on an indictment for wife murder it was irrelevant that deceased had learned on the day of the killing that her husband had some time before visited a house of ill-fame in another state); *Moore v. State*, 2 Ohio St. 500; *Moody v. State*, (Tex. App.), 6 S. W. 321 (where, on trial of a guardian for swindling, a petition filed in a civil suit, in which the removal of the guardian was sought, was held not relevant as not tending to throw light on the issue).

In *Colquitt v. State*, 107 Tenn. 381, 64 S. W. 713, a trial for murder, the defendant offered testimony that shortly before the homicide, on two different occasions, a man came to his house about midnight, aroused the people therein, and asked to see the defendant, refusing to tell his name, or what he wanted, but saying that he wanted to whisper something in his ear alone. This was held inadmissible because the deceased was not connected in any way with these visits.

<sup>89</sup>. *Durett v. State*, 62 Ala. 434; *Daves v. Com.*, 99 Va. 838, 38 S. E. 191.

**Provocation.** — Though criminal intimacy between the deceased and the defendant's wife, which has recently come to the knowledge of the defendant, is admissible on the trial for homicide (*Biggs v. State*, 29 Ga. 723, 76 Am. Dec. 630; *Sanchez v. People*, 22 N. Y. 147), yet no inference can be drawn that is favorable to defendant from the fact that there was such criminal intimacy and the difficulty over transactions as to prop-

erty years before. *Woodward v. State*, (Tex. Crim. App.), 58 S. W. 135.

In *Caddell v. State*, 129 Ala. 57, 30 So. 76, a wife had been shot by her husband's paramour, and it was sought to implicate the husband. It was held improper to show that husband and wife had lived amicably until his paramour came to live in the house with them, after which the witness had often seen the wife in tears, because it did not appear that the husband was present at such time, nor that the facts were communicated to him. Her grief, though caused by the illicit amour, could not affect him unless he was aware of it.

In *Johnson v. State*, 47 Ala. 62, the prosecuting witness was allowed to testify that his horse, the larceny of which by the defendant was alleged, had been in the habit of coming up every evening from the pasture field in which he was feeding, and that on this particular evening he had failed to come.

On an indictment charging the defendants with conspiring with A to commit a felony, the defendants admitted certain conversations had by them with A, and put in evidence by the government, tending to prove the crime charged, but testified that, while employed by the chief of the detective force of the commonwealth, they had been instructed to associate with persons suspected to be criminals, and, when the necessary proofs had been obtained, to arrest them, and that their conversations with A were for this purpose; that, although this officer had ceased to hold office for a year, they had been employed by him more or less since, and had pursued the same methods; and that they had no criminal intent. There was no evidence that the defendants had been informed that A was a suspicious character, or requested to obtain evidence against him. It was held that evidence of the officer who formerly had employed them was

that the testimony has no bearing upon the question at issue, and is calculated to prejudice the accused in the minds of the jurors.<sup>90</sup>

All facts which are necessary to explain or introduce the fact in issue, or a relevant fact, or which will rebut or support an inference which may be drawn from a fact in issue, or a relevant fact, are admissible.<sup>91</sup>

inadmissible to corroborate their testimony. The instructions which such officer gave when he was chief of the force and the method of work pursued by them when under his orders as such chief had no pertinency on the trial of defendants for acts done long after he had ceased to hold office. *Com. v. Cohen*, 127 Mass. 282.

On a trial for conspiracy to pervert legal process to the unlawful purpose of extorting a deed from A to B, testimony offered to show that the paper title was already in B was rejected as tending to disprove fraudulent purpose, the possession, rather than the title, being the issue. *State v. Shooter*, 8 Rich. L. (S. C.) 72.

Evidence that K. wrote letters while in prison to one Flora B. who was not called as a witness, and whose relationship to him was not shown, has no tendency to show that K.'s true name was B., and was inadmissible for that purpose. *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997.

Where a conspiracy to prosecute G., an innocent person, is charged, it cannot be shown that the defendants prosecuted other parties who were guilty, and with whom G. had no connection. "The prosecution of guilty persons is not proof of a conspiracy to prosecute the innocent." *State v. Walker*, 32 Me. 195.

Where the state was required to prove that the prisoner received the stolen "treasury notes" described in the indictment, the evidence admitted to establish this fact was that the prisoner was seen in a store a short time after the larceny, whether a day, a week, or a month after is not stated; that he purchased several articles and had some "bills of money," neither the amount nor denomination of which was seen. Was the sum of money seen with the prisoner unusual in amount? Was any of it of the denomination of that

which was stolen? Was there any incident connected with the store transaction calculated to raise even a suspicion against him? A man is seen in a store, having some money, and making some, we are to assume, ordinary purchases in the usual course of business. The circumstance of his having some money was one common to all persons who use a circulating medium, and was unaccompanied by a single mark or incident which distinguished his possession from that of others, of a similar sum of money. *State v. Carter*, 72 N. C. 99.

A prosecution for homicide where the defense relied upon was that of alibi, a witness whose house was near the home of the deceased was asked "who came with J. B. (a third party) to your house immediately after the killing?" This question was held to have been properly excluded because the answer could have shed no light on the issue involved. *Goodlett v. State*, (Ala.), 33 So. 892.

While it is always competent for the accused to show that another committed the crime with which he is charged, a question as to whether a third party, naming him, did not "leave the neighborhood in a very short time after the killing" may be excluded. *Goodlett v. State*, (Ala.), 33 So. 892. *Citing Ownesbey v. State*, 82 Ala. 63, 2 So. 764; *Kemp v. State*, 89 Ala. 52, 7 So. 413.

Evidence of remarks made by, and of conduct of, deceased two or three hours before the killing and a mile distant from the scene of the crime, and having no relation to, or connection with, the accused, whom the deceased had never met, can have no bearing on the question at issue in the trial. *Macklin v. Com.*, 93 Ky. 294, 19 S. W. 931.

<sup>90.</sup> *Moore v. U. S.*, 150 U. S. 57; *Alexander v. U. S.*, 138 U. S. 353.

<sup>91.</sup> *United States v. U. S.*

It is not necessary to offer at once all the circumstances necessary to establish the proposition in issue. The party seeking to prove or disprove it may proceed step by step. Whatever is a condition either of the existence or non-existence of a relevant hypothesis may be thus shown.<sup>92</sup>

It is to be borne in mind that where the matter of relevancy is being considered there is no reason why the rules applicable in criminal cases should not also govern in civil cases. Where questions of the same character are to be determined, the rules of evi-

Flowery, 25 Fed. Cas. No. 15,122.

*Georgia*.—Walker v. Mitchell, 41 Ga. 102.

*Iowa*.—State v. Lyon, 10 Iowa 340.

*New Jersey*.—Wallace v. Kennelly, 47 N. J. L. 242.

*Pennsylvania*.—Rodgers v. Stophel, 32 Pa. St. 111, 72 Am. Dec. 775.

**Possession of Money After Robbery.**—On a trial for murder alleged to have been committed for the purpose of robbery, the mere fact that the defendant had in his possession shortly after the homicide a large amount of money may be shown, though such money be not identified as ever having been in possession of the deceased. Such testimony may be of little importance standing by itself, but it may become more significant where reinforced by other circumstances of the case. *Lancaster v. State*, (Tex. Crim. App.), 31 S. W. 515.

<sup>92</sup> *Johnson v. Com.*, 115 Pa. St. 369, per Sterett, J.

**Identifying the Criminal.**—Here the great point in the case was as to the identity of the prisoner. It was charged that the defendant, who had been recently discharged from prison, was guilty of murder of one S., and the theory was that the perpetrator of the crime was the same person who enticed S. away from his house and shortly afterwards returned to the house and demanded money from the wife of S. Mrs. S. testified that "the man she confronted on the night of the murder wore a dark frock coat, 'of pretty good length,' etc., corresponding to the one exhibited in the court. The testimony of the keeper of Moyamensing prison was that when Johnson was discharged on November 20th, he gave

him a 'pair of black pants, a long dark coat,' similar to the coat shown in court and referred to by Mrs. Sharpless. It was important therefore for the commonwealth to show where the coat thus exhibited to these witnesses came from, and if possible connect the prisoner with its possession. For that purpose the testimony of Lewis, in connection with that of Officer Anderson, was relevant. The latter testified that in the house where the prisoner lived when arrested he found two coats, claimed by him, one of which he said he had bought from a tramp in West Philadelphia; also a spirit level which he said he had found on the street. The coat which he alleged he had bought from the tramp, spirit level and other articles found in his possession, were identified by Lewis as his property taken by some one from his house shortly after the murder. He also identified the coat—exhibited in court and referred to by Mrs. S. and Livingston, the keeper of Moyamensing—as the coat left at his house at the time his own coat, spirit level and other articles were taken. The tendency of this evidence was to trace into the prisoner's possession the coat thus identified by Lewis. In the absence of satisfactory explanation as to how he acquired Lewis' property the fact that these articles were found in his possession and were claimed by him warranted the inference that he probably took them away and at the same time left the long frock coat in question." Though the evidence was purely circumstantial, and perhaps not very strong in itself, it was held relevant and proper in connection with other facts and circumstances for the consideration of the jury.

dence are the same in both classes of cases.<sup>93</sup>

B. IN PROOF OF CONSPIRACY. — a. *Acts of Party*. — A conspiracy must generally be proved by the acts of the party himself and of any other with whom it is attempted to connect him "concurring together at the same time, and to the same purpose or particular object." "The evidence of the conspiracy is more or less strong, according to the publicity or privacy of the object of such concurrence and the greater or less degree of similarity in the means employed to effect it. The more secret the one and the greater the coincidence in the other, the stronger is the evidence of conspiracy."<sup>94</sup>

b. *Acquaintance*. — The acquaintance of the parties charged with conspiring is always competent to be shown, since from it an inference may be drawn not incompatible with the existence of the agreement.<sup>95</sup>

c. *Business Relations*. — Business relations existing between the parties may be shown, as also any communication they may have had with each other, and the more or less relationship they sustained to each other, the interest they may have had in doing what is charged to be the object of the conspiracy, and the interest each one has, and the desire or willingness shown by the others to assist in accomplishing that end; and also what was done, as is claimed in carrying out the conspiracy to effect the common design or purpose charged; and the several parts performed, and wherever performed, toward reaching the common end; and other like circumstances which may throw light upon the question whether the conspiracy existed.<sup>96</sup>

93. *Bell v. Troy*, 35 Ala. 184; *Brown v. Schock*, 77 Pa. St. 471; *Reg. v. Murphy*, 8 Car. & P. 297.

As to the Order of Testimony, the practice and the principle are the same in both civil and criminal cases. "Where a chain of testimony is proposed, the links of which, unconnected, would be irrelevant, counsel must be allowed to begin somewhere, upon the expectation that the other links are to be afterwards supplied, and for this the court rely upon the statement of counsel, professional honor being a guaranty against abuse. But the order in which such evidence shall be introduced is under the control of the court, who may direct the counsel to begin at any part of the proposed chain of evidence as the purposes of justice may seem to require." *U. S. v. Flowery*, 1 Spr. 109, 25 Fed. Cas. No. 15,122.

94. 1 East P. C. 97, quoted in *Gardner v. Preston*, 2 Day (Conn.) 205, 2 Am. Dec. 91.

And see the following cases: *England*. — *Mulcahy v. Reg.*, L. R. 3 H. L. 306.

*Canada*. — *Reg. v. Connolly*, 25 Ont. 151.

*Connecticut*. — *State v. Gannon*, (Conn.), 52 Atl. 727.

*Massachusetts*. — *Com. v. Meserve*, 154 Mass. 64, 21 N. E. 997.

*Texas*. — *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746.

95. *Reinhold v. State*, 130 Ind. 467, 36 N. E. 306 (where it was shown that one who was alleged to be a conspirator took the witness to the office of the defendant, alleged to be a co-conspirator.) *U. S. v. Lancaster*, 44 Fed. 896, 10 L. R. A. 333; *U. S. v. Cole*, 5 McLean 513, 25 Fed. Cas. No. 14,832.

96. *U. S. v. Newton*, 52 Fed. 275.

*Proof of Conspiracy*. — A letter received by one indicted for a conspiracy from his housekeeper, who was intimately acquainted with his affairs, advising him to disguise himself for the purpose of the trial, is

admissible as showing his relation to the case and his means of information. *Com. v. Waterman*, 122 Mass. 43.

A conspirator, not on trial, having refused to testify on the ground that he might criminate himself, it is competent, for the purpose of showing that he printed circulars used during the existence of the conspiracy and in furtherance of it, to prove the testimony given by him in regard to that matter in the trial of another case, not as the declaration of co-conspirator, but merely to show printing. *State v. Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

**Soliciting Bribes.**—On a trial of aldermen for a conspiracy to solicit bribes for their votes for licenses, evidence that a former rule of the board, under which the defendant aldermen would not have a right in the first instance to vote on applications for licenses, was changed so that they would have this right, was competent against any one of the defendant aldermen who voted for the change. *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189.

On the trial of an indictment for a conspiracy to procure large numbers of persons to assemble for the purpose of exciting terror in the minds of Her Majesty's subjects, evidence was given of several meetings at which the defendants were present. It was held that the superintendent of police might testify that persons complained to him of being alarmed at these meetings, and that it was not necessary to call the persons who made the complaints. *Reg. v. Vincent*, 9 Car. & P. 275.

On trial of an indictment for conspiracy to cause a marriage falsely to appear of record, with intent to prevent a person from contracting another marriage, the testimony of the alleged bridegroom that no marriage ceremony was ever performed between himself and the alleged bride, and that he was never married to her, is admissible, since such conspiracy necessarily requires proof of the false and fraudulent character of the record, which is only presumptive proof of marriage. *Com. v. Waterman*, 122 Mass. 43.

**Obstructing Mails.**—So, on a

prosecution of several for conspiracy to obstruct the United States mails, telegrams exchanged by defendants and other participants in the strike, showing an intentional stopping of trains by defendants, and announcing to them a boycott of a certain class of cars, were held properly admitted. *Clune v. U. S.*, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. ed. 269.

On trial of an indictment charging a conspiracy to commit burglary, evidence that defendant was seeking an interview with his co-conspirator for the purpose of arranging to commit burglaries is admissible, as tending to show his willingness to conspire as charged in the indictment. *Reinhold v. State*, 130 Ind. 467, 30 N. E. 306.

**Boycotting.**—After the introduction of evidence, on a trial for a conspiracy to boycott, that one of the defendants had actively attempted to induce the public to withdraw their patronage from the employer, testimony that said defendant and another person had been seen walking on the street, and that from between them dropped handbills urging the public generally to boycott the employer, is admissible, even though the witness was unable to say whether the handbills had been dropped by the defendant or by his companion. The jury might find that defendant dropped them. *State v. Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

On a trial for conspiracy to procure money to be paid to aldermen for their votes for granting licenses, evidence by witness that, while the conspiracy was in force, he and others were paying money in order to get licenses, and that one of the aldermen had received the money, is material. *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189.

Though an indictment merely charges a conspiracy to cheat and defraud one J. by selling him land falsely represented to contain a gold mine, evidence that defendants jointly "salted" the alleged gold mine is competent to show a previous unlawful combination. *State v. Brady*, 107 N. C. 822, 12 S. E. 325.

On trial for conspiracy to obtain goods under false pretenses, it may



C. IN PROOF OF FRAUD. — Fraud itself is always concealed, and the truth is to be discovered more often from circumstances, from the interests of the parties, from the irregularities of the transaction, coupled with injury worked to an innocent party, than from direct and primary evidence of the fraudulent contrivance itself.<sup>97</sup>

Positive proof of fraud can hardly ever be had. Fraud is a subject of legitimate inference from facts.<sup>98</sup> No rigid rule can be applied to measure the admissibility of circumstances to prove fraud, for they arise out of the condition, relation, conduct and declarations of the parties, and those are infinitely diversified. And so, on the trial of an issue of that sort, great latitude is allowed in the admission of evidence.<sup>99</sup>

**Deceptive Assertions, False Representations** and actions which may be trivial in themselves may, in a given case, be decisive of a fraudulent design.<sup>1</sup> Circumstances which seem to have little or no connec-

be shown that K., who had assumed the name of B. in the transaction, was married under name of K. shortly before the conspiracy, and that he went under name of C., and that his wife, while living with him, took the name of C., as having "some tendency to show that the assumption of the name of Brown was a mere pretense, and that the agreement that he should assume that name for the purpose of obtaining goods on credit was a conspiracy to cheat" as charged. *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997.

**"Anything Done at Any Time,** even as late as the day before the trial, which shows that a person had been at a former time a party to a conspiracy is admitted in evidence against such person." *Kelly, C. B., in Reg. v. Henson*, 12 Cox C. C. 111, where it was shown that at the date of the fraud charged one defendant had declared that he had called himself by the name of H. and represented himself as one of the firm of H. & Co., which was the name under which the frauds were committed.

97. *Casey v. Leggett*, 125 Cal. 664, 58 Pac. 264; *Levy v. Scott*, 115 Cal. 39, 46 Pac. 892.

98. *Gordon v. Ismay*, 55 Mo. App. 323; *Clark v. Baiard*, 9 N. Y. 183.

99. **All Indicia of Fraud.** — The meaning of this is, "that every circumstance in the condition and relation of the parties, and every act and declaration of the party charged with the fraud, shall be competent

evidence, if in the opinion of the judicial mind it bears such a relation to the transaction under investigation as in its nature is calculated to persuade the reasonable men in the jury-box to the belief that the allegation of fraud is or is not well founded. Whatever is not of a nature to beget mental conviction upon the point under inquiry, is irrelevant evidence, and should be rejected — whatever is of that nature should be admitted. And of this moral quality of proofs the presiding judge is the arbiter. He admits and rejects, under our supervision, according to his estimate, not of the effect of that evidence, for that is for the jury, but according to his estimate of the fitness of the evidence to conduct human reason to a sound conclusion on the point in question. In the exercise of this high discretion he is to be careful not to set up an assumption of the fraud, and then to reason that this or that tends to prove it. He is rather to start with the presumption that a transaction, fair on its face, was fair in fact, which is the meaning of that other maxim that fraud is never to be presumed." *Stauffer v. Young*, 3 Wright (Pa.) 455.

1. *United States.* — *Carr v. Gale*, 2 Ware 330, 5 Fed. Cas. No. 2,434.

*Alabama.* — *Snodgrass v. Branch Bank of Decatur*, 25 Ala. 161, 60 Am. Dec. 505.

*California.* — *Kelly v. Owens*, (Cal.), 30 Pac. 596.

tion with the principal transaction are often looked to because on a strict examination they may throw light upon and explain circumstances which have a direct bearing upon it, and which are in evidence.<sup>2</sup> It is not sufficient that the circumstance gives color to the claim of fraud. It must tend to establish a probability of its existence.<sup>3</sup> But any testimony tending to establish the fraud is admissible, though it may be of slight value.<sup>4</sup>

*Connecticut.*—Hoxie v. Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

*Illinois.*—Endsley v. Johns, 120 Ill. 469, 12 N. E. 247, 60 Am. Rep. 572.

*Kansas.*—Elerick v. Reid, 54 Kan. 579, 38 Pac. 814.

*Maine.*—Cushing v. Rice, 46 Me. 303, 71 Am. Dec. 579.

*Massachusetts.*—Wiggin v. Day, 75 Mass. 97.

*Missouri.*—Stewart v. Severance, 43 Mo. 322, 97 Am. Dec. 392.

*North Carolina.*—Knight v. Houghtalling, 85 N. C. 17.

*Pennsylvania.*—Stauffer v. Young, 3 Wright (Pa.) 455.

*South Carolina.*—Gist v. McMun-kin, 2 Rich. L. 154.

*Virginia.*—Hickman v. Trout, 83 Va. 478, 3 S. E. 131.

**2. Purpose and Intent.**—In questions of fraud it is often necessary to inquire into the *quo animo* of the parties; and circumstances to elucidate that may be given in evidence. It may be of consequence, too, to prove a knowledge of the party said to be practiced upon, of the existence of a certain state of things which is disputed by him; and circumstances tending, even remotely, to establish such knowledge is proper evidence. Causey v. Wiley, 27 Ga. 444.

**3. Doctor v. Gilmartin,** 5 N. Y. St. 894. Here an action was brought for the recovery of damages sustained by the plaintiff by reason of the defendant having bought goods on false representations that such goods were bought for a third party, who was pecuniarily responsible. To give color to the plaintiff's claim that representations of agency were made, the plaintiff offered a power of attorney from such third party to carry on a certain business. It was held that such proof was absolutely incompetent on the fact in issue, and

was only competent to show what business the defendant could carry on, and the time and place, when and where he could carry it on for such third party.

**4. Vigus v. O'Bannon,** 118 Ill. 334, 8 N. E. 778; Carr v. Gale, 2 Ware 330, 5 Fed. Cas. No. 2,434.

When a party attacks a transaction upon the ground of fraud between a purchaser and a debtor, every circumstance that can reasonably and legally be admitted must be permitted to be introduced as evidence. The rejection of some very slight circumstance might so weaken the general circumstances as to defeat a party who had in fact a meritorious claim. Rudy v. Katz, 23 Ky. L. Rep. 1,697, 66 S. W. 18.

**Indicia of a Fraudulent Conveyance.**—The following circumstances were enumerated in a recent case as being among the usual *indicia* of a fraudulent conveyance: gross inadequacy of price, want of security for purchase money, unusual length of credit for the deferred installments, bonds taken payable at long periods when the practice was that the deferred installments evidenced by them had already been satisfied in the main by antecedent debts due by the obligee to the obligor, the fact that the conveyance was made in payment of alleged indebtedness of father to son residing together as members of one family, the fact that the indebtedness and insolvency of the grantor were well known to the grantee, threats and pendency of suits, secrecy and concealment of the transaction, failure for over a year to acknowledge and record the deed, continuance in possession by the grantor, the absence of itemized accounts, vouchers, etc., inconsistencies and contradictions in the testimony of the grantor and grantee, and all unexplained. Hickman v. Trout, 83 Va. 478, 3 S. E. 131.

**2. Facts Showing Motive.** — A. GENERALLY. — In proof of motive, any circumstance, though apparently slight in itself, that tends to throw light upon the motives involved in the act in question, or which tends to explain the conduct of a party accused of crime, is admissible, though it may not seem to bear directly upon the contested matters of fact in the cause.<sup>5</sup>

B. REVENGE OR GAIN. — So it may be shown that the defendant had, or believed that he had, suffered some injury at the hands of his victim,<sup>6</sup> or that he wished to rid himself of some financial obligation,<sup>7</sup> or that he had cause to dread the revelation of facts known to the deceased.<sup>8</sup> Or that he needed or was covetous of insurance money

5. *United States.* — *Davis v. U. S.*, 107 Fed. 753; *Tobin v. Walkinshaw*, 23 Fed. Cas. No. 14,070.

*Alabama.* — *Cowan v. State*, (Ala.), 34 So. 193; *Martin v. Hall*, 70 Ala. 421; *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95; *Flanagan v. State*, 46 Ala. 703; *Baalam v. State*, 17 Ala. 451.

*California.* — *People v. Kern*, 61 Cal. 244.

*Delaware.* — *State v. Dill*, (Del.), 18 Atl. 763.

*District of Columbia.* — *McUin v. U. S.*, 17 D. C. App. 323.

*Georgia.* — *Fraser v. State*, 55 Ga. 325; *Hunter v. State*, 43 Ga. 483.

*Kentucky.* — *Cluverius v. Com.*, 8 Crim. L. Mag. 760.

*Michigan.* — *Wellar v. People*, 30 Mich. 16; *Passmore v. Passmore*, 50 Mich. 626, 16 N. W. 170; *Fischer v. Fischer*, (Mich.), 91 N. W. 633; *People v. Bemis*, 51 Mich. 422.

*Mississippi.* — *Bateman v. State*, 64 Miss. 233, 1 So. 172.

*Nevada.* — *State v. Larkin*, 11 Nev. 314.

*New Hampshire.* — *Hale v. Taylor*, 45 N. H. 405.

*New York.* — *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524; *Lake v. People*, 1 Park. Crim. Rep. 495; *People v. Mead*, 1 Wheel. Crim. Cas. 36.

*North Carolina.* — *State v. Gooch*, 94 N. C. 987.

*Pennsylvania.* — *McLain v. Com.*, 99 Pa. St. 86; *McCue v. Com.*, 78 Pa. St. 185, 21 Am. Rep. 7.

*Texas.* — *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; *Dill v. State*, 1 Tex. App. 278.

*Vermont.* — *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

*Virginia.* — *Parsons v. Harper*, 16 Gratt. 64.

*Webb v. State*, 73 Miss. 456, 19 So. 238, was a case where the defendant was charged with the murder of a man whose sister he had seduced. The fact of the seduction was shown; also that, having promised to marry the girl if the child resembled him, he refused to do so. He threatened to burn the house of the deceased unless the latter cared for the girl. He showed impatience at being watched by the family when he visited the girl, and whipped a nephew of the deceased. All these facts tended to show the existence of strained relations between the parties and the cause therefor, and from them a motive might be inferred.

**Motive May Be Inferred** from circumstances in the absence of, notwithstanding the direct testimony of the parties. *Blodgett Paper Co. v. Farmer*, 41 N. H. 398.

6. *England.* — *Rex v. Ferrers*, 19 St. Tr. 885.

*Georgia.* — *Fraser v. State*, 55 Ga. 325; *Hammack v. State*, 52 Ga. 397; *Kelly v. State*, 49 Ga. 12.

*Illinois.* — *Crane v. People*, 168 Ill. 395, 48 N. E. 54.

*New York.* — *Breen v. People*, 4 Park. Crim. Rep. 380.

*Texas.* — *Breedlove v. State*, 26 Tex. App. 445, 9 S. W. 768; *Coward v. State*, 6 Tex. App. 59.

7. *State v. Rainsbarger*, 74 Iowa 196, 37 N. W. 153; *People v. Hendrickson*, 1 Park. Crim. Rep. (N. Y.) 406.

8. *State v. Posey*, 4 Strob. (S. C.) 142; *Cluverius v. Com.*, 8 Crim. L. Mag. (Ky.) 760.

which he believed the crime would bring him;<sup>9</sup> or that he believed that on the death of his victim he would come into possession of the latter's property;<sup>10</sup> or that robbery was the motive, and that the accused was found in possession of property of the deceased.<sup>11</sup>

C. JEALOUSY. — Or that the defendant entertained violent passion for a certain woman and an insane jealousy of all who approached her, and had evinced a desire to put a rival out of the way.<sup>12</sup>

D. LACK OF AFFECTION. — And where the accused is charged with the murder of his wife, to overcome the presumption of innocence arising from the marital relation<sup>13</sup> any facts may be shown which have a tendency to prove a lack of the affection natural to that relation and a desire on his part to be free from her companionship.<sup>14</sup>

9. *Farmers' Ins. Co. v. Gargett*, 42 Mich. 289, 3 N. W. 954; *Roe v. State*, 25 Tex. App. 33.

10. *Clough v. State*, 7 Neb. 320; *Murphy v. People*, 63 N. Y. 590.

11. *Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

12. *McUin v. U. S.*, 17 App. D. C. 323; *Hunter v. State*, 43 Ga. 483; *McCue v. Com.*, 78 Pa. St. 185, 21 Am. Rep. 7.

13. *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556, where it was said that this presumption was a different thing from the ordinary presumption of innocence, and an additional force in favor of the accused.

14. **Domestic Difficulties.** — Thus it may be shown that the husband was not desirous of his wife's companionship, that he treated her with contempt, that he refused to live with her, that he constantly upbraided her and accused her of infidelity, and that he made an unsuccessful attempt to obtain a divorce. *People v. Hamilton*, 137 N. Y. 531, 32 N. E. 1,071.

The husband's infatuation for another woman may always be brought forward by the prosecution in support of the theory as to motive, and this may be shown by his threats against anyone who should interfere between them, as well as by acts of undue intimacy. *Caddell v. State*, 129 Ala. 57, 30 So. 76, where the wife had instituted a prosecution for adultery. See also *People v. Kesler*, 3 Wheel. Crim. Cas. 18.

So it is a circumstance which may have some bearing on the question that the wife did not bring to the husband the money which he ex-

pected from the marriage (*People v. Hendrickson*, 1 Park. Crim. Rep. 406); or that he had requested his wife's consent to a divorce and had been refused. *State v. Jones*, 98 N. C. 651, 3 S. E. 507.

The deductions to be drawn from this line of cases acquire added force from the constant repetition of facts which the cases exhibit.

See: — *Alabama*. — *Wharton v. State*, 73 Ala. 366.

*Connecticut*. — *State v. Watkins*, 9 Conn. 47, 21 Am. Dec. 712.

*Georgia*. — *Shaw v. State*, 60 Ga. 246.

*Iowa*. — *State v. Kennedy*, 77 Iowa 208, 41 N. W. 609; *State v. Cole*, 63 Iowa 695, 17 N. W. 183.

*New York*. — *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846.

*Texas*. — *Pinckard v. State*, 13 Tex. App. 468.

*Wisconsin*. — *Mack v. State*, 48 Wis. 271.

In *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676, the prosecution claimed that the husband was avaricious and that his object in marrying the woman was to get the money which was supposed would be hers when her mother died. It was shown that after her mother's death she bid in some personal property at the sale of her mother's effects, paying 95 cents for one article, which he considered a waste of money.

**An Admission by the Husband** consistent with the prosecution's theory of motive does not shut out proof of specific acts showing ill-treatment of the wife and having a bearing on the question of motive. *Com. v. Spink*, 137 Pa. St. 255, 20

**E. COLLATERAL CRIME.**—The commission of a collateral crime by the accused may be shown if it clearly has a tendency to supply a motive for the commission of the crime for which the accused is on trial.<sup>15</sup>

**F. MOTIVE DISPROPORTIONATE.**—The fact that the motive assigned is to the normal mind altogether disproportionate to the gravity of the offense affords no ground for the exclusion of the circumstances from which the motive may be inferred.<sup>16</sup> Even when such evidence is of slight value and is altogether inconclusive it is necessary to submit it under proper instructions to the jury who are to judge of its weight.<sup>17</sup>

Atl. 680, where the husband was charged with conspiring with others to have his wife declared insane.

15. *England.*—*Rex v. Cleeves*, 4 Car. & P. 221.

*Alabama.*—*Gassenheimer v. State*, 52 Ala. 313.

*California.*—*People v. Walters*, 98 Cal. 138, 32 Pac. 864; *People v. Pool*, 27 Cal. 572.

*Georgia.*—*Jones v. State*, 63 Ga. 395.

*Kansas.*—*State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322.

*Kentucky.*—*Maden v. Com.*, 4 Ky. L. Rep. 45.

*Massachusetts.*—*Com. v. Choate*, 105 Mass. 451.

*Missouri.*—*State v. Williamson*, 106 Mo. 162, 17 S. W. 172.

*Nebraska.*—*Smith v. State*, 17 Neb. 358, 22 N. W. 780.

*New Hampshire.*—*State v. Palmer*, 65 N. H. 216, 20 Atl. 6.

*New Mexico.*—*Territory v. McGinnis*, (N. M.), 61 Pac. 208.

*New York.*—*People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Pontius v. People*, 21 Hun 328.

*North Dakota.*—*State v. Kent*, 5 N. D. 516, 67 N. W. 1,052.

*Ohio.*—*Brown v. State*, 26 Ohio St. 176.

*Pennsylvania.*—*Goersen v. Com.*, 106 Pa. St. 477, 51 Am. Rep. 534.

*Texas.*—*Blackwell v. State*, 29 Tex. App. 194, 15 S. W. 597; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188.

*Wisconsin.*—*Halleck v. State*, 65 Wis. 147, 26 N. W. 572.

16. *State v. Lentz*, 45 Minn. 177, 47 N. W. 720, where the prosecution attempted to show a desire to remove one who was an obstacle to a desired marriage.

**Adequacy of Motive.**—Just in proportion to the depravity of the mind would a motive be trifling and insignificant which prompted the commission of a great crime. We can never say the motive was adequate to the offense, for human minds would differ in their ideas of adequacy, according to their own estimate of the enormity of the crime, and a virtuous mind would find no motive sufficient to justify the felonious taking of human life. *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721.

And see *Com. v. Coe*, 115 Mass. 481; *Shailer v. Bumstead*, 99 Mass. 112; *Murphy v. People*, 63 N. Y. 590.

**Manners and Customs of Defendant's Native Land.**—In 1851 a learned judge, in commenting to the jury, in a murder case, upon the number of accusations of homicide which had in that year been brought against foreign-born persons within his own jurisdiction, directed the jury to consider the circumstances which surround such persons from infancy to manhood, and the effect of such circumstances upon the character of the accused. He instanced the want or defects in the education of such persons, and the peculiarities of governments under which they had lived. He referred to the feelings of "hostility to all governments, which grows with them to manhood, and which here arrays them against the law and its ministers, creating in them a disposition to commit crimes unknown and almost incomprehensible to us." *People v. Gormzig*, 2 Edm. Sel. Cas. (N. Y.) 236.

17. *Story v. State*, 68 Miss. 609,

**3. Facts Showing Intention.** — A. INFERRED FROM ACTS. — Intention is a condition of the mind, a mental status, and when uncommunicated can be inferred only from what the party has done, or has said, and from the acts and circumstances accompanying the main transaction.

B. WHEN EVIDENCE ADMISSIBLE. — Whenever, therefore, it is important to determine the intent with which an act was done, the act not being of such a nature as necessarily to imply a guilty intention, then evidence may be given of any facts or circumstances from which an inference may be drawn as to the fact in issue.<sup>18</sup> Whether or not these facts justify the inference which it is sought to establish by them is for the jury alone to say.<sup>19</sup>

C. EACH CASE MUST DEPEND UPON ITS OWN FACTS AND CIRCUMSTANCES. — While one case may furnish a long train of circumstances and events, in another a single act or the manner in which the act under investigation was done, may justify the inference of the intent.<sup>20</sup>

D. PREVIOUS ACTS OF SAME KIND. — The intent may be inferred from evidence tending to show the commission by the defendant of previous acts of the same kind.<sup>21</sup> Such evidence is most frequently

10 So. 47; *Parson v. Harper*, 16 Gratt. (Va.) 64; *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676.

18. *United States*. — U. S. v. *Armstrong*, 2 Curt. C. C. 446, 24 Fed. Cas. No. 14,467; U. S. v. *Mingo*, 2 Curt. C. C. 1, 26 Fed. Cas. No. 15,781.

*Alabama*. — *McCormick v. Joseph*, 77 Ala. 236; *Durett v. State*, 62 Ala. 434; *Burke v. State*, 71 Ala. 377; *Wheless v. Rhodes*, 70 Ala. 419.

*Arkansas*. — *Austin v. State*, 14 Ark. 555.

*Delaware*. — *State v. Magnell*, 3 Pen. 307, 51 Atl. 606, where on a charge of procuring a miscarriage, the intent was inferred from measures of precaution and concealment taken by the prisoner, and from other circumstances of conduct.

*Indiana*. — *Padgett v. State*, 103 Ind. 550, 3 N. E. 377.

*Iowa*. — *State v. Woodard*, 84 Iowa 172, 50 N. W. 885; *State v. Teeter*, 69 Iowa 717, 27 N. W. 485; *State v. Maxwell*, 42 Iowa 208.

*Louisiana*. — *State v. Munco*, 12 La. Ann. 625.

*Massachusetts*. — *Com. v. Hawkins*, 3 Gray 463; *Williams v. Woodman*, 8 Pick. 78.

*Michigan*. — *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. 609.

*New Hampshire*. — *Hale v. Taylor*, 45 N. H. 405; *Blodgett Paper Co. v. Farmer*, 41 N. H. 398.

*New York*. — *Hennequin v. Naylor*, 24 N. Y. 139; *Hersey v. Benedict*, 15 Hun 282.

*Ohio*. — *Esker v. McCoy*, 5 Ohio Dec. 573.

*Virginia*. — *Booth v. Com.*, 4 Gratt. 525.

19. *New York*. — *People v. Kelly*, 35 Hun 295; *People v. Conroy*, 33 Hun 119.

*Texas*. — *Perry v. State*, 44 Tex. 473; *Murray v. State*, 1 Tex. App. 417.

20. *People v. Walworth*, 4 N. Y. Crim. 355.

21. *England*. — *Reg. v. Stephens*, 16 Cox C. C. 387; *Reg. v. Dossett*, 2 Car. & K. 306.

*United States*. — *Castle v. Bullard*, 23 How. 172; *American Surety Co. v. Pauly*, 72 Fed. 470.

*Alabama*. — *Stanley v. State*, 88 Ala. 154, 7 So. 273; *Ross v. State*, 62 Ala. 224; *Ryall v. Marx*, 50 Ala. 31.

*California*. — *Butler v. Collins*, 12 Cal. 457.

*Connecticut*. — *Hall v. Brown*, 30 Conn. 551.

*Idaho*. — *State v. McGann*, (Idaho), 66 Pac. 823.

resorted to, and affords the surest basis for an inference in investigating such charges as obtaining money or goods under false pretenses,<sup>22</sup> adultery or other sexual crimes,<sup>23</sup> forgery,<sup>24</sup> passing coun-

*Indiana*.—Higgins v. State, 157 Ind. 57, 60 N. E. 685; Lauter v. McEwen, 8 Blackf. 495.

*Iowa*.—State v. Jamison, 74 Iowa 613, 38 N. W. 509.

*Kentucky*.—L. & N. R. Co. v. Berry, 9 Ky. L. Rep. 683.

*Louisiana*.—State v. Porter, 45 La. Ann. 661, 12 So. 832.

*Maine*.—Nichols v. Baker, 75 Me. 334.

*Massachusetts*.—Horton v. Weiner, 124 Mass. 92; Com. v. McCarthy, 119 Mass. 354; Com. v. Shephard, 83 Mass. 575.

*Michigan*.—People v. Thacker, 108 Mich. 652, 66 N. W. 562; Meister v. People, 31 Mich. 99.

*Missouri*.—State v. Phillips, 160 Mo. 503, 60 S. W. 1,050; State v. Franke, 159 Mo. 535, 60 S. W. 1,053.

*New Hampshire*.—State v. Lepage, 57 N. H. 245, 24 Am. Rep. 69; Bradley v. Obeare, 10 N. H. 477.

*New York*.—People v. Dimick, 107 N. Y. 13, 14 N. E. 178; People v. Lyon, 1 N. Y. Crim. 400.

*North Carolina*.—State v. Murphy, 84 N. C. 742.

*Ohio*.—State v. Hahn, 8 Ohio N. P. 101.

*Pennsylvania*.—Com. v. Birriolo, 197 Pa. St. 371, 47 Atl. 355; Neff v. Landis, 110 Pa. St. 204, 1 Atl. 177.

*South Dakota*.—State v. Phelps, 5 S. D. 480, 59 N. W. 471.

*Tennessee*.—Wiley v. State, 3 Cold. 362.

*Texas*.—Cortez v. State, (Tex. Crim. App.), 66 S. W. 453; Goodwyn v. State, (Tex. Crim. App.), 64 S. W. 251; Brown v. State, (Tex. Crim. App.), 59 S. W. 1,118; Street v. State, 7 Tex. App. 5.

*Vermont*.—Eastman v. Premo, 49 Vt. 355, 24 Am. Rep. 142.

*Virginia*.—O'Boyle v. Com., 100 Va. 785, 40 S. E. 121.

*Washington*.—State v. Place, 5 Wash. 773, 32 Pac. 736.

For the rules governing the admission of evidence of this kind, see article "INTENT."

**22.** *England*.—Reg. v. Ollis, 19 Cox C. C. 554.

*United States*.—Bottomley v. U. S., 1 Story 135, 3 Fed. Cas. 1,688.

*Massachusetts*.—Com. v. Lubinsky, 182 Mass. 142, 64 N. E. 966; Com. v. Eastman, 1 Cush. 189, 48 Am. Dec. 596.

*Michigan*.—People v. Henssler, 48 Mich. 49, 11 N. W. 804.

*Missouri*.—State v. Jackson, 112 Mo. 585, 20 S. W. 674 ("confidence game"); State v. Sarony, 95 Mo. 349, 8 S. W. 407; State v. Bayne, 88 Mo. 604.

*New York*.—Shipplly v. People, 86 N. Y. 375, 40 Am. Rep. 551; Weyman v. People, 6 Thomp. & C. 696; Niles v. People, 4 Am. L. J. (N. S.) 507; *In re* Hitchcock, 6 City H. Rec. 43 (conspiracy to defraud of goods).

*North Carolina*.—State v. Walton, 114 N. C. 783, 18 S. E. 945.

*Pennsylvania*.—State v. Finney, 1 Wkly. L. Bull. 30.

*Tennessee*.—Rafferty v. State, 91 Tenn. 655, 16 S. W. 728.

*Virginia*.—Trogdon v. Com., 31 Gratt. 862.

**23.** *Maine*.—State v. Witham, 72 Me. 531.

*Massachusetts*.—Com. v. Merriam, 14 Pick. 518, 25 Am. Dec. 420. And see Thayer v. Thayer, 101 Mass. 111.

*New Hampshire*.—State v. Wallace, 9 N. H. 515.

*Ohio*.—Bowers v. State, 29 Ohio St. 542.

*Pennsylvania*.—Com. v. Bell, 36 Wkly. N. Cas. 146.

*Tennessee*.—Williams v. State, 8 Humph. 585.

**24.** *England*.—Reg. v. Nisbett, 6 Cox C. C. 320; Rex v. Balls, 1 M. C. C. 470.

*Alabama*.—McDonald v. State, 83 Ala. 46, 3 So. 305.

*Maryland*.—Bell v. State, 57 Md. 108.

*Missouri*.—State v. Minton, 116 Mo. 605, 22 S. W. 808.

*Nebraska*.—Burlingim v. State, 61 Neb. 276, 85 N. W. 76.

*New York*.—People v. Everhardt, 104 N. Y. 591, 11 N. E. 62.

terfeit money,<sup>25</sup> or having possession of it with intention to pass it;<sup>26</sup> using the mails for fraudulent purposes,<sup>27</sup> procuring<sup>28</sup> or attempting to procure an abortion.<sup>29</sup>

E. THREATS, ETC. — As bearing on this question it is proper to introduce in evidence declarations of the accused in the way of threats, or verbal indications of a similar nature, pointing to the intended commission of a wrongful act for the purpose of satisfying private vengeance or gratifying an inherent passion for wickedness.<sup>30</sup> Such evidence is none the less admissible because general and inexplicit as to the particular injury to be inflicted, or because the language used is ambiguous.<sup>31</sup>

And it may be shown that the threat or declaration was accompanied by a reference to, or an exhibition of, the weapon which later became the instrument of the crime.<sup>32</sup>

25. *McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510; *State v. Van Houten*, 3 N. J. L. 672, 4 Am. Dec. 407; *Burks v. State*, 24 Tex. App. 326, 6 S. W. 300.

26. *In re Van Houten*, 2 City Hall Rec. (N. Y.) 73.

27. *Packer v. U. S.*, 106 Fed. 906; *U. S. v. Watson*, 35 Fed. 358; *U. S. v. Flemming*, 18 Fed. 907.

28. *Weed v. People*, 3 Thomp. & C. (N. Y.) 50; *Reg. v. Dale*, 16 Cox C. C. 703.

29. *Lamb v. State*, 66 Md. 285, 7 Atl. 399.

30. *Alabama*. — *Porter v. State*, 135 Ala. 51, 33 So. 694; *Drake v. State*, 110 Ala. 9, 20 So. 450; *Horn v. State*, 98 Ala. 23, 13 So. 329; *Pulliam v. State*, 88 Ala. 1, 6 So. 839.

*California*. — *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1,014.

*Connecticut*. — *State v. Tucker*, (Conn.), 52 Atl. 741; *Mead v. Husted*, 49 Conn. 336; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89.

*Florida*. — *Heron v. State*, 22 Fla. 86.

*Indiana*. — *Lipprant v. Lipprant*, 52 Ind. 273, an action for slander, where it was shown that the defendant had said he would break up the plaintiff by litigation.

*Kentucky*. — *Barnes v. Com.*, 24 Ky. L. Rep. 1,143, 70 S. W. 827; *Nichols v. Com.*, 11 Bush 575.

*Louisiana*. — *State v. Edwards*, 34 La. Ann. 1,012.

*Maryland*. — *Cook v. Carr*, 20 Md. 403; *State v. Ridgely*, 2 Har. & McH. 120, 1 Am. Dec. 372.

*Missouri*. — *Carvey v. Huskey*, 79 Mo. 509; *Culbertson v. Hill*, 87 Mo. 553; *Davis v. Clark*, 40 Mo. App. 515.

*New Hampshire*. — *Caverno v. Jones*, 61 N. H. 623.

*Pennsylvania*. — *Com. v. Corrigan*, 1 Pittsb. 292.

*Washington*. — *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

*West Virginia*. — *State v. Prater*, 53 W. Va. 132.

31. *England*. — *Stewart's Case*, 19 St. Tr. 100.

*Alabama*. — *Harrison v. State*, 79 Ala. 29; *Redd v. State*, 68 Ala. 492.

*California*. — *People v. Powell*, 87 Cal. 348.

*Connecticut*. — *Mead v. Husted*, 49 Conn. 336.

*Iowa*. — *State v. Pierce*, 90 Iowa 506, 58 N. W. 891.

*Minnesota*. — *State v. Hayward*, 62 Minn. 474, 65 N. W. 63.

*Missouri*. — *State v. Grant*, 79 Mo. 113.

*North Carolina*. — *State v. Ellis*, 101 N. C. 765, 7 S. E. 704.

*Texas*. — *Johnson v. State*, 18 Tex. App. 385.

32. *Georgia*. — *Burgess v. State*, 93 Ga. 304, 20 S. E. 331.

*Illinois*. — *Palmer v. People*, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146.

*Kentucky*. — *Whittaker v. Com.*, 13 Ky. L. Rep. 504, 17 S. W. 358.

*Michigan*. — *People v. Palmer*, 96 Mich. 580, 55 N. W. 994.

*Wisconsin*. — *Benedict v. State*, 14 Wis. 459.



Generally the fact that a considerable time elapsed between such declarations and the act which they foreshadowed goes not to their competency,<sup>33</sup> but to their weight, which is in all cases for the jury.<sup>34</sup>

**4. Facts Showing Knowledge.** — Where it is important to show the knowledge of a party, collateral facts which tend to show such knowledge are admissible, though otherwise they have no bearing upon the issue,<sup>35</sup> and though they tend to prove the commission by the defendant of a crime distinct from that for which he is on trial.<sup>36</sup>

**33. Alabama.** — *Rains v. State*, 88 Ala. 91, 7 So. 315; *Pate v. State*, 94 Ala. 14, 10 So. 665.

*District of Columbia.* — *U. S. v. Neverson*, 1 Mack. 152.

*Georgia.* — *Keenner v. State*, 18 Ga. 194, 63 Am. Dec. 269.

*Indiana.* — *Goodwin v. State*, 96 Ind. 550.

*Michigan.* — *Peterson v. Toner*, 80 Mich. 350, 45 N. W. 346.

*Missouri.* — *Carvey v. Huskey*, 79 Mo. 509.

*South Carolina.* — *State v. Ford*, 3 Strob. 517.

*Vermont.* — *State v. Bradley*, 64 Vt. 466, 24 Atl. 1,053. But see *McMasters v. State*, (Miss.), 33 So. 2.

**34. England.** — *Rex v. Turner*, 30 St. Tr. 1,132.

*Colorado.* — *Babcock v. People*, 13 Colo. 515, 22 Pac. 817.

*Connecticut.* — *Mead v. Husted*, 49 Conn. 336; *State v. Hoyt*, 46 Conn. 330.

*Indiana.* — *Goodwin v. State*, 96 Ind. 550.

*Montana.* — *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132.

*New York.* — *Jefferds v. People*, 5 Park. Crim. Rep. 522.

**35. Connecticut.** — *Bennett v. Gibbons*, 55 Conn. 450, 12 Atl. 99, where in an action for fraudulently misrepresenting the condition of a horse after it was shown that some one had said to the plaintiff that the horse could not be had for the price if he were sound, the plaintiff's answer should have been admitted.

*Iowa.* — *Kidd v. American Pill & Med. Co.*, 91 Iowa 261, 59 N. W. 41 (an action for damages against the defendant for discharging plaintiff from its employ, where it was shown that the plaintiff knew long before he sold the business to the defendant that certain medicines being manufactured, and which the defend-

ant continued to manufacture, were intended for an illegal purpose).

*State v. Kepper*, 65 Iowa 745, 23 N. W. 304 (a trial for burglary, where it was shown that the defendant knew that there was money in the house broken into).

*Maine.* — *Walker v. Thompson*, 61 Me. 347, *assumpsit* upon a guarantee of certain notes which it was alleged were obtained by false representations as to the maker's financial standing, where facts were admitted tending to show plaintiff's knowledge of the latter's insolvency.

*Missouri.* — *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588, where it was shown that the defendant had discontinued the use generally of the kind of car complained of, because of its dangerous character.

*New York.* — *New York v. Exchange Fire Ins. Co.*, 9 Bos. 424, a question of the knowledge of the defendant as to the purposes for which buildings were used.

*United States.* — *Tobin v. Walkinshaw*, 23 Fed. Cas. No. 14,070.

**36. England.** — *Reg. v. Francis*, 12 Cox C. C. 612; *Reg. v. Foster*, 6 Cox C. C. 521.

*United States.* — *U. S. v. Russell*, 19 Fed. 591; *U. S. v. Roundbush*, Baldw. 514, 27 Fed. Cas. No. 16,198.

*Alabama.* — *Mason v. State*, 42 Ala. 532.

*Connecticut.* — *State v. Ward*, 49 Conn. 429.

*Illinois.* — *Du Bois v. People*, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183.

*Indiana.* — *McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510; *Thomas v. State*, 103 Ind. 419, 2 N. E. 808.

*Massachusetts.* — *Com. v. White*, 145 Mass. 392, 14 N. E. 611.

*Michigan.* — *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326.

**5. Facts Showing Preparation.** — A. PRECEDENT ACTS which render the commission of the crime charged more easy, more safe, more certain, more effective to produce the ultimate result which formed the general motive and inducement, if done with that intention and purpose, have such a connection with the crime charged as to be admissible, though they are also of themselves criminal.<sup>37</sup>

B. WEAPONS, ETC. — Under this head also reference may be made to evidence that weapons or other instruments with which the crime might have been committed were found in the possession of the accused. Such evidence tends to show the defendant's connection with the commission of the crime.<sup>38</sup>

**6. Facts Showing Opportunity.** — A. GENERALLY. — If one charged with the commission of the crime did not possess the opportunity essential to its commission, a conviction cannot be sustained, however strong, apparently, are the other circumstances which point to him as the guilty party. So that it is always competent to show as a circumstance of more or less weight that the accused had the opportunity to commit the offense charged against him.<sup>39</sup>

*Missouri.* — State *v.* Mix, 15 Mo. 153.

*Nebraska.* — Goldsberry *v.* State, (Neb.), 92 N. W. 906.

*New Jersey.* — State *v.* Van Houten, 3 N. J. L. 672, 4 Am. Dec. 407.

*New York.* — People *v.* Doody, 172 N. Y. 165, 64 N. E. 807; People *v.* McClure, 148 N. Y. 95, 42 N. E. 523; Coleman *v.* People, 58 N. Y. 555; People *v.* DeGraff, 6 N. Y. St. 412; Weyman *v.* People, 4 Hun 511.

*Ohio.* — Bainbridge *v.* State, 30 Ohio St. 264; Shriedley *v.* State, 23 Ohio St. 130; Davis *v.* State, 20 Ohio Cir. Ct. 430.

*Rhode Island.* — State *v.* McDonald, 14 R. I. 270.

*Tennessee.* — Wiley *v.* State, 43 Tenn. 362; Peek *v.* State, 2 Humph. 78.

*Texas.* — Gray *v.* State, (Tex. Crim. App.), 72 S. W. 169; Mason *v.* State, 31 Tex. Crim. App. 306, 20 S. W. 564; Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606.

**37.** Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452. See also Long *v.* State, 52 Miss. 23; People *v.* Clark, 2 Hun (N. Y.) 520; Simms *v.* State, 10 Tex. App. 131; Howard *v.* State, 8 Tex. App. 53.

**38.** *United States.* — U. S. *v.* King, 5 McLean 208, 26 Fed. Cas. No. 15,535.

*Alabama.* — Mitchell *v.* State, 94 Ala. 68, 10 So. 518.

*Arkansas.* — Starchman *v.* State, 62 Ark. 538, 36 S. W. 940.

*California.* — People *v.* Winters, 29 Cal. 658.

*Georgia.* — Shaw *v.* State, 102 Ga. 660, 29 S. E. 477.

*Indiana.* — Merrick *v.* State, 63 Ind. 327.

*Iowa.* — State *v.* Jones, 89 Iowa 182, 56 N. W. 427; State *v.* Rainsbarger, 74 Iowa 196, 37 N. W. 153.

*Kentucky.* — Nicely *v.* Com., 22 Ky. L. Rep. 900, 58 S. W. 995.

*Massachusetts.* — Com. *v.* Choate, 105 Mass. 451.

*Michigan.* — People *v.* Machen, 101 Mich. 400, 59 N. W. 664.

*Missouri.* — State *v.* Davis, 80 Mo. 53.

*North Dakota.* — State *v.* Campbell, 7 N. D. 58, 72 N. W. 935.

*Texas.* — Reardon *v.* State, 4 Tex. App. 602.

*Virginia.* — Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364.

**39.** *United States.* — U. S. *v.* Randall, Deady 524, 27 Fed. Cas. No. 16,118.

*Alabama.* — Campbell *v.* State, 23 Ala. 44.

*Maine.* — State *v.* Lambert, 97 Me. 51, 53 Atl. 879 (where it was shown by a careful calculation of time and distances that opportunity was not precluded).

*New Mexico.* — Territory *v.* De Gutman, 8 N. M. 92, 42 Pac. 68.

B. WANT OF OPPORTUNITY. — On the other hand, if the accused offers any explanation of his presence at or near the scene of the crime about the time of its commission, it should be received for the consideration of the jury.<sup>40</sup>

C. DESIRE AND OPPORTUNITY. — The question of opportunity always plays an important part in the proof of the charge of adultery. If from the circumstances of association and intimacy it is shown that the mind and heart were depraved, if the desire to commit the act is shown, then guilt will be inferred when the opportunity is established.<sup>41</sup> But proof of the opportunity alone and the proof that the parties were together, etc., without showing the will to improve the opportunity, will not justify a finding of guilt.<sup>42</sup> As to this charge the fact of opportunity is hardly sufficient to raise a passing cloud of suspicion if there is no proof of previous unwarrantable or indecent intimacy between the parties, or of secret interviews or clandestine correspondence.<sup>43</sup>

D. OPPORTUNITY MUST BE ENFORCED BY CIRCUMSTANCES. — The fact that the defendant can be shown to have been present at or near the scene of the crime, at or about the time of its commission, would be a matter of slight moment unless it were enforced by other circumstances tending to connect him with the matter under investigation.<sup>44</sup>

7. Facts Bearing on Identity of Person.—A. IN GENERAL.—It is as important to identify the accused as the perpetrator of the crime as it is to establish the *corpus delicti*. Without such identification there can be no conviction.<sup>45</sup> And identification is frequently a matter of

*New York*. — *Lindsay v. People*, 63 N. Y. 143.

*Pennsylvania*. — *Hester v. Com.*, 85 Pa. St. 139.

*Texas*. — *Angley v. State*, 35 Tex. Crim. App. 427, 34 S. W. 116; *Hubby v. State*, 8 Tex. App. 597.

In Poisoning Cases, this is a point of peculiar importance. *Brown v. State*, 88 Ga. 257, 14 S. E. 578; *People v. Stephens*, 4 Park. Crim. Rep. 396; *Bell v. Com.*, 88 Va. 365, 13 S. E. 742.

40. *Saunders v. People*, 38 Mich. 218, where it was held erroneous to exclude evidence that it was nothing unusual for the accused to be in the neighborhood where he was seen.

41. *Blake v. Blake*, 70 Ill. 618; *Graham v. Graham*, 50 N. J. L. 701, 25 Atl. 358; *Berckmans v. Berckmans*, 16 N. J. Eq. 122.

42. *Inskeep v. Inskeep*, 5 Iowa 204; *Burke v. Burke*, 44 Kan. 307, 24 Pac. 466, 21 Am. St. Rep. 283; *Larison v. Larison*, 20 N. J. Eq. 100;

*Berckmans v. Berckmans*, 16 N. J. Eq. 122; *Pollock v. Pollock*, 71 N. Y. 137; *Freeman v. Freeman*, 31 Wis. 235.

43. *Pollock v. Pollock*, 71 N. Y. 137; *Whitenack v. Whitenack*, 36 N. J. Eq. 474; *Williams v. Williams*, 1 Hagg. Com. 299; *Dunham v. Dunham*, 6 L. R. 141.

44. *Reynolds v. State*, 34 Fla. 175, 16 So. 78.

45. *Alabama*. — *Booker v. State*, 76 Ala. 22.

*California*. — *People v. Nelson*, 85 Cal. 421, 24 Pac. 1,006.

*Georgia*. — *Patton v. State*, 117 Ga. 230, 43 S. E. 533; *Glover v. State*, 114 Ga. 828, 40 S. E. 998.

*Missouri*. — *State v. Crabtree*, 170 Mo. 642, 71 S. W. 127.

*Texas*. — *Garcia v. State*, 23 Tex. App. 712, 5 S. W. 186; *Griffith v. State*, 9 Tex. App. 372.

*Vermont*. — *State v. Powers*, 72 Vt. 168, 47 Atl. 830.

the utmost difficulty.<sup>46</sup>

**Sufficiency of Identification Is for the Jury.** — The testimony, however, need not be absolute and conclusive. Whether or not in view of all the evidence the identification is complete is a question for the determination of the jury.<sup>47</sup>

**Investigation May Take a Wide Scope.** — And on this question the jury should have before them for their consideration every circumstance which tends to make the fact in issue more or less probable. That a fact sought to be shown is remote from the issues involved does not make it irrelevant.<sup>48</sup>

**Evidence Showing Other Crimes.** — And evidence which tends to show identity of person is not objectionable because it also connects the defendant with the commission of another criminal act than that for which he is on trial.<sup>49</sup>

46. See *White v. Com.*, 80 Ky. 480, where a witness testified that in the town where the crime was committed he had twice seen another man whom he at first sight mistakenly supposed to be the accused. *State v. Witham*, 72 Me. 531.

47. *People v. Young*, 102 Cal. 411, 36 Pac. 770.

*Indiana.* — *Hendricks v. State*, 26 Ind. 493.

*Kentucky.* — *Tatum v. Com.*, 22 Ky. L. Rep. 927, 59 S. W. 32.

*Massachusetts.* — *Com. v. Cunningham*, 104 Mass. 545.

*Michigan.* — *People v. Stanley*, 101 Mich. 93, 59 N. W. 498.

*Missouri.* — *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *State v. Babb*, 76 Mo. 501.

*New Hampshire.* — *State v. Perkins*, 70 N. H. 330, 47 Atl. 268.

*North Carolina.* — *State v. Telfair*, 109 N. C. 878, 13 S. E. 726.

*Pennsylvania.* — *Dodge v. Bache*, 57 Pa. St. 421.

*Wisconsin.* — *Begg v. Begg*, 56 Wis. 534, 14 N. W. 602.

48. *State v. Chambers*, 45 La. Ann. 36, 11 So. 944; *State v. Witham*, 72 Me. 531; *People v. Boughton*, 1 Edm. Sel. Cas. 140; *Johnson v. Com.*, 115 Pa. 369, 9 Atl. 78, (*citing Whart. Ev.* § § 21, 24), where the testimony tended to prove that in general appearance, prominence of teeth, tone of voice and character of dress, the prisoner resembled the perpetrator of the crime. *Simms v. State*, 10 Tex. App. 131.

In *State v. Novak*, 109 Iowa 717,

79 N. W. 465, a trial for murder, it was shown that the body found had on it a St. Joseph's card, which is a card to which special significance is attached in the Catholic church, and which is generally worn through life after it is once put on. It had been previously shown that the deceased was a Roman Catholic, and that such card had been given him some years before. Such evidence was admissible as bearing on the question of identity, if it tended to show no more than that the body found was that of a Roman Catholic.

In *State v. Wilkins*, 66 Vt. 1, 28 Atl. 323, after it was shown that during the commission of the crime certain language was used by the perpetrators, it was held proper to show that the same language was heard by the witness on the road between the scene of the crime and a house where the defendants claimed they were on the night of the crime.

49. *England.* — *Reg. v. Crickmer*, 16 Cox C. C. 701; *Reg. v. Harris*, 4 F. & F. 342.

*United States.* — *U. S. v. Boyd*, 45 Fed. 851.

*Alabama.* — *Curtis v. State*, 78 Ala. 12; *Mason v. State*, 42 Ala. 532.

*Arkansas.* — *Reed v. State*, 54 Ark. 621, 16 S. W. 819.

*California.* — *People v. McGilver*, 67 Cal. 55, 7 Pac. 49.

*Illinois.* — *Cross v. People*, 47 Ill. 152, 95 Am. Dec. 474.

*Indiana.* — *Frazier v. State*, 135 Ind. 38, 34 N. E. 817, where it was shown that other houses were broken

**B. IDENTIFICATION BY VOICE.** — The voice is a circumstance which may be considered with other circumstances of the case on the question of identity.<sup>50</sup>

**Distinguishing Features of Voice.** — Identification by the voice is uncertain unless it is shown that there is some peculiarity about the voice which renders it more easy of identification.<sup>51</sup>

**Value of Evidence Depends on Qualification of Witness.** — Identification by the voice is in the nature of opinion evidence. When a witness attempts to identify the accused by the voice it is important to know how familiar he is with the tones of the defendant's voice. In this connection the length of his acquaintance with the defendant may be inquired into.<sup>52</sup>

into on the same night, and that tracks found in the vicinity of such houses were similar to those made by the defendant.

*Massachusetts.* — *Com. v. Choate*, 105 Mass. 451, where the employment of the same device in setting several fires was shown.

*Minnesota.* — *State v. Barrett*, 40 Minn. 65, 41 N. W. 459.

*New York.* — *People v. Murphy*, 135 N. Y. 450, 32 N. E. 138.

*Ohio.* — *Coble v. State*, 31 Ohio St. 100.

*Oregon.* — *State v. Baker*, 23 Or. 441, 32 Pac. 161.

*Pennsylvania.* — *Shaffner v. Com.*, 72 Pa. St. 60, 13 Am. Rep. 649.

*Rhode Island.* — *State v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446, 49 Am. St. Rep. 766.

*Tennessee.* — *State v. Becton*, 66 Tenn. 138.

*Texas.* — *Kelley v. State*, 18 Tex. App. 262.

*Vermont.* — *State v. Kelley*, 65 Vt. 531, 27 Atl. 203, 36 Am. St. Rep. 884.

*50. England.* — *King v. Brook*, 31 St. Tr. 1, 124.

*Georgia.* — *Cicero v. State*, 54 Ga. 156.

*Illinois.* — *Ogden v. People*, 134 Ill. 599, 25 N. E. 755.

*Indiana.* — *Deal v. State*, 140 Ind. 354, 39 N. E. 930, where a witness testifying as to certain admissions made in his hearing by a man he could not see, said "it sounded like" defendant's voice, and this was held admissible because the only guide the court can have is the tendency, however slight, to prove the fact.

*Iowa.* — *State v. Kepper*, 65 Iowa 745, 23 N. W. 304.

*Pennsylvania.* — *Com. v. Hayes*, 2 Lane L. Rev. 48.

*Texas.* — *Price v. State*, 35 Tex. Crim. App. 501, 34 S. W. 622.

*51. Patton v. State*, 117 Ga. 230, 43 S. E. 533; *State v. Howard*, 92 N. C. 772.

In *Com. v. Hayes*, 138 Mass. 185, the witness had heard the accused speak only once, immediately before the crime, but in that case he testified that the voice was coarse, rough and very ugly.

In *Com. v. Williams*, 105 Mass. 63, the voice of the accused, the witness said, was very pleasant.

It is not competent to break down testimony of a witness who identifies defendant by his voice, by showing that on a previous occasion such witness had mistaken the voice of another person, there being no showing that the conditions were the same. *State v. Hurst*, 23 Mont. 484, 59 Pac. 911.

*52. Fussell v. State*, 93 Ga. 450, 21 S. E. 97.

*Com. v. McMahon*, 145 Pa. St. 413, 22 Atl. 971 (where witness had known defendant for years); *Givens v. State*, 35 Tex. Crim. App. 563, 34 S. W. 626 ("for years"); *Andrews v. Com.*, 100 Va. 801, 40 S. E. 935 (where witness had known defendant nine years).

Where the witness is acquainted with the accused he may be in a position to testify positively to his voice, and thus identify the defendant. But where it appears that there is nothing peculiar in the voice, and

C. FOOTPRINTS. — It is always proper to show that tracks found in the earth or in the snow at the scene of the crime correspond with the footprints of the defendant.<sup>53</sup>

the witness is not acquainted with the defendant, and had only heard him speak twice, and that a considerable period before the crime, and then never in the high pitched tone which was used by the guilty party on that occasion, "the circumstances ought to be most propitious to entitle such evidence to any weight." In *Patton v. State*, 117 Ga. 230, 43 S. E. 533, the occasion was night; the witness was surrounded with barking dogs; the person speaking was about seventy-five yards distant in the woods, and the witness did not mention the name of the defendant as the guilty party until the following day, when he said he thought he recognized his voice.

**Recognition Over Telephone.** — A witness may testify that statements made over a telephone were made by the defendant; that he had talked with defendant "hundreds of times" and recognized his voice (*People v. Ward*, 3 N. Y. Crim. 483); or that he knew and distinguished defendant's voice (*Stepp v. State*, 31 Tex. Crim. App. 349, 20 S. W. 753).

53. *Alabama*. — *Gilmore v. State*, 99 Ala. 154, 13 So. 536; *Hodge v. State*, 98 Ala. 10, 13 So. 385, 39 Am. St. Rep. 17.

*California*. — *People v. Arthur*, 93 Cal. 536, 29 Pac. 126, where the tracks led directly to a vacant building where the defendants were asleep.

*Idaho*. — *State v. Kruger*, (Idaho), 61 Pac. 463, where the tracks were lost, and, after several miles, found again.

*Indiana*. — *Frazier v. State*, 135 Ind. 38, 34 N. E. 817.

*Missouri*. — *State v. Reed*, 89 Mo. 168, 1 S. W. 225.

*North Carolina*. — *State v. Morris*, 84 N. C. 756.

*Texas*. — *Thompson v. State*, 30 Tex. 357; *Freeman v. State*, (Tex. Crim. App.), 72 S. W. 1,001; *Pendy v. State*, 34 Tex. Crim. App. 643, 31 S. W. 647.

**Horse Tracks.** — In the same way it may be shown that the tracks of a horse observed near the scene of the

crime correspond with tracks of a horse in the possession of the defendant. *Campbell v. State*, 23 Ala. 44; *State v. Melick*, 65 Iowa 614, 22 N. W. 895; *Goldsmith v. State*, 32 Tex. Crim. App. 112, 22 S. W. 405.

**Correspondence Not a Matter of Opinion.** — A witness who is not an expert may testify as to the correspondence of the tracks found and the prisoner's feet, for this is a statement of facts.

*Alabama*. — *James v. State*, 104 Ala. 20, 16 So. 94; *Young v. State*, 68 Ala. 569.

*Iowa*. — *State v. Moelchen*, 53 Iowa 310, 5 N. W. 186.

*Kansas*. — *State v. Folwell*, 14 Kan. 105.

*North Carolina*. — *State v. Morris*, 84 N. C. 756; *State v. Reitz*, 83 N. C. 634.

*Texas*. — *McLain v. State*, 30 Tex. App. 482, 17 S. W. 1,092, 28 Am. St. Rep. 934; *Crumes v. State*, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853.

*Vermont*. — *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

But mere conclusions of the witness making the examination and comparison are not admissible. Whether a particular shoe made the imprint described is for the jury to determine from all the facts and circumstances developed, uninfluenced by any opinion of the witness. *Livingston v. State*, 105 Ala. 127, 16 So. 801; *Busby v. State*, 77 Ala. 66; *Collins v. Com.*, 15 Ky. L. Rep. 691, 25 S. W. 743; *Clough v. State*, 7 Neb. 320; *State v. Green*, 40 S. C. 328, 18 S. E. 933, 42 Am. St. Rep. 872.

**Compelling Defendant to Make Evidence Against Himself.** — For cases where compelling defendant to submit to measurements and tests for the purpose of comparing his footprints with tracks found near the scene of the crime has been held violative of the constitutional provision that no accused person in a criminal case shall be compelled to be a witness against himself, see *Day v. State*, 63 Ga. 667; *People v. Wol-*

**The Force of Evidence** of this kind is greatly increased where the track is distinguished by some peculiarity which is observable also in the defendant.<sup>54</sup>

The value of such evidence depends largely on the accuracy with which the comparison is made,<sup>55</sup> and upon the nearness in time of such comparison to the crime.<sup>56</sup>

**Must Be Other Evidence to Support Conviction.**—The correspondence of tracks near the place of the commission of the crime with those made by the defendant is not sufficient, however, standing alone, to support a conviction.<sup>57</sup>

**Explanation of Footprints.**—The introduction of testimony of this

cott, 51 Mich. 612, 17 N. W. 78; *People v. Mead*, 50 Mich. 228, 15 N. W. 95; *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72.

For action called in question, and which has been held not to controvert the constitutional provision, see *State v. Prudhomme*, 25 La. Ann. 522; *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493; *Meyers v. State*, 14 Tex. App. 35; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382.

See generally on this subject, article "PRIVILEGE."

54. *Alabama*.—*James v. State*, 104 Ala. 20, 16 So. 94; *Cooper v. State*, 88 Ala. 107, 7 So. 47 (a deformity).

*Florida*.—*Whetstone v. State*, 31 Fla. 240, 12 So. 661 (where the toe turned in a little); *Whitfield v. State*, 25 Fla. 289, 5 So. 805 (where the defendant had worn shoes of different sizes); *Green v. State*, 17 Fla. 669 (where owing to bent leg the heel barely touched the ground).

*Georgia*.—*Glover v. State*, 114 Ga. 828, 40 S. E. 998 (where there was a mark V-shaped in the heel); *Griggs v. State*, 59 Ga. 738 (very long and square toed); *Shannon v. State*, 57 Ga. 482.

*Illinois*.—*Schoolcraft v. People*, 117 Ill. 271, 7 N. E. 649 (where the right foot turned in).

*Iowa*.—*State v. Milmeier*, 102 Iowa 692, 72 N. W. 275; *State v. Moelchen*, 53 Iowa 310, 5 N. W. 186 (coarse nails).

*Kansas*.—*State v. Grebe*, 17 Kan. 458 (where the track and foot were unusually small).

*Mississippi*.—*Cook v. State*,

28 So. 833 (where the track of a wagon showed a wobbling wheel).

*South Carolina*.—*State v. Green*, 40 S. C. 328, 18 S. E. 933, 42 Am. St. Rep. 872.

*Tennessee*.—*Lipes v. State*, 83 Tenn. 125, 54 Am. Rep. 402.

*Texas*.—*Augley v. State*, 35 Tex. Crim. App. 427, 34 S. W. 116 (a raised place in track corresponding with worn place in shoe); *McGill v. State*, 25 Tex. App. 499, 8 S. W. 661, where the track was made by a shoe run down at the heel, and patched.

55. *Stone v. State*, 12 Tex. App. 219.

56. *McDaniel v. State*, 53 Ga. 253.

**Remoteness in Time** affects not the competency of this evidence, but the weight to be attached to it. *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207, where the measurements were made two weeks after the crime.

57. *Cooper v. State*, 88 Ala. 107, 7 So. 407; *Shannon v. State*, 57 Ga. 482; *McDaniel v. State*, 53 Ga. 253 (where there was evidence of peculiarity); *Reg. v. Britton*, 1 F. & F. 354.

Though the State's evidence very strongly and conclusively tended to establish the fact that tracks seen near the place of the crime, and which must have been made on the night it was committed, corresponded in minute particulars with the shoes belonging to the accused, this, without more, was not sufficient to show, to the exclusion of every other reasonable hypothesis, that he committed the crime. *Cummings v. State*, 110 Ga. 293, 35 S. E. 117.

**Horse Tracks.**—The fact that the defendant's horse was traced by its tracks to the scene of the crime would be a strong circumstance

character calls for any explanation or countervailing testimony which it is in the power of the defendant to offer.<sup>58</sup>

**D. BLOODSTAINS.** — Stains of blood upon the person or clothing of the accused, or upon weapons in his possession with which the crime might have been committed, are among the ordinary *indicia* of homicide.<sup>59</sup> The existence, character and appearance of such stains may always be shown.<sup>60</sup>

**The Value of Such Evidence** is a question for the jury, and may depend on a variety of circumstances.<sup>61</sup>

**E. MARKS OR WOUNDS.** — Marks or scars upon the person of the defendant are regarded as most important means of identification.<sup>62</sup> Where it is shown that the perpetrator of the crime received wounds or marks upon his person at or during the time of its commission,

against him, if there were any other evidence pointing to the defendant as the guilty party. Without such evidence, the tracks amount to no more than mere suspicion. *State v. Melick*, 65 Iowa 614, 22 N. W. 895, where the defendant's barn door was open and some one else might have taken the horse.

58. *Green v. State*, 17 Fla. 669; *Stone v. State*, 12 Tex. App. 219, where it was held error to exclude evidence in behalf of defendant that he had never worn nor possessed shoes which would make the "tack points" which distinguished the tracks found.

See article "BLOODSTAINS."

60. *California*. — *People v. Smith*, 106 Cal. 73, 39 Pac. 40.

*Delaware*. — *State v. Miller*, 9 Houst. 564, 32 Atl. 137.

*Georgia*. — *Thomas v. State*, 67 Ga. 460.

*Indiana*. — *Beavers v. State*, 58 Ind. 530.

*Maine*. — *State v. Knight*, 43 Me. 11.

*New York*. — *People v. Johnson*, 140 N. Y. 350, 35 N. E. 604; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 936; *People v. Fernandez*, 35 N. Y. 49.

*Pennsylvania*. — *McLean v. Com.*, 99 Pa. St. 86.

*West Virginia*. — *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

61. *People v. Fernandez*, 35 N. Y. 49.

**Witnesses Not Experts** may testify to the existence and character of stains observed by them on the person or clothing of the defendant.

*California*. — *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 295.

*Florida*. — *Gantling v. State*, 40 Fla. 237, 23 So. 857.

*Georgia*. — *Thomas v. State*, 67 Ga. 460.

*Mississippi*. — *Dillard v. State*, 58 Miss. 677.

*Missouri*. — *State v. Robinson*, 117 Mo. 649, 23 S. W. 1,066.

*New York*. — *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636; *People v. Fernandez*, 35 N. Y. 49, where it was said that the testimony of the expert who has analyzed blood, and that of the observer who has merely recognized it, belong to the same grade of evidence.

*Pennsylvania*. — *Gaines v. Com.*, 14 Wright 319.

*Utah*. — *People v. Thiede*, 11 Utah 241, 39 Pac. 837.

*West Virginia*. — *State v. Henry*, 51 W. Va. 283, 41 S. E. 439; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419.

62. *State v. Ah Chuey*, 14 Nev. 79, where after a witness had testified that the defendant had certain tattooed designs on his arm, the court compelled the defendant to exhibit his arm to the jury. This action of the trial court was held proper, and not violative of the constitutional provision that no person in a criminal case shall be compelled "to be a witness against himself." The court, by Hawley, J., said:

"In a case of homicide the defendant makes evidence against himself by being compelled to surrender the weapon with which the offense was committed, for it can always be used



it may be shown that the defendant bears upon his person wounds or marks of the kind inflicted.<sup>63</sup>

F. POSSESSION OF THE FRUITS OF CRIME. — The possession of the fruits of a crime, soon after the commission thereof, is, if unexplained, a circumstance of more or less weight pointing to the one in whose possession they are found as the guilty party;<sup>64</sup> whether

as evidence against him. A burglar is compelled to give evidence against himself when he is forced to surrender false keys and other burglarious instruments found in his possession. A counterfeiter is compelled to give evidence against himself when the dies he had manufactured and used are discovered and brought into court for inspection. . . . From whatever standpoint this question can be considered, the truth forces itself upon my mind that no evidence of physical facts can, upon any established principle of law, or upon any substantial reason, be held to come within the letter or spirit of the constitution. The question of whether or not the court erred in compelling the defendant Ah Chuey to exhibit his arm must, in my opinion, be determined upon other grounds. Was the defendant compelled to exhibit himself in such a manner as to unjustly or improperly prejudice his case before the jury? Did the act in question have a tendency to degrade, humiliate, insult or disgrace the defendant? Did the judge, by the act in question, convey to the jury the idea that he believed the defendant to be guilty of the offense charged against him? If either of these questions ought to be answered in the affirmative, then I think the defendant should be granted a new trial. A defendant in a criminal case is entitled to a fair and impartial trial, free from insult or obloquy, and courts cannot be too particular in guarding his personal rights and privileges. He should never be compelled to make any indecent or offensive exhibition of his person for any purpose whatever. The judge presiding at the trial should not express any opinion upon the facts (*State v. Tickel*, 13 Nev. 502, and the authorities there cited), or compel the defendant to do any act which would clearly convey to the jury an

intimation that the defendant was guilty of the offense charged, or to exhibit himself in such a manner as to prejudice his case before the jury."

See article "DEMONSTRATIVE EVIDENCE."

63. See articles "DEMONSTRATIVE EVIDENCE," "HOMICIDE," "RAPE," etc.

But it is not relevant to show that the defendant was suffering from wounds inflicted at a time other than the date of the crime. *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782.

64. *England*. — *Reg. v. Hughes*, 14 Cox C. C. 223; *Reg. v. Harris*, 8 Cox C. C. 333; *Reg. v. Coots*, 2 Cox C. C. 188.

*United States*. — *Wilson v. U. S.*, 162 U. S. 613; *Considine v. U. S.*, 112 Fed. 342; *U. S. v. Martin*, 2 McLean 256.

*Alabama*. — *Walker v. State*, 97 Ala. 85, 12 So. 83; *White v. State*, 72 Ala. 195.

*Arkansas*. — *Boykin v. State*, 34 Ark. 443.

*California*. — *People v. Sansom*, 84 Cal. 449, 24 Pac. 143; *People v. Lowney*, 70 Cal. 193, 11 Pac. 605.

*Georgia*. — *Andrews v. State*, 116 Ga. 83, 42 S. E. 476; *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; *Falvey v. State*, 85 Ga. 157, 11 S. E. 607; *Franklin v. State*, 85 Ga. 157, 11 S. E. 876.

*Idaho*. — *State v. Seymour*, (*Idaho*), 61 Pac. 1,033.

*Illinois*. — *Smith v. People*, 115 Ill. 17, 3 N. E. 733; *Sahlinger v. People*, 102 Ill. 241; *Gates v. People*, 14 Ill. 433.

*Indiana*. — *Frazier v. State*, 135 Ind. 38, 34 N. E. 817.

*Iowa*. — *State v. Clifford*, 86 Iowa 550, 53 N. W. 299, 41 Am. St. Rep. 518.

*Kansas*. — *State v. Ingram*, 16 Kan. 14.

*Kentucky*. — *Branson v. Com.*, 92 Ky. 330, 17 S. W. 1,019.

the crime committed to secure possession of such property be arson,<sup>65</sup> burglary,<sup>66</sup> larceny,<sup>67</sup> robbery,<sup>68</sup> receiving stolen goods,<sup>69</sup> or murder.<sup>70</sup>

G. PROPERTY OF ACCUSED NEAR SCENE OF CRIME. — That garments or portions thereof,<sup>71</sup> or weapons belonging to the accused,<sup>72</sup> or other personal property<sup>73</sup> which can be traced to the possession

*Maine.* — *State v. Furlong*, 19 Me. 225.

*Massachusetts.* — *Com. v. O'Neil*, 169 Mass. 394, 48 N. E. 134.

*Michigan.* — *People v. Wood*, 99 Mich. 620, 58 N. W. 638; *Gablick v. People*, 40 Mich. 292.

*Minnesota.* — *State v. Holden*, 42 Minn. 350, 44 N. W. 123.

*Mississippi.* — *Stokes v. State*, 58 Miss. 677.

*Missouri.* — *State v. Owens*, 79 Mo. 619; *State v. Harrold*, 38 Mo. 496.

*Nevada.* — *State v. Mandich*, 24 Nev. 336, 54 Pac. 516.

*New Hampshire.* — *State v. Hodge*, 50 N. H. 510.

*New York.* — *Knickerbocker v. People*, 43 N. Y. 177; *Linsday v. People*, 67 Barb. 548.

*Oklahoma.* — *Johnson v. Territory*, 5 Okla. 695, 50 Pac. 90.

*Pennsylvania.* — *Com. v. Roddy*, 184 Pa. 274, 39 Atl. 211.

*Texas.* — *Wallace v. State*, (Tex. Crim. App.), 66 S. W. 1,102; *Lancaster v. State*, (Tex. Crim. App.), 31 S. W. 515; *Dawson v. State*, 32 Tex. Crim. App. 535, 25 S. W. 21, 40 Am. St. Rep. 791.

*Vermont.* — *State v. Fitzgerald*, 72 Vt. 142, 47 Atl. 403; *State v. Bradley*, 67 Vt. 465, 32 Atl. 238.

*Virginia.* — *Branch v. Com.*, 100 Va. 837, 41 S. E. 862; *Walker v. Com.*, 28 Gratt. 969.

*Washington.* — *State v. Harris*, 25 Wash. 416, 65 Pac. 774; *State v. Humason*, 5 Wash. 499, 32 Pac. 111.

*West Virginia.* — *State v. Henry*, 51 W. Va. 283, 41 S. E. 439.

*Wisconsin.* — *Ryan v. State*, 83 Wis. 486, 53 N. W. 836; *Neubrandt v. State*, 53 Wis. 89, 9 N. W. 824; *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785.

65. See article "ARSON."

66. See article "BURGLARY."

67. See article "LARCENY."

68. See article "ROBBERY."

69. See article "RECEIVING STOLEN GOODS."

70. See article "HOMICIDE."

71. *Franklin v. State*, 69 Ga. 36, 47 Am. Rep. 748; *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81.

72. *State v. Outerbridge*, 82 N. C. 617 (bullets which fitted prisoner's mould); *Howard v. State*, 8 Tex. App. 53 (where a shot with which deceased had been killed was of same size as accused was known to have bought); *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812 (cartridge shells); *Dean v. Com.*, 32 Gratt. 912 (bullet of large size which corresponded with calibre of defendant's gun); *State v. Craemer*, 12 Wash. 217, 40 Pac. 944 (where the defendant's revolver was found eighteen days after the commission of the crime).

73. *Alabama.* — *Thornton v. State*, 113 Ala. 43, 21 So. 356, 59 Am. St. Rep. 97 (a memorandum book and pencil); *Hodge v. State*, 97 Ala. 37, 12 So. 164, 38 Am. St. Rep. 145 (discolored and blackened pieces of cloth corresponding with wadding found in the barrel of the prisoner's gun which had not been discharged).

*Georgia.* — *Gregory v. State*, 80 Ga. 269, 7 S. E. 222 (wrapping paper corresponding with paper around a parcel in prisoner's packet).

*New York.* — *People v. How*, 2 Wheel. Crim. Cas. 410.

*South Carolina.* — *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1,021, 42 Am. St. Rep. 877 (pieces of paper used as gun wadding corresponding with paper in possession of defendant from which pieces had been torn).

*Tennessee.* — *King v. State*, 15 Lea 51 (postal cards addressed to defendant).

*Texas.* — *Freeman v. State*, (Tex. Crim. App.), 72 S. W. 1,001, where a piece of paper picked up in the yard where the shooting occurred, and which had been used as wadding,

of the accused,<sup>74</sup> are found at or near the scene of a crime may always be shown as giving rise to an inference that the accused was connected with the crime.

**H. CONDUCT AND Demeanor.** — *a. In General.* — Any indications of a consciousness of guilt by a person suspected of or charged with crime, or who may be suspected or charged at a time later than such indications, are admissible against him.<sup>75</sup>

**Infinite Variety of Such Indications.** — The nature or character of such indications cannot be defined or limited.<sup>76</sup> However minute or

corresponded exactly as to words and particulars and details of a picture, with a torn newspaper found in the defendant's house.

74. Such evidence is of no value unless the articles are shown to have been previously in the prisoner's possession. *State v. Arthur*, 13 N. C. 217; *King v. State*, 15 Lea (Tenn.) 51.

75. *Alabama.* — *McAdory v. State*, 62 Ala. 154; *Murrell v. State*, 46 Ala. 89, 7 Am. Rep. 592; *Mason v. State*, 42 Ala. 532.

*California.* — *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347.

*Illinois.* — *Jamison v. People*, 145 Ill. 357, 34 N. E. 486.

*Michigan.* — *People v. Pyckett*, 99 Mich. 613, 58 N. W. 621.

*New Jersey.* — *Donnelly v. State*, 26 N. J. L. 463.

*New York.* — *Greenfield v. People*, 85 N. Y. 75, 35 Am. Rep. 936; *People v. Green*, 1 Park. Crim. Rep. 11.

*Pennsylvania.* — *McCabe v. Com.*, (Pa.), 8 Atl. 45.

*Texas.* — *Johnson v. State*, 18 Tex. App. 385; *Noftsinger v. State*, 7 Tex. App. 301.

76. Attempting to evade arrest (*Nicely v. Com.*, 22 Ky. L. Rep. 900, 58 S. W. 995); demeanor at time of arrest (*People v. Hawkins*, 127 Cal. 372, 59 Pac. 697; *People v. Higgins*, 127 Mich. 291, 86 N. W. 812); dodging and trembling (*Beavers v. State*, 58 Ind. 530); laughing and turning pale (*State v. Nash*, 7 Iowa 347); nervousness before coroner's jury (*State v. Baldwin*, 36 Kan. 1, 12 Pac. 318); indications of feigning insanity (*Basham v. Com.*, 87 Ky. 440, 9 S. W. 284); concealment by the accused of property claimed to have been stolen (*State v. Bruce*, 24 Me. 71); making contradictory replies (*Com. v. Trefethen*, 157 Mass. 180,

31 N. E. 961, 24 L. R. A. 235); resisting arrest (*People v. Moore*, 26 Misc. 168, 56 N. Y. Supp. 802); excitement of defendant when his boots were being measured to compare with tracks (*People v. Rowell*, 133 Cal. 39, 65 Pac. 127; *People v. Wolcott*, 51 Mich. 612, 17 N. W. 78); drinking liquor after fire which defendant was charged with starting (*People v. O'Neill*, 112 N. Y. 355, 6 N. Y. Crim. 284, 19 N. E. 796); false pretense of defendant that he was injured in attempting to save the deceased (*State v. Garrett*, 71 N. C. 85, 17 Am. Rep. 1); conduct of defendant when confronted with corpse of his victim (*Handline v. State*, 6 Tex. App. 347); that the defendant, an accomplice, dropped his head and showed agitation when informed of arrest of principal (*Holt v. State*, 39 Tex. Crim. App. 282, 45 S. W. 1,016); that upon witness meeting defendant in company with others and exclaiming that deceased was murdered, defendant went away, *Davis v. State*, 126 Ala. 44, 28 So. 617.

Sometimes a person is detected as the author of a crime by showing an unusual anxiety to discover the perpetrator. At other times the discovery is led to by the person showing too much indifference. In some instances the observation that the person appears to know too much about the transaction leads to the discovery; at other times the inquiry is started by his appearing to know too little. *Moore v. State*, 2 Ohio St. 500.

In *Dean v. Com.*, 32 Gratt. (Va.) 912, a murder had been committed which greatly stirred the whole community. The defendant lived near the scene of the crime and the home of the murdered man, but visited neither place and showed no interest

insignificant the particulars of conduct may be, and however dim the light that it sheds upon the transaction, if it has a tendency to elucidate the transaction it must be admitted.<sup>77</sup>

**Significance of Conduct Is for the Jury to Determine.**—Whether in fact any particular item of conduct refers to the criminal offense and springs from a consciousness of guilt is a question for the determination of the jury.<sup>78</sup>

But a conviction upon slight circumstances of suspicious conduct cannot be sustained.<sup>79</sup>

b. *Flight or Escape.*—As tending to show a consciousness of guilt it is always proper in a criminal case to introduce evidence that the defendant concealed himself after the commission of the crime,<sup>80</sup> or that he attempted to disguise himself by means of an alias and by means of other devices,<sup>81</sup> or that he fled<sup>82</sup>

in the topic that was engrossing the attention of his neighbors.

77. *McAdory v. State*, 62 Ala. 154; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; citing *Whart. Crim. Ev.*, § 751.

78. *McAdory v. State*, 62 Ala. 154; *Anderson v. State*, 147 Ind. 445, 46 N. E. 901 (where the defendant resisted arrest); *State v. Lucey*, 24 Mont. 295, 61 Pac. 994.

79. *Overman v. State*, 49 Ark. 364, 5 S. W. 588.

**Attempt to Commit Suicide.**—In *State v. Caudotte*, 7 N. D. 109, 72 N. W. 913, it was held that the attempt of the defendant, an Indian, to commit suicide while confined in jail awaiting trial, was not a sufficient corroboration of the testimony of an accomplice to justify a conviction. The court referred to the peculiarities of the defendant's character, and said generally: "We believe that it would be dangerous to innocence to declare, as a legal proposition, that an attempt to commit suicide before trial raises a presumption of guilt in any case."

80. *State v. Davis*, (Idaho), 53 Pac. 678; *Com. v. Tolliver*, 119 Mass. 312; *People v. Pitcher*, 15 Mich. 397; *State v. Chase*, 68 Vt. 405, 35 Atl. 336.

81. *California*.—*People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; *People v. Hope*, 62 Cal. 291.

*Illinois*.—*Barron v. People*, 73 Ill. 256.

*Kansas*.—*State v. Stewart*, 65 Kan. 371, 69 Pac. 335.

*Massachusetts*.—*Com. v. Tolliver*, 119 Mass. 312; *Com. v. Griffin*, 4 Allen 310.

*Montana*.—*Territory v. Bryson*, 9 Mont. 32, 22 Pac. 147, where the defendant, after the disappearance of the woman with whose murder he was charged, stated that she had gone to another town, where he also was going, but he merely moved to another place in the same town.

*North Carolina*.—*State v. Whitson*, 111 N. C. 695, 16 S. E. 332.

*Rhode Island*.—*State v. Ellwood*, 17 R. I. 763, 24 Atl. 782.

*Texas*.—*Freese v. State*, (Tex. Crim. App.), 21 S. W. 189 (where defendant gave fictitious name when disposing of the stolen property); *Burks v. State*, 24 Tex. App. 326, 6 S. W. 300.

And so it is quite competent to show that the defendant had registered at a hotel a few miles away from the scene of the crime the day before the offense was committed. *Considine v. U. S.*, 112 Fed. 342.

82. *United States*.—*Allen v. U. S.*, 164 U. S. 492; *U. S. v. Jackson*, 29 Fed. 503.

*Alabama*.—*Koch v. State*, 115 Ala. 99, 22 So. 471; *Sylvester v. State*, 71 Ala. 17.

*Arkansas*.—*Burris v. State*, 38 Ark. 221.

*California*.—*People v. Giancoli*, 74 Cal. 642, 16 Pac. 510; *People v. Welsh*, 63 Cal. 167; *People v. Lock Wing*, 61 Cal. 380 (where the defendant ran away when the man whom he had wounded pointed at him and

to avoid arrest.<sup>83</sup>

requested his arrest); *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401. *Georgia*.—*Sewell v. State*, 76 Ga. 836.

*Iowa*.—*State v. Schaffer*, 70 Iowa 371, 30 N. W. 639.

*Kentucky*.—*Baker v. Com.*, 13 Ky. L. Rep. 571, 17 S. W. 625; *Basham v. Com.*, 87 Ky. 440, 9 S. W. 284.

*Louisiana*.—*State v. Williams*, 30 La. Ann. 842.

*Michigan*.—*People v. Pitcher*, 15 Mich. 397.

*Mississippi*.—*Smith v. State*, 58 Miss. 867.

*Missouri*.—*State v. Adler*, 146 Mo. 18, 47 S. W. 794; *State v. Moore*, 101 Mo. 316, 14 S. W. 182; *State v. Griffin*, 87 Mo. 608.

*Nebraska*.—*George v. State*, 61 Neb. 669, 85 N. W. 840.

*Ohio*.—*Grillo v. State*, 9 Ohio Cir. Ct. 394.

*Pennsylvania*.—*Com. v. McMahon*, 145 Pa. St. 413, 22 Atl. 971.

*Texas*.—*Gage v. State*, (Tex. Crim. App.), 55 S. W. 63 (where the evidence was held admissible on the further ground that it tended to overthrow the theory of self-defense); *Stevens v. State*, (Tex. Crim. App.), 49 S. W. 105.

*Vermont*.—*State v. Shaw*, 73 Vt. 149, 50 Atl. 863.

**Flight When Officer Approached** with a warrant for the defendant's arrest may be shown, though it does not appear that defendant knew on what charge he was to be arrested. *State v. Frederic*, 69 Me. 400.

**Not Admitted as Part of the Res Gestae**.—Evidence of flight, or escape, is not to be regarded as part of the *res gestae*, but only as a circumstance tending to show guilt. For this reason it need not have occurred in such immediate proximity as to time to the main fact as to make evidence of it admissible under rules governing *res gestae*. *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401; *Anderson v. Com.*, 100 Va. 860, 42 S. E. 865; *Cordova v. State*, 6 Tex. App. 207.

**Flight Must Be Actual, Not Constructive**.—The testimony of an officer that he had carried a warrant for several months and had searched

for the defendant in all his known haunts, and had finally arrested him at his own house, does not show flight. A mere absence from particular places is not flight. *Com. v. Roland*, 8 Phila. (Pa.) 606.

**Default in Court on a Particular Day** in no manner tends to prove flight. *State v. Lee*, 17 Or. 488, 21 Pac. 455.

A witness may testify that the accused was out of the state (*Sebastian v. State*, [Tex. Crim. App.], 53 S. W. 875,) and that he was arrested under requisition papers. *Bowles v. State*, 58 Ala. 335.

And a letter written by the defendant showing that he was a fugitive from justice is admissible. *Stevens v. State*, (Tex. Crim. App.), 49 S. W. 105.

The steps taken by officers to arrest the defendant may be shown. *Koch v. State*, 115 Ala. 99, 22 So. 471; *Carden v. State*, 84 Ala. 417, 4 So. 823; *People v. Fine*, 77 Cal. 147, 19 Pac. 269; *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1,052, 35 L. R. A. 18.

*People v. Ogle*, 104 N. Y. 511, 11 N. E. 53, and, in addition, that a reward was offered for his apprehension, and that notices describing him were sent to different places. *State v. Lucey*, 24 Mont. 295, 61 Pac. 994.

The sheriff may testify that for three years he had had capias for the arrest of the defendant, and diligently searched for him, but had failed to find him. *Henry v. State*, (Tex. Crim. App.), 43 S. W. 340.

A witness may testify that he lived so near the accused, and was accustomed to see him so often when at home, that a failure to see him would tend to show absence from home, when accused was not seen after the crime. *Gray v. State*, 42 Fla. 174, 28 So. 53.

**83. The Intention to Evade Justice** is of the greatest importance in deciding upon the weight to be given to testimony as to flight or escape. *Com. v. Brigham*, 147 Mass. 414, 18 N. E. 167.

An instruction relating to the inference to be deduced from evidence

So it may be shown that after his arrest the defendant gave bonds for his appearance at the trial, and that by failing to appear he forfeited the bond.<sup>84</sup>

**Extent and Circumstances of Flight.** — And when testimony as to flight is resorted to, it is proper to show the extent of the flight and the circumstances thereof, including the actions and doings of the defendant which tend to characterize it and increase its significance;<sup>85</sup> such as, for example, resistance of known officers of the law.<sup>86</sup>

**Escape.** — For the same purpose it may be shown that the defendant escaped from the custody of the law.<sup>87</sup>

of flight which ignores the question of whether such flight was to avoid arrest is defective. *State v. Marshall*, 115 Mo. 383, 22 S. W. 452; *State v. Potter*, 108 Mo. 424, 22 S. W. 89; *State v. Jackson*, 95 Mo. 623, 8 S. W. 749.

**An Example of Such a Defective Instruction** is to be found in *People v. Choy Ah Sing*, 84 Cal. 276, 24 Pac. 379, where the court charged as follows: "The flight of the defendant is a circumstance tending to establish his guilt, but is not of itself alone sufficient to justify a verdict of guilty. The jury may take evidence of such flight into consideration in connection with the circumstances and testimony in the case." As a matter of fact the evidence as to the cause of the flight was conflicting.

<sup>84.</sup> *Saylor v. Com.*, 22 Ky. L. Rep. 472, 57 S. W. 614 (criticising *Morgan v. Com.*, 14 Bush (Ky.) 106, where a contrary ruling was made without any expression of the reason therefor). *Williams v. State*, 43 Tex. 182, 23 Am. Rep. 590; *Mathews v. State*, 9 Tex. App. 138.

<sup>85.</sup> *Batten v. State*, 80 Ind. 394; *State v. Van Winkle*, 80 Iowa 15, 45 N. W. 388 (where defendant, when arrested, denied his identity); *Waite v. State*, 13 Tex. App. 169; *Aiken v. State*, 10 Tex. App. 610.

**Breach of Contract.** — It may be shown as a circumstance indicating that the flight was the result of some powerful motive, and that the defendant had intended to remain in the locality, that he had recently entered into a contract of employment which was broken by his flight. *Welsh v. State*, 97 Ala. 1, 12 So. 275.

<sup>86.</sup> *Alabama.* — *Horn v. State*, 102 Ala. 144, 15 So. 278.

*District of Columbia.* — *Funk v. U. S.*, 16 App. (D. C.) 478.

*Illinois.* — *Jamison v. People*, 145 Ill. 357, 34 N. E. 486.

*Michigan.* — *People v. Burns*, 67 Mich. 537, 35 N. W. 154.

*Vermont.* — *State v. Shaw*, 73 Vt. 149, 50 Atl. 863.

*Virginia.* — *Williams v. Com.*, 85 Va. 607, 8 S. E. 470.

In *State v. Shipley*, 171 Mo. 544, 74 S. W. 612, the sheriff testified that when he reached the scene of the crime the defendant was running and the marshal was ordering him to halt, but he ran on, and the sheriff also commanded him to halt, but he continued his flight, and the sheriff thereupon shot at him, and he returned the fire and ran on. See also *State v. Taylor*, 117 Mo. 181, 22 S. W. 1, 103.

<sup>87.</sup> *Alabama.* — *Nelson v. State*, 130 Ala. 83, 30 So. 728; *Murrell v. State*, 46 Ala. 89, 7 Am. Rep. 592.

*Kentucky.* — *Clark v. State*, 17 Ky. 540, 32 S. W. 131.

*Louisiana.* — *State v. Hobgood*, 46 La. Ann. 855, 15 So. 406; *State v. Dufour*, 31 La. Ann. 804.

*Michigan.* — *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216, where on the separate trial of one of three charged with the crime it was shown that all three escaped.

*New York.* — *People v. Myers*, 2 Hun 6.

**That the Defendant Advised His Accomplice to Escape** is also admissible on the same ground. *People v. Rathbun*, 21 Wend. (N. Y.) 509.

See also *Ezell v. State*, (Tex. Crim.

**So an Attempt to Escape** from custody has a tendency to show consciousness of guilt, and is admissible.<sup>88</sup>

**Bribery of Officer.** — In this connection it is competent for the prosecution to show that the defendant attempted to bribe an officer of the law to be allowed to escape;<sup>89</sup> or that he requested another to aid him to escape.<sup>90</sup>

**Showing Other Crimes.** — And a plan to escape, formed by the defendant, may be shown, though such plan involved the commission of another crime.<sup>91</sup>

**Explanation of Flight.** — But as different individuals will act differently under the same circumstances, owing to the difference in their mental and moral constitution, it is possible in a particular case that flight or escape may not have been induced by a consciousness of guilt and dread of punishment according to law, but by a nervous dread of imprisonment and the consequent shame which

App.), 71 S. W. 283, where the defendant offered to pay the car fare of an accomplice to a point outside the state.

**88. Arkansas.** — *Burris v. State*, 38 Ark. 221.

*California.* — *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457.

*Indiana.* — *Anderson v. State*, 104 Ind. 467, 4 N. E. 63; *Hittner v. State*, 19 Ind. 48.

*Iowa.* — *State v. Wrand*, 108 Iowa 73, 78 N. W. 788; *State v. Stevens*, 67 Iowa 557, 25 N. W. 777; *State v. Rodman*, 62 Iowa 456, 17 N. W. 663.

*Louisiana.* — *State v. Beatty*, 30 La. Ann. 1,267.

*Michigan.* — *Hall v. People*, 39 Mich. 717.

*Missouri.* — *State v. Foster*, 136 Mo. 653, 38 S. W. 721; *State v. Moore*, 117 Mo. 395, 22 S. W. 1,086; *Fanning v. State*, 14 Mo. 386.

*Wisconsin.* — *Ryan v. State*, 83 Wis. 486, 53 N. W. 836.

**Attempt to Escape Pending Appeal** from conviction on previous trial may be shown. *State v. Howell*, 117 Mo. 307, 23 S. W. 263.

**Attempt to Escape, After Arrest in Another County** subsequent to the finding of the indictment under which the defendant is on trial cannot be shown. *State v. Hart*, 66 Mo. 208.

**Possession of Tools.** — It is proper for the state to show as bearing on this question, that the defendant had in his possession tools adapted to the accomplishment of an escape.

*Barnes v. Com.*, 24 Ky. L. Rep. 1,143, 70 S. W. 827; *Clark v. Com.*, 17 Ky. L. Rep. 540, 32 S. W. 131; *State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *Fanning v. State*, 14 Mo. 386 (false key); *State v. Palmer*, 65 N. H. 216, 20 Atl. 6 (razor and gun wrench); *State v. Koontz*, 31 W. Va. 127, 5 S. E. 328 (saw for cutting iron); such evidence is greatly strengthened, if, in addition to the possession of such tools, it can be shown that a bar (*State v. Koontz*, 31 W. Va. 127, 5 S. E. 328), or the netting of the prisoner's cell window was in fact cut. *State v. Palmer*, 65 N. H. 216, 20 Atl. 6.

**89. McRae v. State**, 71 Ga. 96; *Whaley v. State*, 11 Ga. 123; *U. S. v. Barlow*, 1 Cr. C. C. 94, 24 Fed. Cas. No. 14,521.

**When in Custody for Different Offense.** — Such evidence was allowed in *Dean v. Com.*, 4 Gratt. (Va.) 541, though when the attempt was made by the defendant he was under arrest for a different offense, such offense and the one for which he was on trial being founded on the same facts.

**90. State v. Jackson**, 95 Mo. 623, 8 S. W. 749.

**91. People v. Petniecky**, 2 N. Y. Crim. 450.

See also *Revel v. State*, 26 Ga. 275 (where a homicide was committed in the attempt to escape); *Russell v. State*, 38 Tex. Crim. App. 599, 44 S. W. 159 (attack on officer).

innocent persons frequently suffer.<sup>92</sup>

So after the prosecution has shown the fact of flight,<sup>93</sup> the defendant may offer any proof at his command which tends to show that flight was not induced by a consciousness of guilt,<sup>94</sup> but by the apprehension of danger of such a character that it could not be easily guarded against.<sup>95</sup> Thus flight either before<sup>96</sup> or after arrest<sup>97</sup> may be accounted for by a showing of a reasonable apprehension of physical violence.<sup>98</sup> But before the apprehension from this cause can have any weight, it must appear that the defendant fled soon after the knowledge of the danger was brought home to him. The interval must be so short as to make the inference reasonable that flight was the result of the threats.<sup>99</sup> Of course threats of which the defendant

92. *Alabama*.—*Elmore v. State*, 98 Ala. 12, 13 So. 427.

*Arkansas*.—*Burris v. State*, 38 Ark. 221.

*Nebraska*.—*Mathews v. State*, 19 Neb. 330, 27 N. W. 234.

*New York*.—*Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 936.

*Virginia*.—*Anderson v. Com.*, 100 Va. 860, 42 S. E. 865 (citing Whart. Crim. Ev., § 750).

93. **Evidence to Account for Flight Is Irrelevant**, unless the prosecution has first shown the actual flight. *People v. Shaw*, 111 Cal. 171, 43 Pac. 593; *People v. Clark*, 84 Cal. 573, 24 Pac. 313; *State v. Hays*, 23 Mo. 287.

94. *Bradburn v. U. S.*, 3 Ind. Terr. 604, 64 S. W. 550; *Webb v. Com.*, 4 Ky. L. Rep. 436; *State v. Mallon*, 75 Mo. 355; *Walters v. State*, 17 Tex. App. 226, 50 Am. Rep. 128.

**Insanity of Accused** may be shown, to account for the fact that he absented himself from the trial after the introduction of the evidence of the prosecution. *Peacock v. State*, 50 N. J. L. 653, 14 Atl. 893.

**Voluntary Surrender** of the defendant after an escape has no tendency to overcome the inference of guilt, and the fact of such surrender cannot be shown by the defendant. *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216.

95. *Kennedy v. Com.*, 14 Bush (Ky.) 340, where it was held that the unsanitary condition of the jail in which the defendant was confined was not such a danger as would rebut the inference from flight.

96. *Plummer v. Com.*, 1 Bush

(Ky.) 76; *State v. Ma Foo*, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414; *Lewallen v. State*, 33 Tex. Crim. App. 412, 26 S. W. 832; *Arnold v. State*, 9 Tex. App. 435; *State v. Roller*, 30 Wash. 692, 71 Pac. 718.

97. *Golden v. State*, 25 Ga. 527; *Kennedy v. Com.*, 14 Bush (Ky.) 340.

98. *Lewis v. State*, 96 Ala. 6, 11 So. 259, 38 Am. St. Rep. 75; *Plummer v. Com.*, 1 Bush (Ky.) 76.

In *State v. Ma Foo*, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414, an instruction that if the defendant fled from a mob and to escape arrest, the inference of guilt would not arise, was held correct.

**Advice of Friends**.—In this connection the defendant may show that he was advised to leave the country to avoid harm from relatives of the deceased. *Bradburn v. U. S.*, 3 Ind. Terr. 604, 64 U. S. 550. And see *State v. Phillips*, 24 Mo. 475.

**Character of Persons Threatening Violence**.—That the defendant was threatened by relatives of the deceased having been shown, it is relevant to show further the desperate character of the persons making the threats. *State v. Barham*, 82 Mo. 67.

**Forfeiture of Bond Not Justified**. In *State v. Chevallier*, 36 La. Ann. 81, it was held that threats of friends and relatives of the deceased against the life of the accused did not justify the latter in forfeiting his bond, and were inadmissible to explain his flight.

99. *State v. McDevitt*, 69 Iowa 549, 29 N. W. 459 (threats of lynching); *State v. Phillips*, 24 Mo. 475.



did not know prior to his flight could not have influenced such flight, and therefore cannot be shown to account for it.<sup>1</sup>

**Value of Evidence.** — The fact of flight is at best only a circumstance to be weighed by the jury, and, standing by itself, is not sufficient to warrant a conviction.<sup>2</sup> Whether or not the motive for such an escape has its origin in the consciousness of guilt, and the dread of being brought to justice, or whether it can be explained and attributed to some other innocent motive, are questions for the determination of the jury under all the evidence in the case.<sup>3</sup>

**c. Fabrication of Evidence.** — The attempt to pollute the current of justice by the fabrication of evidence always has a tendency to throw discredit on the party resorting to it.<sup>4</sup>

1. *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

2. *United States*. — *Alberty v. U. S.*, 162 U. S. 499; *Hickory v. U. S.*, 160 U. S. 408.

*Alabama*. — *Elmore v. State*, 98 Ala. 12, 13 So. 427.

*California*. — *People v. Wong Ah Ngow*, 54 Cal. 151, 35 Am. Rep. 69.

*Georgia*. — *Smith v. State*, 106 Ga. 673, 32 S. E. 851, 71 Am. St. Rep. 286; *Sewell v. State*, 76 Ga. 836; *Jesse v. State*, 20 Ga. 156.

*Idaho*. — *State v. Seymour*, (Idaho), 61 Pac. 1,033.

*Indiana*. — *State v. Waybright*, 56 Ind. 122.

*Iowa*. — *State v. Arthur*, 23 Iowa 430.

*Kansas*. — *State v. Thomas*, 58 Kan. 805, 51 Pac. 228.

*Kentucky*. — *Madison v. Com.*, 13 Ky. L. Rep. 313, 17 S. W. 164.

*Louisiana*. — *State v. Middleton*, 104 La. 233, 28 So. 914.

*Missouri*. — *State v. Thomson*, 155 Mo. 300, 55 S. W. 1,013; *State v. Walker*, 98 Mo. 95, 9 S. W. 646.

*New York*. — *Ryan v. People*, 79 N. Y. 593.

*Pennsylvania*. — *Com. v. Bezek*, 168 Pa. St. 603, 32 Atl. 109.

*Texas*. — *Sheffield v. State*, 43 Tex. 378.

*Virginia*. — *Anderson v. Com.*, 100 Va. 860, 42 S. E. 865.

**Commission of Crime Must Be Shown** before evidence of an attempted escape can be given. *State v. Rodman*, 62 Iowa 456, 17 N. W. 663.

**When There Is No Other Evidence** of guilt, an attempted escape can-

not be shown. *Webb v. Com.*, 4 Ky. L. Rep. 436.

3. *Alabama*. — *Thomas v. State*, 107 Ala. 13, 18 So. 229; *Elmore v. State*, 98 Ala. 12, 13 So. 427.

*Arkansas*. — *Burris v. State*, 38 Ark. 221.

*California*. — *People v. Choy Ah Sing*, 84 Cal. 276, 24 Pac. 379.

*Colorado*. — *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953.

*Illinois*. — *Fox v. People*, 95 Ill. 71.

*Missouri*. — *State v. Potter*, 108 Mo. 424, 22 S. W. 89; *State v. Jackson*, 95 Mo. 623, 8 S. W. 749.

*Pennsylvania*. — *Com. v. Bezek*, 168 Pa. St. 603, 32 Atl. 109. See also cases cited in preceding note.

**Admission of Evidence of Flight Is Not Made Erroneous by Explanation.** — The question is still, in view of the explanation, and other circumstances, whether or not the flight is indicative of a consciousness of guilt. *State v. Chase*, 68 Vt. 405, 35 Atl. 336.

**Attempt to Explain Flight Disregarded.** — The jury may utterly disregard the defendant's attempt to account for his flight, because of the unworthiness of the witness; (*Benavides v. State*, 31 Tex. 579,) or may attach little importance to it on account of the other circumstances in the case. *State v. Roller*, 30 Wash. 692, 71 Pac. 718, where, after the defendant's arrest in a foreign country, he wrote a letter to his son requesting the latter to procure the suppression of certain testimony.

4. *England*. — *Rex v. Crossfield*, 26 St. Tr. 217; *Rex v. Nairn*, 19 St. Tr. 1,284.

**Bribery of Witness.** — So the attempt to influence a witness by bribery or intimidation to give false testimony is always damaging to the party whose case is sought to be aided.<sup>5</sup>

**To Be Considered With Other Evidence.** — Such an act on the part of the accused in a criminal case, however reprehensible it may be, cannot be said to raise a strong presumption of guilt. It is a circumstance to be considered by the jury in connection with all the other evidence.<sup>6</sup>

**Fact of Fabrication Must Be Established.** — But to have justly any weight the evidence must establish beyond question that there

*United States.* — *U. S. v. Randall*, Deady 524, 27 Fed. Cas. No. 16,118 (falsification of records).

*Illinois.* — *Winchell v. Edwards*, 57 Ill. 41.

*Pennsylvania.* — *Heslop v. Heslop*, 82 Pa. St. 537.

*Vermont.* — *State v. Williams*, 27 Vt. 724.

**Fabrication of Alibi.** — The defense of alibi is one peculiarly susceptible to fabrication, and the fact that fraud has been resorted to to establish this defense, if clearly established, may properly tell with great force against the accused. The weight to be attached to such a circumstance is to be decided by the jury in view of the other evidence in the case.

*England.* — *Rex v. Villan*, 20 How. St. Tr. 1,085.

*Alabama.* — *Crittenden v. State*, 134 Ala. 145, 32 So. 273; *Prince v. State*, 100 Ala. 144, 14 So. 409, 46 Am. St. Rep. 28; *Jackson v. State*, 117 Ala. 155, 23 So. 47; *Albritton v. State*, 94 Ala. 76, 10 So. 426.

*California.* — *People v. Lee Gam*, 69 Cal. 552, 11 Pac. 183; *People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375.

*Florida.* — *Adams v. State*, 28 Fla. 511.

*Indiana.* — *Albin v. State*, 63 Ind. 598; *Sater v. State*, 56 Ind. 378; *White v. State*, 31 Ind. 262.

*Iowa.* — *State v. Dimmitt*, 88 Iowa 551; 55 N. W. 531; *State v. Rowland*, 72 Iowa 327, 33 N. W. 137; *State v. Collins*, 20 Iowa 85.

*Mississippi.* — *Dawson v. State*, 62 Miss. 241; *Nelms v. State*, 58 Miss. 362.

*New York.* — *People v. Johnson*,

140 N. Y. 350, 35 N. E. 604; *People v. Riley*, 3 N. Y. Crim. 374.

*North Carolina.* — *State v. Byers*, 80 N. C. 426.

*Ohio.* — *Toler v. State*, 16 Ohio St. 583.

*Oregon.* — *State v. Chee Gong*, 16 Or. 534, 19 Pac. 607.

*Pennsylvania.* — *Com. v. McMahon*, 145 Pa. St. 413, 22 Atl. 971; *Turner v. Com.*, 86 Pa. St. 54, 27 Am. Rep. 683.

*Tennessee.* — *Sawyers v. State*, 83 Tenn. 694; *Phipps v. State*, 3 Coldw. 344.

*Texas.* — *Droak v. State*, (Tex. Crim. App.), 43 S. W. 988.

*Vermont.* — *State v. Manning*, 74 Vt. 449, 52 Atl. 1,033.

A distinction is to be made between the fabrication of this defense and a mere unsuccessful attempt to prove an alibi, which is not, as a matter of law, circumstance of "great weight" against the prisoner. *People v. Malaspina*, 57 Cal. 628.

5. *Georgia.* — *Kimbrough v. State*, 76 Ga. 787.

*Indiana.* — *Conway v. State*, 118 Ind. 482, 21 N. E. 285.

*Massachusetts.* — *Com. v. Cooper*, 87 Mass. 495, 81 Am. Dec. 762.

*Michigan.* — *People v. Marion*, 29 Mich. 31.

*New York.* — *Adams v. People*, 9 Hun 89.

*Texas.* — *Love v. State*, 35 Tex. Crim. App. 27, 29 S. W. 790; *Williams v. State*, 22 Tex. Crim. App. 497, 4 S. W. 64.

*Vermont.* — *Willey v. Carpenter*, 64 Vt. 212.

6. *Sater v. State*, 56 Ind. 378; *State v. Collins*, 20 Iowa 85; *Sheffield v. State*, 43 Tex. 378.

has been a fabrication.<sup>7</sup>

d. *Suppression or Destruction of Evidence.* — In both civil and criminal cases the maxim *omnia praesumuntur contra spoliatorem* applies. And the suppression, destruction or concealment of pertinent evidence by a party having it in his power may be shown as a circumstance tending to raise the inference that its production would have operated unfavorably for him.<sup>8</sup>

*Cumulative Evidence.* — This rule does not apply in the case of evidence that is merely cumulative.<sup>9</sup>

*Evidence Accessible to Other Party.* — Nor does the rule apply where the evidence was equally within the power of the other

7. *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *State v. Williams*, 27 Vt. 724.

8. *England.* — *Mortimer v. Craddock*, 12 L. J. C. P. 166; *Blatch v. Archer*, Cowper 66; *Armory v. Delamirie*, 1 Strange 504; *Dalston v. Coatsworth*, 1 P. Wms. 731; *Rex v. De la Motte*, 21 St. Tr. 810.

*United States.* — *The Joseph B. Thomas*, 81 Fed. 578; *Gulf C. & S. F. R. Co. v. Ellis*, 54 Fed. 481; *U. S. v. Flemming*, 18 Fed. 907.

*Alabama.* — *Adams v. State*, 52 Ala. 379.

*California.* — *Johnson v. White*, 46 Cal. 328.

*Florida.* — *Roberson v. State*, 40 Fla. 509, 24 So. 474 (citing 1 Greenl. Ev., § 37; 1 Tayl. Ev., § 116; Whart. Crim. Ev., § 748).

*Georgia.* — *Reid v. State*, 20 Ga. 681 (an attempt to induce a witness to abscond).

*Idaho.* — *Houser v. Austin*, 2 Idaho 188, 10 Pac. 37.

*Illinois.* — *Downing v. Plate*, 90 Ill. 268; *Miller v. People*, 39 Ill. 457.

*Indiana.* — *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

*Iowa.* — *State v. Baldwin*, 70 Iowa 180, 30 N. W. 476; *State v. Rorabacher*, 19 Iowa 154 (where a witness was threatened).

*Kansas.* — *State v. Grebe*, 17 Kan. 458.

*Kentucky.* — *Benjamin v. Ellinger*, 80 Ky. 472.

*Louisiana.* — *Lucas v. Brooks*, 23 La. Ann. 117.

*Maryland.* — *Love v. Dilley*, 64 Md. 238, 1 Atl. 59.

*Massachusetts.* — *Com. v. Smith*, 162 Mass. 508, 39 N. E. 111; *Eldridge*

*v. Hawley*, 115 Mass. 410; *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

*Michigan.* — *Cole v. Lake Shore & M. S. R. Co.*, 95 Mich. 77, 54 N. W. 638; *Gavigan v. Scott*, 51 Mich. 373, 16 N. W. 769.

*Minnesota.* — *State v. Keith*, 47 Minn. 559, 50 N. W. 691.

*Missouri.* — *State v. Dickinson*, 78 Mo. 438; *Pomeroy v. Benton*, 77 Mo. 64.

*New Jersey.* — *Jones v. Knauss*, 31 N. J. Eq. 609.

*New York.* — *Nowack v. Metropolitan St. R. Co.*, 166 N. Y. 433, 60 N. E. 32, 82 Am. St. Rep. 691.

*North Carolina.* — *State v. Atkinson*, 51 N. C. 65.

*Pennsylvania.* — *Diehl v. Enig*, 65 Pa. St. 320; *Lee v. Lee*, 9 Pa. St. 169.

*South Carolina.* — *Haleyburton v. Kershaw*, 3 Des. 105.

*Texas.* — *Clark v. State*, (Tex. Crim. App.), 43 S. W. 522.

*Vermont.* — *State v. Barron*, 37 Vt. 57.

*Wisconsin.* — *Dimond v. Henderson*, 47 Wis. 172, 2 N. W. 73.

In *People v. Hamilton*, 137 N. Y. 531, 32 N. E. 1,071, the defendant was on trial for the murder of his wife. Near the body was found a razor with which the crime had been committed, apparently. All of the defendant's shaving utensils were found in his room except his razor, which he said was at his place of work. As he worked only a few miles away his failure to produce the razor told against him.

9. *Haynes v. McRae*, 101 Ala. 318, 13 So. 270. See article "CUMULATIVE EVIDENCE."

party.<sup>10</sup>

**Existence of Evidence Must Be Shown.**—And before any inference of this nature can arise it must appear that such evidence actually existed.<sup>11</sup>

e. *Silence.* — **In a Criminal Case.** — Silence under certain circumstances may amount to a tacit admission of guilt. So if one who is not under restraint remains silent when he is accused of a crime, the circumstance is admissible in evidence against him.<sup>12</sup>

**And in a Civil Case** where statements or declarations touching the actions of a party or involving his liability have been made in his presence, his silence may be shown as justifying the inference of acquiescence.<sup>13</sup>

**Statement Must Have Been Heard and Understood and Must Have Called for a Reply.** — That such evidence may be competent, however, it must appear that the defendant heard what was said,<sup>14</sup> that

10. *Haynes v. McRae*, 101 Ala. 318; *State v. Rosier*, 55 Iowa 517, 8 N. W. 345; *People v. Sweeney*, 41 Hun 332.

11. *People v. McWhorter*, 4 Barb. 438.

12. *England.* — *Rex v. Bartlett*, 7 Car. & P. 832; *Rex v. Smithers*, 5 Car. & P. 332.

*Alabama.* — *Johnson v. State*, 17 Ala. 618. And see *Hicks v. Lawson*, 39 Ala. 90.

*Arkansas.* — *Williams v. State*, 42 Ark. 380, *Ford v. State*, 34 Ark. 649.

*District of Columbia.* — *McUin v. U. S.*, 17 App. D. C. 323.

*Georgia.* — *Brantley v. State*, 115 Ga. 229, 41 S. E. 695.

*Illinois.* — *Ackerson v. People*, 124 Ill. 563, 16 N. E. 847.

*Missouri.* — *State v. Hale*, 156 Mo. 102, 56 S. W. 881; *State v. Walker*, 78 Mo. 380.

*Nebraska.* — *Musfelt v. State*, (Neb.), 90 N. W. 237.

*New Jersey.* — *Donnelly v. State*, 26 N. J. L. 463.

*North Carolina.* — *State v. Suggs*, 89 N. C. 527.

*Pennsylvania.* — *Ettinger v. Com.*, 98 Pa. St. 338.

*Tennessee.* — *Low v. State*, 108 Tenn. 127, 65 S. W. 401.

*Texas.* — *Brown v. State*, 32 Tex. Crim. App. 119, 22 S. W. 596.

*Utah.* — *State v. Mortensen*, (Utah), 73 Pac. 562.

*Wisconsin.* — *Richards v. State*, 82 Wis. 172, 51 N. W. 652. See article "CONFESSIONS."

13. *Alabama.* — *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13; *Wheat v. Croom*, 7 Ala. 349 (a charge of trespass).

*Arkansas.* — *Humphries v. McCraw*, 9 Ark. 91.

*Connecticut.* — *Walbridge v. Arnold*, 21 Conn. 424.

*Georgia.* — *Giles v. Vandiver*, 91 Ga. 192, 17 S. E. 115; *Morris v. Stokes*, 21 Ga. 552.

*Illinois.* — *Mix v. Osby*, 62 Ill. 193.

*Indiana.* — *Springer v. Byram*, 137 Ind. 15, 36 N. E. 361, 45 Am. St. Rep. 159, 23 L. R. A. 244; *Spencer v. Robins*, 106 Ind. 580, 5 N. E. 726.

*Kentucky.* — *Milton v. Hunter*, 13 Bush (Ky.) 163.

*Louisiana.* — *Olivier v. Louisville & N. R. Co.*, 43 La. Ann. 804, 9 So. 431.

*Maine.* — *Johnson v. Day*, 78 Me. 224, 3 Atl. 647.

*Massachusetts.* — *Drury v. Hervey*, 126 Mass. 519.

*Mississippi.* — *State v. Farish*, 23 Miss. 483.

*New Hampshire.* — *Wallace v. Goodall*, 18 N. H. 439.

*New York.* — *Gibney v. Marchay*, 34 N. Y. 301.

*North Carolina.* — *Andres v. Lee*, 21 N. C. 318.

*Pennsylvania.* — *Nippenose Mfg. Co. v. Staddon*, 68 Pa. St. 256.

*South Carolina.* — *Hendrickson v. Millar*, 1 Mill 296. See articles "ADMISSIONS," "ASSENT."

14. *Alabama.* — *Davis v. State*, 131 Ala. 10, 31 So. 569.

he understood the import of the language used,<sup>15</sup> and that the statement was made under such circumstances that it naturally called for a reply.<sup>16</sup>

**When the Rule Does Not Apply.** — The rule has no application where the statements are made in the course of a judicial proceeding,<sup>17</sup> or while the defendant is under restraint.<sup>18</sup>

*Georgia.* — *Moye v. State*, 66 Ga. 740.

*Indiana.* — *Pierce v. Goldsberry*, 35 Ind. 317.

*Iowa.* — *State v. Crafton*, 89 Iowa 109, 56 N. W. 257.

*Massachusetts.* — *Mallen v. Boynton*, 132 Mass. 443; *Com. v. Galavan*, 91 Mass. 271.

*Michigan.* — *Barry v. Davis*, 33 Mich. 515.

*Missouri.* — *State v. Murray*, 126 Mo. 611, 29 S. W. 700.

*New York.* — *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630.

*Oregon.* — *Joseph v. Furnish*, 27 Or. 260, 41 Pac. 424.

*Pennsylvania.* — *Moore v. Smith*, 14 Serg. & R. 388.

*Tennessee.* — *Allison v. Barrow*, 3 Coldw. 414, 91 Am. Dec. 291.

*Texas.* — *Bookser v. State*, 26 Tex. App. 593, 10 S. W. 219; *Ingle v. State*, 1 Tex. App. 307.

15. *Territory v. Big Knot*, 6 Mont. 242, 11 Pac. 670 (where defendant could not understand the language in which statements were made); *People v. Izzo*, 60 Hun 583, 14 N. Y. Supp. 906; *Lanergan v. People*, 39 N. Y. 39; *State v. Perkins*, 10 N. C. 377.

16. *United States.* — *Sparf v. U. S.*, 156 U. S. 51.

*Alabama.* — *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182; *Perry v. Johnston*, 59 Ala. 648.

*Georgia.* — *Graham v. State*, (Ga.), 45 S. E. 616; *Giles v. Vandiver*, 91 Ga. 192, 17 S. E. 115.

*Illinois.* — *Slattery v. People*, 76 Ill. 217, where the accusations were made at a time when defendant had promised his companion to govern his temper and be careful as to his deportment.

*Massachusetts.* — *Com. v. Brailey*, 134 Mass. 527.

*Michigan.* — *People v. O'Brien*, 68 Mich. 468, 36 N. W. 225.

*Missouri.* — *State v. Murray*, 126

Mo. 611, 29 S. W. 700; *State v. Glahn*, 97 Mo. 679, 11 S. W. 260; *State v. Hamilton*, 55 Mo. 520.

*New York.* — *People v. Young*, 72 App. Div. 9, 76 N. Y. Supp. 275 (where defendant had been cautioned).

*Texas.* — *Felder v. State*, 23 Tex. App. 477, 5 S. W. 145, 59 Am. Rep. 777; *Loggins v. State*, 8 Tex. App. 434.

*Utah.* — *People v. Kessler*, 13 Utah 69, 44 Pac. 97, where the defendant having been brought into the presence of his victim, was told by the officer to "keep still."

*Vermont.* — *Pierce v. Pierce*, 66 Vt. 369, 29 Atl. 364; *Gale v. Lincoln*, 11 Vt. 152.

17. *Alabama.* — *Collier v. Dick*, 111 Ala. 263, 18 So. 522; *Weaver v. State*, 77 Ala. 26.

*California.* — *Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64.

*Georgia.* — *Bell v. State*, 93 Ga. 557, 19 S. E. 244; *McElmurray v. Turner*, 86 Ga. 215, 12 S. E. 359.

*Indiana.* — *Broyles v. State*, 47 Ind. 251.

*Massachusetts.* — *Com. v. Walker*, 95 Mass. 570.

*Missouri.* — *State v. Mullins*, 101 Mo. 514, 14 S. W. 625.

*New York.* — *People v. Willett*, 92 N. Y. 29.

*Pennsylvania.* — *Com. v. Zorambo*, 205 Pa. 109.

*Rhode Island.* — *State v. Boyle*, 13 R. I. 537.

*South Carolina.* — *State v. Senn*, 32 S. C. 392, 11 S. E. 292.

*South Dakota.* — *Enos v. St. Paul F. M. Ins. Co.*, 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

*Texas.* — *Kirby v. State*, 23 Tex. App. 13, 5 S. W. 165.

*Vermont.* — *Brainard v. Buck*, 25 Vt. 573, 60 Am. Dec. 291.

18. *Iowa.* — *State v. Weaver*, 57 Iowa 730, 11 N. W. 675.

*Louisiana.* — *State v. Carter*, 106

**To Be Considered With Other Evidence.** — In any event the mere silence of the accused is a circumstance of slight weight,<sup>19</sup> whose effect is to be determined by the jury in connection with the other evidence in the case.<sup>20</sup>

**f. False Explanations of Suspicious Circumstances.** — The attempt to account for suspicious circumstances by giving false explanations is a circumstance indicative of guilt.<sup>21</sup>

*La.* 407, 30 So. 895; *State v. Munston*, 35 *La. Ann.* 888.

*Massachusetts.* — *Com. v. Kenney*, 53 *Mass.* 235, 46 *Am. Dec.* 672.

*Missouri.* — *State v. Howard*, 102 *Mo.* 142, 14 *S. W.* 937.

*Texas.* — *Denton v. State*, (*Tex. Crim. App.*), 60 *S. W.* 670; *Gardner v. State*, (*Tex. Crim. App.*), 34 *S. W.* 945.

**The Contrary Is Held in California.** *People v. Amaya*, 134 *Cal.* 531, 66 *Pac.* 794.

19. *Jones v. State*, 107 *Ala.* 93, 18 *So.* 237; *Johnson v. State*, 17 *Ala.* 618; *Williams v. State*, 42 *Ark.* 380.

20. *Georgia.* — *Moye v. State*, 66 *Ga.* 740.

*Illinois.* — *Hazenbaugh v. Crabtree*, 33 *Ill.* 225.

*Iowa.* — *State v. Pratt*, 20 *Iowa* 267.

*Maine.* — *State v. Reed*, 62 *Me.* 129.

*Massachusetts.* — *Com. v. Brailey*, 134 *Mass.* 527; *Com. v. Galavan*, 91 *Mass.* 271.

*Missouri.* — *State v. Hill*, 134 *Mo.* 663, 36 *S. W.* 223.

*New Hampshire.* — *Morrill v. Richey*, 18 *N. H.* 295.

*New York.* — *Kelley v. People*, 55 *N. Y.* 565, 14 *Am. Rep.* 342.

*North Carolina.* — *State v. Crockett*, 82 *N. C.* 599; *State v. Swink*, 19 *N. C.* 9; *State v. Perkins*, 10 *N. C.* 377.

*South Carolina.* — *State v. Edwards*, 13 *S. C.* 30.

*West Virginia.* — *State v. Belknap*, 39 *W. Va.* 427, 19 *S. E.* 507.

21. *Arkansas.* — *Edmond v. State*, 34 *Ark.* 720.

*California.* — *People v. Cuff*, 122 *Cal.* 589, 55 *Pac.* 407.

*Georgia.* — *Lovett v. State*, 60 *Ga.* 257.

*Iowa.* — *State v. Feltes*, 51 *Iowa* 495, 1 *N. W.* 755.

*Kentucky.* — *Little v. Ragan*, 83 *Ky.* 321.

*Maine.* — *State v. Benner*, 64 *Me.* 267.

*Missouri.* — *State v. Dickinson*, 78 *Mo.* 438.

*Pennsylvania.* — *McMeen v. Com.*, 114 *Pa. St.* 300, 9 *Atl.* 878; *Pilger v. Com.*, 112 *Pa. St.* 220, 5 *Atl.* 309; *Cathcart v. Com.*, 37 *Pa. St.* 108.

*Texas.* — *Kelley v. State*, 31 *Tex. Crim. App.* 211, 20 *S. W.* 365; *Thomas v. State*, 13 *Tex. App.* 493.

*Vermont.* — *State v. Bradley*, 64 *Vt.* 466, 24 *Atl.* 1,053.

In *State v. Crabtree*, 170 *Mo.* 642, 71 *S. W.* 127, blood spots were found on the bank of a river near where the body was discovered. The defendant first drew suspicion to himself by attempting to convince the searchers that the spots were caused by the juice of persimmons or some other substance.

In *State v. Lucey*, 24 *Mont.* 295, 61 *Pac.* 994, the defendant was accused of murder. It was shown that he had been seen in a neighboring town, on the morning after the crime, with his face and hands scratched and bleeding, and with his clothes wet and torn. He said that he had been thrown off an early morning train by the brakeman. But the crew of the train were all sworn and said that they were the only persons on that train, and that no one had been put off on that particular morning.

**False Explanation of Possession of Stolen Property.** — When it is shown that property recently stolen was found in the possession of one accused of the theft, it may be further shown, as a circumstance indicative of guilt, that the accused has made false and contradictory explanations of his possession. *State v. En*, 10 *Nev.* 277 (*citing* 3 *Greenl. Ev.*, § 31).

**Contradictory Explanations.** — And the fact that the defendant makes several contradictory statements strengthens the inference arising from falsehood.<sup>22</sup>

**Fact of Falsity Must Be Established,** — But whether the defendant in fact has made false and contradictory statements in explanation of suspicious circumstances is for the determination of the jury.<sup>23</sup>

And see *State v. Schaffer*, 70 Iowa 371, 30 N. W. 639, where the transaction detailed by the defendant to account for his possession was an extraordinary and unusual occurrence.

In *Fowle v. State*, 47 Wis. 545, 2 N. W. 1,133, the defendant had said that he bought the goods at public auction, but it was shown that there had not been any auction in the neighborhood.

22. *Arkansas*. — *Edmond v. State*, 34 Ark. 720.

*Iowa*. — *State v. Rodman*, 62 Iowa 456, 17 N. W. 663.

*Kentucky*. — *Logan v. Com.*, 16 Ky. L. Rep. 508, 29 S. W. 632.

*Massachusetts*. — *Com. v. O'Neil*, 169 Mass. 394, 48 N. E. 134.

*North Carolina*. — *State v. Gillis*, 15 N. C. 606.

*Pennsylvania*. — *Cathcart v. Com.*, 37 Pa. St. 108.

In *Cluverius v. Com.*, 8 Crim. Law Mag. 760, the defendant had scratches on his hand asserted to have been made by his victim during her struggles, and he attempted to account for such scratches by several inconsistent accounts.

23. *Jones v. State*, 59 Ark. 417, 27 S. W. 601; *People v. Stewart*, 75 Mich. 21, 42 N. W. 662; *State v. Howard*, 32 S. C. 91, 10 S. E. 831; *Schultz v. State*, 20 Tex. App. 308; *Massey v. State*, 1 Tex. App. 563.

---

## CITIES. — See Municipal Corporations.

# CITIZENS AND ALIENS.

BY FRANK S. ADAMS.

## I. CITIZENS, 153

1. *Proof of Citizenship*, 153
2. *Naturalization*, 153
  - A. *Record of Naturalization*, 153
  - B. *Parol Evidence of Naturalization*, 154
    - a. *When Incompetent*, 154
    - b. *Naturalized Person Must Produce Record*, 154
    - c. *Where Place of Record Is Unknown*, 154
    - d. *Acts and Declarations*, 154
    - e. *Exercise of Political Rights Presumed Legal*, 154
  - C. *Certificate of Naturalization*, 155
    - a. *What Certificates Should Show*, 155
    - b. *Defective Record Cannot Invalidate*, 155
    - c. *Clerical Errors In*, 155
  - D. *Passports Not Competent*, 156
  - E. *Citizenship of Children of Naturalized Citizen*, 156

## II. ALIENS, 156

1. *Presumption of Citizenship*, 156
2. *Burden of Proof*, 156
3. *Slight Evidence Required to Overcome Presumption*, 156
4. *Residents of Foreign Countries*, 157
5. *Proof of Original Status*, 157
6. *Expatriation*, 157
7. *Marriage*, 158
8. *Acts of Husband During Coverture*, 158

### CROSS-REFERENCES.

Domicile ;  
Elections ;  
Extradition.



## I. CITIZENS.

**1. Proof of Citizenship.**—The place of birth should be proved by positive testimony;<sup>1</sup> hearsay is not admissible.<sup>2</sup> Proof of birth within the country establishes citizenship in that country.<sup>3</sup>

**2. Naturalization.**—A. RECORD OF NATURALIZATION.—The record of a competent court is the best evidence to prove naturalization,<sup>4</sup> and is conclusive.<sup>5</sup>

**1. Evidence of Father.**—The evidence of the father as to the place of birth of his children is sufficient. *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.

**2.** *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545; *Wilmington v. Burlington*, 4 Pick. (Mass.) 173; *Rex v. Erith*, 8 East 539; *Bartlet v. Delprat*, 4 Mass. 702; *Queen v. Hepburn*, 7 Cranch 290; *Keenan v. State*, 8 Wis. 132; *Schuster v. State*, 80 Wis. 107, 49 N. W. 30.

**3. Effect of Proof of Nativity.** **Citizenship From Birth is the Rule.** Subjection to a foreign power is the exception, and a case will not be presumed to fall within the exception. Hence proof of birth within the United States is sufficient in the absence of a showing of subjection to a foreign power. *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.

**4. United States.**—*Charles Green's Son v. Salas*, 31 Fed. 106; *The Acorn*, 2 Abb. U. S. 434, 1 Fed. Cas. No. 29; *Campbell v. Gordon*, 6 Cranch 176; *Stark v. Chesapeake Ins. Co.*, 7 Cranch 420, 3 L. ed. 391; *Spratt v. Spratt*, 4 Pet. 393, 406, 7 L. ed. 897; *in re Coleman*, 15 Blatchf. 406, 6 Fed. Cas. No. 2,980; *in re McCoppin*, 5 Sawy. 630, 15 Fed. Cas. No. 8,713.

*Arkansas.*—*State v. Penney*, 10 Ark. 621.

*Illinois.*—*Ackerman v. Haenck*, 147 Ill. 514, 35 N. E. 381.

*Massachusetts.*—*Inhabitants of Dennis v. Inhabitants of Brewster*, 7 Gray (73 Mass.) 351.

*Minnesota.*—*State v. MacDonald*, 24 Minn. 48.

*New York.*—*Ritchie v. Putnam*, 13 Wend. 524.

*Pennsylvania.*—*Com. v. Sheriff*, 1 Brewst. (Pa.) 183; *in re Contested Elections*, 2 Brewst. 1; *Com. v. Leary*, 1 Brewst. 270.

*South Carolina.*—*McDaniel v. Richards*, 1 McCord 187.

*Wisconsin.*—*State v. Hoeflinger*, 35 Wis. 393.

**5. Conclusiveness of Record.**—In proceedings of naturalization, matters are submitted to the decision of the court, and the presumption will be indulged that the court heard evidence, was satisfied the applicant had complied with the law, and its findings must be held conclusive as to all the facts recited in the record. *People v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254.

**Notwithstanding Proof of Minority.**—The record is conclusive evidence of citizenship, although it is shown that the party was under the age of twenty-one years at the time of naturalization. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

**Compliance With Preliminary Requisites Need Not Be Shown.**—It need not appear by the record that all the preliminary requisites were complied with. The judgment of the court admitting the alien to become a citizen is conclusive evidence on that point. *Starke v. Chesapeake Ins. Co.*, 7 Cranch (U. S.) 420; *Spratt v. Spratt*, 4 Pet. (U. S.) 406; *Ritchie v. Putnam*, 13 Wend. (N. Y.) 524.

**Unauthorized Judgment.**—But where the judgment shows upon its face that the court was without authority to pronounce it, the determination is void and must be disregarded. *In re Takuji Yamashita*, (Wash.) 70 Pac. 482.

**Not Issued by Competent Court.** Parol evidence is admissible to show that naturalization papers were fraudulently issued or procured if the naturalization was in fact the act of the clerk alone, etc., and not the judgment of a court of compe-

**B. PAROL EVIDENCE OF NATURALIZATION.** — a. *When Incompetent.* — Naturalization cannot be proved by parol where the record can be produced.<sup>6</sup>

b. *Naturalized Person Must Produce Record.* — A party who has applied for naturalization is presumed to know where he applied and must produce the record.<sup>7</sup>

c. *Where Place of Record is Unknown.* — But where the question is as to the naturalization of a third party, and it is not known where or when he was naturalized, proof of facts inconsistent with alienage is competent to show citizenship.<sup>8</sup>

d. *Acts and Declarations.* — Where the witness cannot be produced, his declarations of his citizenship may be shown, and with a showing of exercise of rights inconsistent with alienage have been held sufficient evidence of his citizenship.<sup>9</sup>

e. *Exercise of Political Rights Presumed Legal.* — Proof that one has exercised rights, such as voting, which, if exercised by an alien, would be a crime, overcomes the presumption of alienage,

tent jurisdiction. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

**Certificate of Naturalization of Chinaman.** — A certificate of the naturalization of a native of China is void on its face, for want of jurisdiction, and cannot be recognized. *In re Gee Hop*, 71 Fed. 274.

6. *Charles Green's Son v. Salas*, 31 Fed. 106; *Slade v. Minor*, 2 Cranch 139; *State v. O'Hearn*, 58 Vt. 718, 6 Atl. 606; *Dryden v. Swinburne*, 20 W. Va. 89; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704; *Inhabitants of Dennis v. Inhabitants of Brewster*, 7 Gray (73 Mass.) 351.

**Where Record Cannot Be Obtained.** — The oath of a party that he came to this country with his father when he was six years old; that his father was naturalized long before he came of age and that he does not know the date of his father's certificate nor where it is nor where he was naturalized, and that his father is dead, is *prima facie* evidence of citizenship. *People v. McNally*, 59 How. Pr. (N. Y.) 500.

7. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

**Where Record Is Produced.** — And if the record when produced fails to show the naturalization, parol evidence to prove it is inadmissible. *Dryden v. Swinburne*, 20 W. Va. 89.

8. **Proof of Facts Inconsistent**

**With Alienage.** — In *Nalle v. Fenwick*, 4 Rand. (Va.) 585, where the date of the immigration of a deceased alien was unknown, and it was unknown when or where he was naturalized, if ever, but it appeared that he had voted and participated in elections and had acquired and held land by purchase and devise, it was held that his naturalization should be presumed. See also *Fay v. Taylor*, 31 Misc. 32, 63 N. Y. Supp. 572.

**Holding Office, etc.** — In *Blight's Lessee v. Rochester*, 7 Wheat. 534, 546, the court held that no presumption of the citizenship of a deceased alien could arise from his having held real estate for a long period of time, and no proceeding to escheat it had been instituted. But such presumption could arise from his holding office which only citizens could hold. See also *Boyd v. State of Nebraska*, 143 U. S. 135, 12 Sup. Ct. 375, reversing 31 Neb. 682, 48 N. W. 739.

9. Where it was shown that the absent witness had declared his citizenship to his friends and companions; had voted at elections and that his name had appeared on the great register and that he had located mining claims, it was held sufficient evidence of citizenship. *Providence Gold Min. Co. v. Burke*, (Ariz.), 57 Pac. 641. See also *Boyd v. State of Nebraska*, 143 U. S. 180, 12 Sup. Ct. 375.

and raises a presumption of naturalization.<sup>10</sup>

C. **CERTIFICATE OF NATURALIZATION.**—A certificate of naturalization in due form is primary evidence of citizenship<sup>11</sup> and is admissible without further proof.<sup>12</sup>

a. *What Certificate Should Show.*—The certificate should show or verify some extract from the record or minutes of the court.<sup>13</sup>

b. *Defective Record Cannot Invalidate.*—Such a certificate reciting compliance of the applicant with all the conditions necessary to entitle him to naturalization, cannot, in absence of fraud, be invalidated by a showing that the record of the court from which the certificate issued is informal or defective.<sup>14</sup>

c. *Clerical Errors In.*—Clerical errors in a certificate of naturalization may be shown by parol.<sup>15</sup>

10. *Kadlec v. Pavik*, 9 N. D. 278, 83 N. W. 5; *Gumm v. Hubbard*, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242.

**Naturalization of Father Presumed.** "Assuming that the child who has exercised the right of voting, derived through the naturalization of the father, is bound, when such right is properly challenged, to produce the record of the judgment admitting the father to citizenship, yet it would seem but reasonable and just, before such production should be required, that the challenger should overcome the strong presumption that the voter had voted legally, and had not committed a crime, by the introduction of at least some vague proof to show that the father had not been naturalized." *Behrensmeier v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

11. *Inhabitants of Dennis v. Inhabitants of Brewster*, 7 Gray (73 Mass.) 351.

12. *Newcomb v. Newcomb*, 23 Ky. L. Rep. 286, 57 S. W. 2.

13. **Contents of Certificate.**—The certificate of the clerk reciting that the applicant has been duly admitted to citizenship, but failing to show or verify any extract from the record or minutes of the action of the court, is not competent evidence to show naturalization. *Charles Green's Son v. Salas*, 31 Fed. 106. See also *Miller v. Reinhart*, 18 Ga. 239.

**Sufficient Showing in Certificate.** The certificate in *re Coleman*, 15 Blatchf. 406, 6 Fed. Cas. No. 2,980,

began, "By the court, James M. Sweeney, Clerk." The oath was in the record, the original application was on file and the initials of the judge were written across the paper. The certificate was held sufficient.

14. *Spratt v. Spratt*, 4 Pet. 393.

**Neglect of Clerk to Enter Judgment.**—The neglect of the clerk to enter the judgment is immaterial. In such case the certificate is valid and conclusive. *Matter of Christern*, 56 How. Pr. (N. Y.) 5.

"It is hardly to be supposed that Congress intended to make the applicant for citizenship responsible for a non-compliance with any other conditions than such as he had the power to comply with. The applicant can declare his intention, and can take the prescribed oath and make the renunciation, but he cannot see to it that the proceedings and renunciations are recorded." *Matter of Christern*, 56 How. Pr. (N. Y.) 5.

**Docket Entries in Place of Record.**

Where docket entries stand in the place of any record and are regarded by the court which makes them as the record, they receive from other courts the same consideration as a record which is accorded to them by the court which permits them to stand, in the place of any other record. *In re Coleman*, 15 Blatchf. 406, 6 Fed. Cas. No. 2,980.

15. **Mistake in Name.**—Where the certificate of naturalization read George Waack, but the evidence satisfactorily established that it was issued for and delivered to John

D. PASSPORTS NOT COMPETENT. — Although passports are, from the comity of nations in amity to each other, admitted as *prima facie* evidence of what they purport, they are not judicial in their character and cannot be received in courts of justice as competent evidence to establish the fact of the citizenship of the persons in whose favor they were given.<sup>16</sup>

E. CITIZENSHIP OF CHILDREN OF NATURALIZED CITIZEN. — Proof of the naturalization of the parent does not establish citizenship of the children unless it also is shown that at the time of such naturalization the child was under the age of twenty-one years and dwelling in the United States.<sup>17</sup>

## II. ALIENS.

1. **Presumption of Citizenship.** — A person living in the United States is presumed to be a citizen thereof.<sup>18</sup>

2. **Burden of Proof.** — And one alleging alienage of such person has the burden of proof.<sup>19</sup>

3. **Slight Evidence Required to Overcome Presumption.** — Full proof is not required, however, but such evidence as shows non-citizenship probable is sufficient *prima facie*.<sup>20</sup>

Waack, it was held that he should not be disfranchised on account of the clerical error of the clerk. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

16. **Passport Not Evidence.** — A passport is a mere *ex parte* certificate; and if founded upon any evidence produced to the secretary of state, establishing the fact of citizenship, that evidence, if of a character admissible in a court of justice, ought to be produced upon the trial, as higher and better evidence of the fact. *Urtetiqui v. D'Arcy*, 9 Pet. 692.

17. **Status of Children at Time of Naturalization.** — The father came to America from Ireland in 1851, and was naturalized and died in 1862. The child who was born in Ireland in 1850, and who was a minor at the time of his father's naturalization, but who did not come to America until after the father's naturalization, is an alien. *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704. See also *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 69 Am. St. Rep. 228, 42 L. R. A. 809.

18. *State v. Beackmo*, 6 Blackf. (Ind.) 488; *Molyneux v. Seymour*, *Fanning & Co.*, 30 Ga. 440, 76 Am. Dec. 662; *Quinby v. Duncan*, 4 Harr.

(Del.) 383; *State v. Haynes*, 54 Iowa 109, 6 N. W. 156; *Moore v. Wilson*, 10 Yerg. (18 Tenn.) 406; *Jantzen v. Arizona Copper Co.*, (Ariz.), 20 Pac. 93; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153.

**Presumption from Long Residence and Other Circumstances.** — Long residence, engaging in business and claiming and cultivating a plantation will give rise to the presumption of citizenship in the state. *Shelton v. Tiffin*, 6 How. 163, 12 L. ed. 387. See also *Johnson v. Twenty-one Bales, etc.*, 2 Paine 601, 13 Fed. Cas. No. 7,417.

19. *State v. Beackmo*, 6 Blackf. (Ind.) 488; *State v. Haynes*, 54 Iowa 109, 6 N. W. 156; *Moore v. Wilson*, 10 Yerg. (18 Tenn.) 406.

20. **Proof of Birth in Foreign Country.** — Evidence that the parties alleged to be aliens were born in foreign countries and came to the United States after they were twenty-one years of age and had never taken out naturalization papers, is sufficient to cast upon the parties alleged to be aliens the burden of proving that they were born under such conditions as to their parentage as would make them citizens of the United States. *Beh-*

**4. Residents of Foreign Countries.**—In the United States it is presumed that persons residing in foreign countries are aliens.<sup>21</sup>

**5. Proof of Original Status.**—The original status of an alien, when established, is presumed to continue until the contrary appears.<sup>22</sup>

**6. Expatriation.**—The fact of expatriation is to be proved like any other fact for which there is no prescribed form of proof.<sup>23</sup> But general evidence of expatriation is actual emigration,<sup>24</sup> with

*rensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

**The Fact of Emigration to the United States.**—In *Jackson v. Wright*, 4 Johns. (N. Y.) 75, where the evidence was that one Thomas Nelson had emigrated to the United States from Ireland, it was held that it must be presumed that he was born in Ireland and was an alien.

**Absence of Record of Naturalization.**—The absence of any record of the declaration of intention to become a citizen in the counties where a person, foreign born, has resided a large portion of his time since he came to this country is sufficient evidence to require the party insisting upon the legality of his vote to show by competent evidence either that he had declared his intention to become a citizen, or had become a citizen. *State v. Olin*, 23 Wis. 309. See also *White v. White*, 2 Met. (Ky.) 185.

**Official Character Insufficient.** But alienage cannot be inferred from the single circumstance that the person holds and exercises the office of consul of a foreign country. *Bors v. Preston*, 111 U. S. 252.

**21. Statement of Stranger Insufficient.**—When all that is known of a person is that his home and residence has been in a foreign country, the mere statement of a stranger that he was a citizen of the United States is not sufficient to establish his citizenship in this country against the presumption which would arise from his home and his residence being in another. *State v. Salge*, 1 Nev. 385.

**22. Charles Green's Son v. Salas**, 31 Fed. 106; *Hauenstein v. Lynham*, 100 U. S. 483; *White v. White*, 2 Met. (Ky.) 185; *Kadlec v. Pavik*, 9

N. D. 278, 83 N. W. 5; *Walther v. Rabolt*, 30 Cal. 185.

**23. Rules of Evidence, Reasonable.**—Courts will adopt reasonable rules of evidence as to the fact of intention. *The Venus*, 8 Cranch 253, 3 L. ed. 553.

**Expatriation, How Proved.**—The fact of expatriation may be proved by any evidence that will convince the judgment. *Charles Green's Son v. Salas*, 31 Fed. 106. See also *The Venus*, 8 Cranch 253, 3 L. ed. 553.

**24. Change of Domicile Must Be Bona Fide.**—A change of domicile made for the purpose of expatriation must be in good faith. It can never be asserted as a cover for fraud or as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act. *Santissima Trinidad*, 7 Wheat. 283.

**Residence Must Not Be Transient.** If the residence be for a special purpose and transient in its nature, it shall not destroy the original or prior national character. But if it be taken up *animus manendi*, with the intention of remaining, then it becomes a domicile, superadding to the original or prior character, the rights and privileges, as well as the disabilities and penalties of a citizen or subject of the country in which the residence is established. *Johnson v. Twenty-one Bales*, etc., 2 Paine 601, 13 Fed. Cas. No. 7417.

**Mere Residence Abroad Not Sufficient.**—A citizen of the United States does not become an alien by mere residence abroad. *McGregor v. McGregor*, 1 Keyes (N. Y.) 133. See also *Ludlan v. Ludlan*, 31 Barb. 486, 26 N. Y. 356, 84 Am. Dec. 193.

**Length of Residence Depends**

other concurrent acts showing a determination and intention to transfer allegiance.<sup>26</sup>

**7. Marriage.**—The earlier rule was that marriage with an alien, whether a friend or an enemy, produced no dissolution of the native allegiance of the wife,<sup>26</sup> but it is now held that the political status of the wife follows that of her husband, provided that there is a withdrawal from her native country or an equivalent act expressive of her election of renouncing her former citizenship as a consequence of her marriage.<sup>27</sup>

**8. Acts of Husband During Coverture.**—Acts of expatriation by the husband during the coverture, although *prima facie* evidence of the alienage of the wife who accompanies him to a foreign country, are not conclusive as to her citizenship.<sup>28</sup>

**Upon Intention.**—A very short residence with the intention to change domicile is sufficient, but long continued residence without such intention is insufficient for the purposes of expatriation. *Charles Green's Son v. Salas*, 31 Fed. 106.

**Declarations of the Party.**—Declarations of the party as to his intention to return to the country whence he came are admissible to show want of citizenship. *Baptiste v. D'Volunbrun*, 5 Har. & J. (Md.) 86.

**25. Taking Oath of Allegiance to Foreign Country.**—Swearing allegiance to another government, residing there for several years, and entering into its service is sufficient evidence of expatriation. *Juando v. Taylor*, 2 Paine 652, 13 Fed. Cas. No. 7,558.

**Foreign Government Need Not Be Independent.**—The fact that the party has sworn allegiance to a foreign government is sufficient, and it is not essential that the new government be recognized as independent. *Juando v. Taylor*, 2 Paine 652, 13 Fed. Cas. No. 7,558. For the general effect of taking the oath of allegiance, see also *Browne v. Dexter*, 66 Cal. 39, 4 Pac. 913; *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545; *Alsberry v. Hawkins*, 9 Dana (Ky.) 177, 33 Am. Dec. 546.

**26.** *Shanks v. Dupont*, 3 Pet. (U. S.) 242; *Kelly v. Harrison*, 2 Johns.

Cas. (N. Y.) 29; *Comitis v. Parker-son*, 56 Fed. 556.

**27.** *Ruckgaher v. Moore*, (C. C. 1900), 104 Fed. 947; *affirmed*, *Moore v. Ruckgaher*, 114 Fed. 1,020, 52 C. C. A. 587; *Pequignot v. City of Detroit*, 16 Fed. 211.

**28. Rights and Duties of the Wife.**—If expatriation be a matter of election, a wife who, as in duty bound, has shared the lot of her husband, and abides by his choice during the coverture, ought to be allowed on its termination to have the privilege of electing for herself, and of fixing by her election, not only her future but her past character. *Moore v. Tisdale*, 5 B. Mon. (Ky.) 352.

**Adoption of Foreign Domicile by Widow.**—Where the wife followed her husband to a foreign state and continued there with him until his death, contented, while she was his wife, to abide by his election of a country and a home, and after his death continued to remain there for many years, it was held sufficient evidence to establish her alienage. *Alsberry v. Hawkins*, 9 Dana (Ky.) 177, 33 Am. Dec. 546.

**Return and Presumption of Former Domicile.**—But in *Moore v. Tisdale*, 5 B. Mon. (Ky.) 352, the return of the wife to the United States shortly after the death of her husband, who had become a citizen of a foreign state, and remaining here, is proof of her intention to retain her citizenship.

CLAIM AND DELIVERY.—See Repievin.

---

CLOUD ON TITLE.—See Quieting Title.

---

CLUBS.—See Corporations.

---

CODICIL.—See Wills.

---

CO-DEFENDANTS.—See Accomplices; Competency.

---

CO-EMPLOYEES.—See Negligence.

---

COHABITATION.—See Adultery; Criminal Conversation.

---

COLLISION.—See Admiralty.

---

COLLUSION.—See Conspiracy; Divorce; Fraud.

---

COLOR OF TITLE.—See Title.

---

COMMERCIAL PAPER.—See Bills and Notes.

COMMITMENT.—See Contempt; Witnesses.

---

COMMON CARRIERS.—See Carriers.

---

COMMON COUNCIL.—See Municipal Corporations.

---

COMMUNICATIONS.—See Privileged Communications.

---

COMMUNITY PROPERTY.—See Husband and Wife.

---

COMPARATIVE NEGLIGENCE.—See Negligence.

---

COMPARISON OF HANDWRITING.—See Handwriting.

---

COMPENSATION.—See Damages.

---

COMPOSITION WITH CREDITORS.—See Compromise and Settlement.



# COMPETENCY.

BY EDWARD W. TUTTLE.

## I. DEFINITION AND DISTINCTIONS, 167

1. *Generally*, 167
2. *Distinction Between Competency of Evidence and Witness*, 168

## II. BY WHOM DETERMINED, 168

1. *Questions of Law and Fact*, 168~~5~~
  - A. *Generally*, 168
  - B. *Questions of Law*, 169
  - C. *Questions of Fact*, 169
    - a. *Generally*, 169
    - b. *Reference to Jury*, 169
      - (1.) *Collateral Facts*, 169
      - (2.) *Facts in Issue*, 172
    - c. *Degree of Proof*, 172
      - (1.) *Collateral Facts*, 172
      - (2.) *Facts in Issue*, 173
2. *Preliminary Proof of Competency*, 173
  - A. *Generally*, 173
  - B. *Determination of Competency of Evidence*, 174
    - a. *In General*, 174
    - b. *Objections*, 174
  - C. *Determination of Competency of Witness*, 174
    - a. *Objections When Taken*, 174
      - (1.) *Old Practice*, 174
      - (2.) *Modern Practice*, 174
        - (A.) *Incompetency Known*, 174
        - (B.) *Incompetency Unknown*, 175
        - (C.) *Partial and Total Incapacity*, 175
        - (D.) *Waiver*, 175
        - (E.) *Depositions*, 176
  - b. *Nature of the Examination*, 176
    - (1.) *Generally*, 176
    - (2.) *Evidence*, 176
    - (3.) *Cross-Examination*, 177

(4.) *Right to Offer Evidence*, 177.

(5.) *Limits of Examination*, 178

3. *Review on Appeal*, 178

A. *Generally*, 178

B. *Competency of Evidence*, 179

**III. WHEN DETERMINED**, 179

**IV. COMPETENCY OF EVIDENCE**, 180

1. *Generally*, 180

2. *Indecent and Immoral Evidence*, 180

A. *Generally*, 180

B. *Limits of Such Evidence*, 181

C. *Improper Exhibitions and Experiments*, 181

D. *Non-Access*, 181

3. *Evidence Wrongfully Obtained*, 181.

A. *Generally*, 181

B. *Taken From Defendant's Person or Premises*, 182

C. *Obtained Through Improper Confession*, 182

D. *Privileged Communications*, 182

4. *Incompetent Evidence in Rebuttal of Similar Incompetent Evidence*, 183

A. *Generally*, 183

B. *Effect of Objection*, 183

C. *Fault of Complaining Party*, 183

D. *Parol Evidence*, 185

E. *Secondary Evidence*, 185

F. *Character, Opinion and Hearsay*, 185

G. *Irrelevant and Immaterial Evidence*, 186

H. *Discretion of Court*, 187

I. *Prejudice From Improper Evidence*, 187

J. *Cross-Examination*, 187

5. *Exclusion of Competent Evidence*, 188

6. *Competent for One Purpose*, 188

A. *Generally*, 188

B. *Competent as to One Party*, 188

C. *Cautionary Instructions*, 188

a. *Generally*, 188

b. *Necessity of Such Instructions*, 189

- (1.) *Criminal Cases*, 189
  - (A.) *Generally*, 189
  - (B.) *Limits of Rule*, 190
- (2.) *Civil Cases*, 190
- c. *Statement in Lieu of Instructions*, 191
- d. *Nature of Instructions*, 191
- 7. *Stipulations*, 192
  - A. *Generally*, 192
  - B. *Contrary to Public Policy*, 193
  - C. *As to Evidence in Another Proceeding*, 193
    - a. *Generally*, 193
    - b. *Objections and Exceptions*, 194
  - D. *Depositions*, 194
  - E. *Secondary Evidence*, 194
  - F. *Construction*, 194
    - a. *Generally*, 194
    - b. *Application to Subsequent Trial*, 195
    - c. *Effect on Other Parties*, 195
  - G. *Stipulations as to Facts*, 195
- 8. *Rules of Court*, 196

## V. COMPETENCY IN FEDERAL COURTS, 196

- 1. *Generally*, 196
- 2. *Rule in Criminal Cases*, 197
- 3. *Federal Provision Exclusive*, 198

## VI. COMPETENCY OF WITNESSES, 198

- 1. *Presumptions and Burden of Proof*, 198
- 2. *At What Time Competent*, 199
  - A. *Generally*, 199
  - B. *By Statute*, 199
- 3. *Mental Capacity*, 200
  - A. *Generally*, 200
  - B. *Intoxication*, 200
  - C. *Deaf Mutes*, 200
    - a. *Generally*, 200
    - b. *Method of Communication*, 201
    - c. *Extent of Ability to Communicate*, 202
- 4. *Moral Capacity*, 202

- A. *Generally*, 202
- B. *Religious Belief*, 202
- C. *Obligation of Oath*, 202
  - a. *Generally*, 202
  - b. *Amenability to Punishment*, 202
- D. *Infamy*, 203
  - a. *Generally*, 203
  - b. *What Constitutes Infamy*, 204
    - (1.) *Generally*, 204
    - (2.) *At Common Law*, 204
      - (A.) *Generally*, 204
      - (B.) *Crimen Falsi*, 204
      - (C.) *By Statute*, 205
  - c. *Necessity of Sentence or Judgment*, 205
  - d. *Conviction in Another Jurisdiction*, 206
  - e. *Continuance of Disability*, 206
  - f. *How Proved*. 206
    - (1.) *Record of Judgment*, 206
    - (2.) *Admission of Witness*, 207
    - (3.) *Privilege of Witness*, 207
  - g. *Restoration to Competency*, 208
    - (1.) *Pardon*, 208
      - (A.) *Generally*, 208
      - (B.) *Nature of Pardon*, 208
      - (C.) *Statutory Distinguished From Common Law Liability*, 209
      - (D.) *Time of Granting*, 209
      - (E.) *Conditional Pardon*, 209
      - (F.) *Proof of the Pardon*, 210
    - (2.) *Commutation of Sentence*, 210
  - h. *Affidavit of Infamous Person*, 210
- 5. *Exclusions Based on Public Policy*, 211
  - A. *Interest and Parties*, 211
    - a. *In Civil Suits*, 211
      - (1.) *Generally*, 211
      - (2.) *Remnants of Rule*, 211
    - b. *In Criminal Cases*, 211
      - (1.) *Defendants*, 211
      - (2.) *Co-Defendants*, 211

- (A.) *At Common Law*, 211
  - (a.) *Generally*, 211
  - (b.) *Removal of Disability*, 212
- (B.) *Statutory Modification of Rule*, 214
  - (a.) *Generally*, 214
  - (b.) *Effect of Statutes*, 214
- B. Judicial Officers**, 215
  - a. *In Case Pending Before Them*, 215
    - (1.) *Judge of Court of Record*, 215
    - (2.) *Justice of the Peace*, 217
    - (3.) *Arbitrators*, 217
    - (4.) *Statutes*, 217
  - b. *As to Proceedings Before Them*, 217
- C. Jurors as Witnesses**, 218
  - a. *In Trial Pending Before Them*, 218
    - (1.) *Generally*, 218
    - (2.) *Limits of Such Testimony*, 219
    - (3.) *Statutes*, 219
  - b. *Impeaching Verdict*, 220
    - (1.) *Generally*, 220
    - (2.) *Misconduct in Jury Room*, 221
      - (A.) *Generally*, 221
      - (B.) *Chance Verdict*, 222
      - (C.) *Improper Matters Considered*, 222
    - (3.) *Misconduct Outside of Jury Room*, 223
      - (A.) *Generally*, 223
      - (B.) *Unauthorized View*, 223
    - (4.) *Motives and Grounds of Verdict*, 224
    - (5.) *Explaining Verdict*, 224
    - (6.) *Misunderstanding*, 225
      - (A.) *Instructions*, 225
      - (B.) *Effect of Verdict*, 226
    - (7.) *Mistake*, 226
      - (A.) *Generally*, 226
      - (B.) *Mistakes in Rendering Verdict*, 227
    - (8.) *Non-Assent*, 228
    - (9.) *As to Incompetency of Juror*, 229
    - (10.) *Misconduct of Others*, 230
      - (A.) *Generally*, 230

- (B.) *Bailiff's Misconduct*, 230
- (C.) *Court's Misconduct*, 230
- (D.) *Party's Misconduct*, 230
- (11.) *Dissenting Jurors*, 231
- (12.) *Modifications of Rule*, 231
  - (A.) *At Common Law*, 231
    - (a.) *Matters Inhering in Verdict*, 231
    - (b.) *Rule in Tennessee*, 232
  - (B.) *By Statute*, 233
    - (a.) *Chance Verdict*, 233
    - (b.) *Criminal Cases*, 233
- (13.) *Declarations of Jurors*, 234
  - (A.) *Generally*, 234
  - (B.) *Prior to Trial*, 234
- c. *To Sustain Verdict*, 234
  - (1.) *Generally*, 234
  - (2.) *As to Influence of Misconduct*, 236
- d. *Privilege of Jurors*, 237
- D. *Attorneys*, 237
  - a. *Generally*, 237
  - b. *Prosecuting Attorney*, 238
- E. *Interpreter*, 238
- F. *Miscellaneous Rules*, 239
  - a. *Contemnors of Rule of Exclusion*, 239
    - (1.) *Generally*, 239
    - (2.) *Exclusion of Witness Discretionary*, 239
    - (3.) *Witness Competent When Party Not in Fault*, 240
    - (4.) *Always Competent*, 240
  - b. *Witnesses Not on List or Indictment*, 241
    - (1.) *Generally*, 241
    - (2.) *When Statute Has No Application*, 242
    - (3.) *Misnomer of Witness*, 242
    - (4.) *Modifications of Rule*, 242
      - (A.) *Generally*, 242
      - (B.) *Information Distinguished from Indictment*, 243
    - (5.) *Notice Required*, 243
- 6. *Declarations of Incompetent Witness*, 244

## CROSS-REFERENCES.

Admissions; Atheist;

Bias;

Contempt; Contradiction of Witnesses; Corroboration; Credibility;

Declarations; Demonstrative Evidence; Diagrams; Dying Declarations;

Elections; Entries in the Regular Course of Business; Executors and Administrators; Expert and Opinion Evidence;

Fraud;

Hearsay Evidence; Husband and Wife;

Impeachment; Infants; Insanity;

Objections;

Parol Evidence; Photographs; Private Writings; Privileged Communications.

## I. DEFINITION AND DISTINCTIONS.

**1. Generally.** — **Evidence.** — The terms “competent” and “incompetent,” as applied to evidence, are quite generally used as synonymous with “admissible” and “inadmissible;” but in the strict sense the former terms have a narrower meaning than the latter, and refer rather to the nature, quality and form generally of the evidentiary matter, as distinguished from its relevancy and materiality to a particular issue,<sup>1</sup> all of which are included in the term “admissibility.”

**1. Competent Evidence.** — **Definition.** — “That which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of inquiry.” Greenl. Ev., Vol. I, § 2.

**Competency Distinguished From Materiality.** — “There is a wide distinction between immaterial and incompetent evidence. It may be material and tend to prove the issue, but incompetent for that purpose under the rules of law. On the other hand, it may be competent evidence in a proper case, but immaterial to any issue before the court.” People

*v. Manning*, 48 Cal. 335. See also *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

**Relevancy and Competency Distinguished.** — An objection to evidence as irrelevant does not raise the question of its competency. *Burke v. Koch*, 75 Cal. 356, 17 Pac. 228. See article “OBJECTIONS.”

“Testimony may be incompetent because from its nature parties ought not to be bound by it, yet, if it was admissible, it would not be wholly irrelevant, for it would tend to establish some fact or facts under the issues. Immaterial and irrelevant testimony establishes nothing

\* **2. Distinction Between Competency of Evidence and Witness.** — It is sometimes important to distinguish between competency of evidence and competency of witnesses. The former has reference solely to the nature of the evidentiary matter offered, while the latter is concerned only with the person through whom such matter is to be placed before the court, and an objection to one does not question the other.<sup>2</sup>

## II. BY WHOM DETERMINED.

**1. Questions of Law and Fact.** — A. GENERALLY. — In general it is the province of the court to determine the competency of both the evidence and the witness.<sup>3</sup> This is a judicial function, and cannot be

pertaining to the issues." *Joseph v. Furnish*, 27 Or. 260, 41 Pac. 424.

**Competent Synonymous With Admissible.** — In *State v. Johnson*, 12 Minn. 378, the word "competent" in the statute making certain facts evidence of marriage was held to mean admissible.

**Incompetency. — Meaning.** — "The word 'incompetency' is familiarly used to indicate the want of lawful authority or power, and that proceedings to which it is applied are contrary to law. It is used to express the thought that certain evidence cannot be lawfully received, or that a witness cannot lawfully testify. It would be quite properly used to express the idea that a witness could not be required to testify to certain facts. In this case it is proper to say that it was incompetent to require defendant to testify to his religious belief. This very thought was expressed by the objection to his examination. A question was asked him requiring an answer disclosing his religious belief. This was 'objected to as incompetent under the law.' The thought expressed by the language is that defendant could not be lawfully required to answer a question intended to disclose his religious belief." *Dedric v. Hopson*, 62 Iowa 562, 17 N. W. 772.

**2.** *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579; *Hines v. Consolidated Coal Co.*, 29 Ind. App. 563, 64 N. E. 887; *State v. Hughes*, 106 Iowa 125, 76 N. W. 520, 68 Am. St. Rep. 288; *Gage v. Eddy*, 179 Ill. 392, 53 N. E. 1,008; *Bingham v. Walker*, 128 Ind.

164, 27 N. E. 483; *Isaacs v. McLean*, 106 Mich. 79, 64 N. W. 2. See further and more in detail article "OBJECTIONS."

**Illustration.** — In *Garrett v. Han-shue*, 53 Ohio St. 482, 42 N. E. 256, this distinction is illustrated. In this case the rule was invoked requiring a deed to be proved by the subscribing witnesses. The court held that this rule was based upon the common law incapacity of parties to testify, generally, and the statute removing this disability also abrogated the rule founded upon it. "While a statute making a party to an action a competent witness, does not of itself make that part of his evidence competent which was before incompetent, yet if the evidence was in its nature competent before the statute, and was made unavailable by reason of the incompetency of the witness, when such incompetency is removed by statute, the evidence thereby becomes available, and may be introduced through such newly enfranchised witness. . . . On principle it was not the evidence of the grantor which was incompetent, but it was the witness that was incompetent."

**3.** *United States.* — District of Columbia *v. Armes*, 107 U. S. 519.

*Colorado.* — *Solander v. People*, 2 Colo. 48.

*Connecticut.* — *Cook v. Mix*, 11 Conn. 432.

*Georgia.* — *Peterson v. State*, 47 Ga. 524.

*Indiana.* — *Indiana T. L. S. Ins. Co. v. Byrkett*, 9 Ind. App. 443, 36 N. E. 779; *Guetig v. State*, 63 Ind.



delegated.<sup>4</sup> The constitutional provision making juries the judges of both the law and the facts does not take from the courts this right and duty.<sup>5</sup>

**B. QUESTIONS OF LAW.** — When only questions of law are involved in this determination of competency, the court alone must decide them, and its decision is not subject to review by the jury.<sup>6</sup>

**C. QUESTIONS OF FACT.** — *a. Generally.* — As to the province of the court and jury in determining questions of fact preliminary to the admission or rejection of certain testimony, the cases are conflicting; and for the rule in particular issues the appropriate titles must be consulted.<sup>7</sup> The court must decide all such questions in the first instance, but it seems may first take the opinion of the jury on the matter.<sup>8</sup>

*b. Reference to Jury.* — **(1.) Collateral Facts.** — If such preliminary questions are entirely collateral to the issues, the court must finally determine them, and admit or reject the evidence, or the witness, without referring the matter conditionally to the jury.<sup>9</sup> But in

278; *Townsend v. State*, 2 Blackf. 151.

*Maine.* — *Sellars v. Carpenter*, 27 Me. 497.

*Massachusetts.* — *Gorton v. Hadsell*, 9 Cush. 508; *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84.

*Missouri.* — *State v. Johnson*, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405.

*North Carolina.* — *Doe v. Ealgham*, 6 N. C. 364.

*Tennessee.* — *Anderson v. Maberry*, 2 Heisk. 653.

**4. Delegations Improper.** — In *Simpson v. State*, 31 Ind. 90, it is held error for the court to delegate the determination of a witness' competency to referees, who retired with the witness and made a private examination.

**5.** *Townsend v. State*, 2 Blackf. (Ind.) 151; *Thibault v. Sessions*, 101 Mich. 279, 59 N. W. 624.

**6.** *State v. Williams*, 67 N. C. 12.

**Distinction Between Law and Fact.** — "It often happens that the competency of evidence may depend upon the existence of some other fact; whether such fact exists is a preliminary question, to be decided by the presiding judge. His decision as to such fact cannot be revised; but his ruling as matter of law that such fact renders the evidence competent or incompetent is the subject of revision; and upon examination, in all those cases in which the ad-

mission of the evidence is said to rest in the discretion of the presiding judge, we think it will be found that it is the decision of a preliminary fact upon which the finding of the judge is conclusive, and which fact determines the competency of the evidence." *Com. v. Gray*, 129 Mass. 474, 37 Am. Rep. 378.

**Illustration.** — Where a copy of a will is offered in evidence, whether or not the original has been probated is a question of fact for the jury. *Counts v. Wilson*, 45 S. C. 571, 23 S. E. 942.

But whether the probate was regular and legal is a question for the court, preliminary to the admission of such copy in evidence. *McMillan v. Baxley*, 112 N. C. 578, 16 N. E. 845.

**7.** See articles "ACCOMPLICES," "BEST AND SECONDARY EVIDENCE," Vol. II, p. 473; "CONFESSIONS," "CONSPIRACY," "DYING DECLARATIONS," "EXPERT AND OPINION EVIDENCE," "FORGERY," "PRINCIPAL AND AGENT," "PHOTOGRAPHS," and other titles.

**8.** *O'Connor v. Hallinan*, 103 Mass. 547; *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502.

**9.** *England.* — *Bartlett v. Smith*, 11 Mees. & W. 483; *Cleave v. Jones*, 7 Ex. 421; *Reg. v. Hucks*, 1 Stark. 521, 2 Eng. C. L. 198.

some courts this rule has not been adhered to,<sup>10</sup> and there seems to

*United States.*—*Cliquot's Champagne*, 3 Wall. 114; *U. S. v. Patrick*, 73 Fed. 800.

*Arkansas.*—*Campbell v. State*, 38 Ark. 498.

*California.*—*Tabor v. Staniels*, 2 Cal. 240; *People v. Glenn*, 10 Cal. 33; *People v. Ivey*, 49 Cal. 56; *Clements v. McGinn*, (Cal.), 33 Pac. 920.

*Connecticut.*—*Witter v. Latham*, 12 Conn. 392; *Cook v. Mix*, 11 Conn. 432.

*Delaware.*—*State v. Brown*, 2 Marv. 380, 36 Atl. 458.

*Florida.*—*Florida S. R. Co. v. Parsons*, 33 Fla. 631, 15 So. 338; *Ortiz v. State*, 30 Fla. 256, 11 So. 611.

*Georgia.*—*Hicks v. State*, 105 Ga. 627, 31 S. E. 579; *Peterson v. State*, 47 Ga. 524.

*Illinois.*—*Grand Lodge I. O. of M. A. v. Wietung*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

*Indiana.*—*Townsend v. State*, 2 Blackf. 151; *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 41 Am. St. Rep. 440, 24 L. R. A. 483.

*Massachusetts.*—*Com. v. Reagan*, 175 Mass. 335, 56 N. E. 577, 78 Am. St. Rep. 496; *McManagil v. Ross*, 20 Pick. 99; *Donelson v. Taylor*, 8 Pick. 390.

*Missouri.*—*Chouteau v. Searcy*, 8 Mo. 733.

*Nebraska.*—*Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 78 N. W. 300, 73 Am. St. Rep. 532.

*New Jersey.*—*Goldsboro v. Central R. Co.*, 60 N. J. L. 49, 37 Atl. 433.

*New York.*—*People v. Kraft*, 148 N. Y. 631, 43 N. E. 80; *Hand v. Burrows*, 23 Hun 330; *Harris v. Wilson*, 7 Wend. 57.

*North Carolina.*—*State v. Dick*, 60 N. C. 440.

*Pennsylvania.*—*Semple v. Callery*, 184 Pa. St. 95, 39 Atl. 6.

*Vermont.*—*Cairns v. Mooney*, 62 Vt. 172, 19 Atl. 255; *State v. Ward*, 39 Vt. 225.

*Virginia.*—*Vass v. Com.*, 3 Leigh 786, 24 Am. Dec. 695.

*West Virginia.*—*State v. Michael*, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605.

See review of authorities in 1 Mich. L. Rev. 624.

**10. Court the Sole Judge.**—In *Doe v. Davies*, 10 Ad. & E. 314, 59 Eng. C. L. 313, Lord Denman, C. J., says: "There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury. Thus an oath, or its equivalent, and competency, are conditions precedent to admitting *viva voce* evidence; and apprehension of immediate death to admitting evidence of dying declarations; and search to secondary evidence of lost writings; and stamp to certain written instruments; and so is consanguinity or affinity in the declarant to declarations of deceased relatives. The judge alone has to decide whether the condition has been fulfilled. If the proof is by witnesses, he must decide on their credibility. If counter-evidence is offered, he must receive it before he decides, and he has no right to ask the opinion of the jury on the fact, as a condition precedent."

**Reason of the Rule.**—Where a witness' competency depended upon the existence of an agency, it was contended that the witness should have been permitted to testify, and the question of his agency left to the jury. Taft, J., said: "Questions of fact affecting the admissibility of testimony often arise, and it would be very inconvenient, if not impracticable, to submit them to the decision of a jury. The testimony, as to the competency of a witness, and that of the witness as to the issues upon trial, would all go to the jury, with directions that, if they found the witness incompetent, it would be their duty to disregard his evidence upon the main issues, which in many instances it might be impossible to do. Having heard the illegal testimony discussed by counsel, the confusion which would probably arise in separating the legal from the illegitimate testimony would no doubt lead to the rendition of erroneous verdicts, with no relief for the unfortunate party; and certainly this should not be the rule in a jurisdiction where the admission of illegal

be a distinction between the evidence and the witness drawn in some jurisdictions.<sup>11</sup>

evidence is not cured by a direction from the court to disregard it." *Cairns v. Mooney*, 62 Vt. 172, 19 Atl. 225.

In *Com. v. Reagan*, 175 Mass. 335, 56 N. E. 577, 78 Am. St. Rep. 496, it was held error for the court to refer the question of the witness' competency to the jury. The court says: "The rule conduces to the orderly and efficient conduct of a trial. It is also of the gravest importance in a criminal case that the radical question whether a witness understands the nature of an oath should be considered by itself in the first instance, free from any complication with the nature of the evidence he is expected to give, or its bearing upon the issues of the case. When the decision is to be made by a mind so situated as to be in danger of being influenced by the nature of the story as told by the witness and the importance of the testimony and its bearing one way or the other, it is plain that the decision is not so likely to be upon the real merits of the question as it otherwise would be; and it is easy to see, as indeed this very case may, perhaps, show, that with the whole case before the jury there is danger that the question of the competency of a witness may be decided according as his testimony may be legally necessary to sustain a view of the case which the emotions of the jury may lead them to take, if they can find evidence enough to justify them."

**Reference to Jury.—Harmless Error.**—Where objection was made to the witness on the ground that she was the defendant's wife, and the court would have been justified in holding the witness competent under the evidence, a reference of the question to the jury was harmless error. *Com. v. Mudgett*, 174 Pa. St. 211, 34 Atl. 588. See also *Bohn v. State*, 9 Lea (Tenn.) 516.

**Competency of Witness Not Produced.**—Where counsel in their argument raise the question of the competency of a witness not produced at the trial, the court is under

no obligation to give an instruction as to the competency of such witness. *Crenshaw v. Johnson*, 120 N. C. 270, 26 S. E. 810.

*Connecticut.*—*Coleman v. Wolcott*, 4 Day 388.

*Georgia.*—*Jackson v. State*, 56 Ga. 235; *Bush v. State*, 109 Ga. 120, 34 S. E. 298.

*Michigan.*—*Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502.

*New Hampshire.*—*Bartlett v. Hoyt*, 33 N. H. 151; *Hall v. Brown*, 58 N. H. 93.

*Pennsylvania.*—*Harte v. Heilner*, 3 Rawle 407.

**Generalization** on this question is very difficult, and inasmuch as the question is treated under the separate titles, they should be consulted. See note 7 *supra*.

**11. Reference to Jury Proper.**—In *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502, it was held proper for the court to refer to the jury the final determination of the existence of the relation of attorney and client as affecting the competency of a proffered witness. *Campbell, J.*, says: "We do not think it improper to leave to the jury the question of the existence of such a relation when disputed. The judge may determine upon the statements of a witness himself whether he is competent or not; but it does not properly belong to a judge to decide upon the truth of matters which have come out during the examination of witnesses who conflict. And it has been held that on an intricate question of fact the jury may very properly be consulted. 1 *Edw. Ph. Ev.*, 4. We understand this to be correct practice, and in many cases to be the only safe rule for determining such questions. It is laid down very plainly by *Greenleaf*, 1 *Greenl. Ev.*, § § 49, 425."

**Admission or Offer of Compromise.** Whether certain offered evidence was an admission of an offer of compromise has been held a proper question of fact to be submitted to the jury. *Bartlett v. Hoyt*, 33 N. H. 151.

**Testimony Clear and Uncontra-**

(2.) **Facts in Issue.**—When the determination of such preliminary questions involves a decision of any of the ultimate issues of the case, the court's decision is final only in case of rejection. If the evidence or witness is admitted the jury must be instructed to accept or reject it, according as they finally determine the existence or non-existence of the facts necessary to its competency.<sup>12</sup>

c. *Degree of Proof.*—(1.) **Collateral Facts.**—The degree of proof required to establish these preliminary facts when collateral to the issue rests largely in the discretion of the court.<sup>13</sup> But it is not essen-

dicted.—Where the testimony is clear and uncontradicted the court must decide the preliminary question, but if it be doubtful the fact must be left to the jury. *Funk v. Kincaide*, 5 Md. 404.

**Evidence Conflicting.**—In *Wilson v. Van Leer*, 127 Pa. St. 371, 17 Atl. 1,097, 14 Am. St. Rep. 854, it was held that where the facts upon which the competency of a handwriting expert depended were not denied, or contradicted, it was no error for the court to refuse to allow the jury to review his ruling. But if the evidence had been conflicting "it might have been proper to submit the whole matter to the final decision of the jury."

See articles "EXPERT AND OPINION EVIDENCE;" "HANDWRITING."

**Distinction Between Oral and Written Testimony.**—In *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 7 Am. Dec. 66, it was held that where an agent's authority to make the note, upon which the principal is sued, is based on a writing, the question of the competency of the note is for the court; but when the agent's authority is founded on an oral contract it is a question for the jury.

**Incompetency Subsequently Appearing.**—In *Bowdle v. Detroit St. R. Co.*, 103 Mich. 272, 61 N. W. 529, 50 Am. St. Rep. 366, it was held that where, after the witness has been held competent upon a preliminary hearing, his incompetency subsequently appears from the evidence, it is the province of the jury to determine the question of his competency. See also *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266.

**Distinction Between Evidence and Witness.**—In Massachusetts it seems

that the question of the competency of evidence may be passed upon by the jury in some circumstances. *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560; *Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92; *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494. But the competency of the witness is exclusively for the court. *Com. v. Reagan*, 175 Mass. 335, 56 N. E. 577, 78 Am. St. Rep. 496, reviewing the English and American authorities.

Compare also the case of *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266, with *Jackson v. State*, 56 Ga. 235. See *Mead v. Harris*, 101 Mich. 585, 60 N. W. 284.

12. *Doe v. Davies*, 10 Ad. & E. 314, 59 Eng. C. L. 313; *Sitler v. Gehr*, 105 Pa. 577, 51 Am. Rep. 207; *Com. v. Brown*, 14 Gray (Mass.) 419; *Luttrell v. State*, 31 Tex. Crim. 493, 21 S. W. 248; *Crook v. State*, 27 Tex. Crim. 198, 11 S. W. 444. See *Rohrer v. Morning Star*, 18 Ohio 579.

13. **Distinction Between Facts Collateral and Those in Issue.**—"If the fact on which the relevancy of the disputed evidence depends be merely preliminary, and no otherwise essential than as it may lay the foundation for receiving the evidence in question, then it may perhaps in all cases be proper to make the admissibility of the disputed evidence depend upon the judge's opinion as to the sufficiency of the proof to establish the preliminary fact. But where the preliminary fact is otherwise material in the cause, and essentially involved in the issue, the general practice is to admit the dependent evidence, if in the opinion of the judge there be evidence conducing to prove the preliminary fact, and from which a jury

tial that there be the same amount as is required for the verdict or findings.<sup>14</sup>

(2.) **Facts in Issue.** — But where the preliminary questions are identical with the issues of the case, if there be any evidence sufficient to support a finding of such facts by the jury, then the court must conditionally admit the evidence or the witness.<sup>15</sup>

**2. Preliminary Proof.** — A. **GENERALLY.** — The court may determine the competency of evidence and witnesses by a consideration of the pleadings,<sup>16</sup> the evidence then in,<sup>17</sup> and such further evidence as

might rationally infer it. A contrary practice would in many instances, as in this, take the whole case from the jury, and subject it to the decision of the judge upon the weight of the evidence, thus destroying the established distinction between their respective functions. When it is necessary to prove a deed, the instrument is admitted to be read to the jury, upon evidence conducing to prove its execution, could a judge afterwards exclude it on motion, on the ground that the proof of its execution was not fully satisfactory to his mind, or could he have rejected it on this ground, even in the first instance? The execution of the deed being the material fact in the issue, the judge does not decide it peremptorily, though it is in one aspect a preliminary fact, but having decided that there is evidence conducing to prove it, he places the whole question of fact before the jury." *Swearingen v. Leach*, 7 B. Mon. (Ky.) 285; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452; *Blair v. Groton City*, 13 S. D. 211, 83 N. W. 48. See cases in note 50. See list of titles in note 7.

**14.** *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452; *McDonald v. Ashland (City)*, 78 Wis. 251, 47 N. W. 434.

**Prima Facie Competent.** — In *Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 78 N. W. 300, 73 Am. St. Rep. 532, an affidavit made by the plaintiff in the adjustment of an insurance claim was rejected on the ground that it was a compromise valuation. The court, while holding that the decision of preliminary issues of fact touching the competency of evidence or witnesses is for the court, says: "If proffered evidence

is *prima facie* admissible it is the duty of the court to receive it."

**15. Degree of Proof.** — "We are satisfied that in this and similar cases, where the relevancy of one fact depends upon another material fact in the cause, the admissibility of evidence in support of the dependent or secondary fact, depends not upon the absolute proof of the principal fact, but upon their being such evidence as conduces to prove it, and would authorize the jury to find it." *Swearingen v. Leach*, 7 B. Mon. (Ky.) 285.

**Disputed Document.** — **Amount of Proof.** — When the authenticity of a document is the principal fact in issue the court must admit it conditionally "if there is the smallest evidence of its existence." *Porter v. Wilson*, 13 Pa. St. 641.

In *Verzan v. McGregor*, 23 Cal. 339, it was held that such document must be submitted to the jury if there is any evidence from which its genuineness might be presumed.

**16. Pleadings Not Conclusive.** In *Holcomb v. Holcomb*, 28 Conn. 177, it is held that an allegation in the pleadings as to the insanity of an offered witness was not conclusive upon the party offering him, since the test of the competency of a witness is his mental condition when his testimony is offered. See also *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164; *Worthington v. Mencer*, 96 Ala. 310, 11 So. 72, 17 L. R. A. 407; *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 41 Am. St. Rep. 440, 24 L. R. A. 483.

**17.** *Taylor v. Taylor*, 2 Watts (Pa.) 357; *Scherpf v. Szadeczky*, 1 Abb. Pr. (N. Y.) 366, 4 E. D. Smith 110.

may be taken.<sup>18</sup>

**B. DETERMINATION OF COMPETENCY OF EVIDENCE.** — **a. In General.** — Generally it is error for the court to refuse to receive evidence on preliminary questions of fact,<sup>19</sup> or to deprive the objecting party of the privilege of cross-examination.<sup>20</sup> But where such questions must be finally determined by the jury, and a sufficient showing of competency is made, it is error to receive evidence in rebuttal. The court must admit the evidence and refer the whole matter to the jury with proper instructions.<sup>21</sup>

**b. Objections.** — Objection to incompetent evidence is waived if not properly made before it is introduced.<sup>22</sup>

**C. DETERMINATION OF COMPETENCY OF WITNESS.** — **a. Objections.** — **When Taken.** — (1.) **Old Practice.** — Under the old practice an objection to the competency of a witness was required to be made before he was sworn to testify in chief. The witness might be examined under oath, or his incompetency proved by other evidence, at the option of the objecting party, but a resort to one method was a waiver of the right to the other.<sup>23</sup>

(2.) **Modern Practice.** (A.) **INCOMPETENCY KNOWN.** — Under the modern practice, when the witness' incompetency is known, objection must be taken as soon as the witness is sworn and before he

18. See cases in the following note.

19. *United States.* — *Trussell v. Scarlett*, 18 Fed. 214, and note by Mr. Francis Wharton.

*Georgia.* — *Crenshaw v. Jackson*, 6 Ga. 509, 50 Am. Dec. 309.

*Iowa.* — *State v. Fidment*, 35 Iowa 541.

*Maryland.* — *Maurice v. Worden*, 54 Md. 233, 39 Am. Rep. 384.

*Massachusetts.* — *Com. v. Culver*, 126 Mass. 464; *Com. v. Howe*, 9 Gray 110.

*New York.* — *People v. Fox*, 121 N. Y. 449, 24 N. E. 923; *Woodworth v. Brooklyn El. R. Co.*, 22 App. Div. 501, 48 N. Y. Supp. 80.

*Ohio.* — *Montgomery v. State*, 11 Ohio 424.

**Refusal to Receive Evidence** as to the incompetency of a dying declaration was held error in *State v. Elliott*, 45 Iowa 486, the court saying: "We are satisfied that the court ought to have inquired into all the circumstances attending the declarations, and to have heard the testimony offered, . . . before determining that the declarations were competent."

20. *Rufer v. State*, 25 Ohio St.

464; *Territory v. McClin*, 1 Mont. 394; *Trussell v. Scarlett*, 18 Fed. 214 and note; *Woodworth v. Brooklyn El. R. Co.*, 22 App. Div. 501, 48 N. Y. Supp. 80; *Wright v. Mathews*, 2 Blackf. (Ind.) 187; *Foley v. Mason*, 6 Md. 37; *State v. Richie*, 28 La. Ann. 327, 26 Am. Rep. 100.

**Infants.** — In *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4, it is held that cross-examination, by counsel, of an infant of tender years is discretionary with the court. See also *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272.

21. **Receiving Evidence Improper.** When a *prima facie* case of the execution of a disputed document has been made, it is error for the court to receive evidence in rebuttal; such document must be submitted to the jury with proper instructions. *Verzan v. McGregor*, 23 Cal. 339.

22. **Objections.** — For the form, necessity, and time of making objections, see article "OBJECTIONS."

23. *Jones' Ev.*, § 796, and cases cited; *Abb. Tr. Br. Civ. Jur. Tr.*, p. 126 and cases; *Greenl. Ev.* (16th ed.), § 328a.

is permitted to testify.<sup>24</sup>

(B.) **INCOMPETENCY UNKNOWN** — If the grounds of incompetency are not known at the time the witness is offered, the objection must be taken as soon as the incapacity is discovered,<sup>25</sup> and the testimony already in may be stricken out.

(C.) **PARTIAL AND TOTAL INCAPACITY.** — **Distinction.** — When the witness' incapacity is only partial, however, the objection need not be taken until he is asked to testify to those matters as to which he is incapacitated.<sup>26</sup>

(D.) **WAIVER.** — A failure to object at the proper time is a waiver of the right.<sup>27</sup> So, also, no objection to the competency of a witness can be made after he has been cross-examined with the knowledge

24. *Alabama.* — *Henderson v. State*, 135 Ala. 43, 33 So. 433.

*Iowa.* — *Watson v. Reskamire*, 45 Iowa 231; *Winters v. Winters*, 102 Iowa 53, 71 N. W. 184, 63 Am. St. Rep. 428; *Murphy v. McCarthy*, 108 Iowa 38, 78 N. W. 819.

*Louisiana.* — *State v. Downs*, 50 La. Ann. 694, 23 So. 456.

*Maryland.* — *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628.

*Ohio.* — *Inglebright v. Hammond*, 19 Ohio 337, 53 Am. Dec. 430.

*Tennessee.* — *Burke v. Ellis*, 105 Tenn. 702, 58 S. W. 855.

*Virginia.* — *Pillow v. Southwestern Va. Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804.

**After Oath. — Modern Rule.** — "Formerly, indeed, it was considered necessary to raise the objection on the *voir dire*; and if once the witness is sworn in chief, he could not afterwards be objected to on the ground of interest. But this rule has been relaxed in modern times; and now it is allowable to make the objection after the witness is sworn in chief, but before the examination is commenced; and where the interest is incidentally disclosed for the first time in the course of the trial the evidence may then be excluded. See 1 Starkie on Evidence 134; 1 Greenl. Ev., § 421." *Hord v. Colbert*, 28 Gratt. (Va.) 49. And see also *State v. Downs*, 50 La. Ann. 694, 23 So. 456.

**After Partial Examination.** — In *State v. Summer*, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, it was held no error for the trial court to allow an objection to the competency of a witness to be made after his ex-

amination in chief had been taken, although his incapacity was known at the time he was offered.

*Contra.* — *State v. Downs*, 50 La. Ann. 694, 23 So. 456.

25. *Donelson v. Taylor*, 8 Pick. (Mass.) 390; *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628; *Butler v. Tufts*, 13 Me. 302; *Swift v. Dean*, 6 Johns. (N. Y.) 523; *Inglebright v. Hammond*, 19 Ohio 337, 53 Am. Dec. 430. And see article "OBJECTIONS."

**When Other Evidence Necessary.** — In *Crenshaw v. Jackson*, 6 Ga. 509, 50 Am. Dec. 361, it was held that when the examination of a witness shows his incompetency, objection must be made at once, but when his incapacity can only be determined by a consideration of other evidence it is proper to defer the question until his examination is completed.

26. *Le Baron v. Redman*, 30 Me. 536; *Swift v. Dean*, 6 Johns. (N. Y.) 523; *Bohn v. State*, 9 Lea (Tenn.) 516; *Winters v. Winters*, 102 Iowa 53, 71 N. W. 184, 63 Am. St. Rep. 428; *Murphy v. McCarthy*, 108 Iowa 38, 78 N. W. 819; *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266.

27. *Drake v. Foster*, 28 Ala. 649; *Lewis v. Morse*, 20 Conn. 211; *Kingsbury v. Buchanan*, 11 Iowa 387; *State v. Damery*, 48 Me. 327. See article "OBJECTIONS."

**Waiver. — Second Trial.** — A waiver of the right to object to the disclosure of privileged communications by a physician on one trial is not binding on the second trial of the same cause. *Briesenmeister v. Supreme Lodge K. of P.*, 81 Mich. 525, 45 N. W. 977. But see article "PRIVILEGED COMMUNICATIONS."

of his incompetency,<sup>28</sup> or after the objecting party has himself taken the witness' testimony on the matters as to which he is alleged to be incompetent.<sup>29</sup>

(E.) DEPOSITIONS. — The competency of a witness whose deposition is taken is for the trial court and not for the officer taking the deposition.<sup>30</sup> But the cases are not in harmony as to whether objection must be made at the time the deposition is taken or at the trial.<sup>31</sup>

b. *Nature of the Examination.* — (1.) Generally. — The preliminary examination to determine the competency of a witness must be made in public,<sup>32</sup> and in a criminal case in the presence of the accused<sup>33</sup> and the jury.<sup>34</sup>

(2.) Evidence. — Generally the evidence admissible on a preliminary hearing is governed by the rules applicable to trials generally.<sup>35</sup>

28. *Miller v. Miller*, 92 Va. 196, 23 S. E. 232; *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; *Wait v. Maxwell*, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; *Foster v. Hess*, (Minn.), 59 N. W. 193.

29. *Kentucky.* — *Weil v. Silverstone*, 6 Bush 698.

*Michigan.* — *Dunlap v. Dunlap*, 94 Mich. 11, 53 N. W. 788.

*Missouri.* — *Ess v. Griffith*, 139 Mo. 322, 40 S. W. 930.

*Ohio.* — *Choteau v. Thompson*, 3 Ohio St. 424.

*Pennsylvania.* — *Bair v. Frischkorn*, 151 Pa. St. 466, 25 Atl. 123.

*Tennessee.* — *Thomas v. Ervin*, 90 Tenn. 512, 16 S. W. 1,045.

*Virginia.* — *Pillow v. Southwestern Va. Imp. Co.*, 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; *Hord v. Colbert*, 28 Gratt. 49.

*Deposition. — Failure to Use.* Where one party has taken the deposition of an incompetent witness, the fact that he does not use such deposition will not deprive the other party of the right to such witness' testimony. *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; *Weil v. Silverstone*, 6 Bush (Ky.) 698.

*Waiver. — Co-defendants.* — A defendant does not waive the objection that plaintiff is incompetent to testify concerning dealings with her deceased agent, where a co-defendant, acting independently of her, introduces him to formally prove his signature while dealing with such agent, and she does not object until he is

asked to state the dealings in detail. *Hollmann v. Lange*, 143 Mo. 100, 44 S. W. 752.

30. *Carpenter v. Dame*, 10 Ind. 125.

31. See articles "OBJECTIONS;" "DEPOSITIONS."

32. *Taylor v. State*, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656; *People v. Bernal*, 10 Cal. 66; *Simpson v. State*, 31 Ind. 90; *State v. Morea*, 2 Ala. 275; *People v. McNair*, 21 Wend. (N. Y.) 608.

33. *Taylor v. State*, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656; *People v. Bernal*, 10 Cal. 66; *State v. Morea*, 2 Ala. 275; *People v. McNair*, 21 Wend. (N. Y.) 608.

*Private Examination.* — In *McGuire v. People*, 44 Mich. 286, 6 N. W. 669, 38 Am. Rep. 265, the court examined the witness, a young child, in private in addition to the public examination. This course was not questioned, but seems to be commended by the appellate court. But such practice was held error in *Taylor v. State*, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656, and *State v. Morea*, 2 Ala. 275.

34. *Taylor v. State*, 22 Tex. App. 529, 3 S. W. 753, 58 Am. Rep. 656; *People v. Bernal*, 10 Cal. 66; *Johnson v. State*, 47 Ala. 9; *People v. McNair*, 21 Wend. (N. Y.) 608. But see *Swisher v. Com.*, 26 Gratt. (Va.) 963, 21 Am. Rep. 330.

35. *Jones v. Tevis*, 4 Litt. (Ky.) 25, 14 Am. Dec. 98; *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341.



Thus a witness may testify as to his own competency,<sup>36</sup> but his extra-judicial declarations cannot be used.<sup>37</sup> He may state the contents of a paper on which his competency depends.<sup>38</sup> A ruling as to a witness' competency made on the first trial cannot be used to determine the question when raised on the second trial.<sup>39</sup>

(3.) **Cross-Examination.**—The right of the objecting party to cross-examine the witness on his *voir dire* seems to depend somewhat upon the nature of the disqualification. Generally he has this right,<sup>40</sup> especially in a criminal case,<sup>41</sup> but the rule in particular cases will be found elsewhere.<sup>42</sup>

(4.) **The Right to Offer Evidence.**—While it has been held error for the court to refuse to receive evidence on the question of competency,<sup>43</sup> no rule can be laid down applicable to all cases.<sup>44</sup> Much of the law upon this subject relates to proof of interest and is now obsolete.<sup>45</sup> When the evidence already adduced, together with the witness' appearance, is sufficient to justify a decision, no further

**36. Witness Proving Own Competency.**—In *Hoxie v. State*, 114 Ga. 19, 39 S. E. 944, where the witness was objected to as being the wife of the accused, it was held no error to allow her to testify that she was not his wife. But see *Queen v. Madden*, 14 U. C. Q. B. 588. See article "HUSBAND AND WIFE."

So in *Hunnicut v. State*, 18 Tex. App. 498, 51 Am. Rep. 330, it was held proper to allow the offered witness to testify to show that he was not infamous.

**Witness Incompetent as to His Own Capacity.**—In Georgia, by statute, where evidence has been introduced showing the witness incompetent as to transactions with a deceased person, the witness, himself, is incompetent to rebut such showing. *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266.

**37. Witness' Declarations of His Own Incompetency** are not admissible on the determination of this question. *Com. v. Waite*, 5 Mass. 261. See, however, special titles for rules in particular cases.

**38. Physician's Qualifications. Parol Evidence.**—Where a statute requires a physician to hold a proper diploma before he is competent as an expert, he may, nevertheless, testify that he has such diploma without producing the document, and this is sufficient evidence of his competency. *McDonald v. Ashland*

(City), 78 Wis. 251, 47 N. W. 434.

**Instruments Not Produced.** Where the competency of a witness depends upon a written instrument he may be examined as to its contents without producing it. *Hernon v. Givens*, 16 Ala. 261; *Fifield v. Smith*, 21 Me. 383; *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341.

**39. Rulings on First Trial Not Res Adjudicata.**—A ruling on the first trial as to the competency of a witness is not *res adjudicata* on the second trial. *Redd v. State*, 65 Ark. 475, 47 S. W. 119. But see *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186.

**40.** *Fifield v. Smith*, 21 Me. 383; *Beach v. Covilland*, 2 Cal. 237; *Livingston v. Kiersted*, 10 Johns. (N. Y.) 362. But see *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272.

See article "INFANTS."

**41.** *Woodworth v. Brooklyn El. R. Co.*, 22 App. Div. 501, 48 N. Y. Supp. 80.

**42.** See special titles, such as "EXPERT AND OPINION EVIDENCE" and others in note 7.

**43.** *Dowdy v. Watson*, 115 Ga. 42, 41 S. E. 266; *Seeley v. Engell*, 13 N. Y. 542; *State v. Cornish*, 5 Harr. (Del.) 502; *State v. Elliott*, 45 Iowa 486.

**44.** Consult special titles.

**45.** 1 Phil. Ev., p. 103.

examination is necessary.<sup>46</sup>

(5.) **Limits of Examination.** — The limits of the preliminary examination lie largely within the trial court's discretion,<sup>47</sup> but it must be sufficiently comprehensive to enable the court to render an intelligent decision on the question involved.<sup>48</sup>

**3. Review on Appeal.** — A. **GENERALLY.** — The trial court's decision on preliminary questions of fact is often said to be conclusive,<sup>49</sup> but generally whenever in the opinion of the appellate court there has been an abuse of discretion, such decision will be reviewed.<sup>50</sup>

46. See articles "INFANCY;" "INSANITY;" "EXPERT AND OPINION EVIDENCE."

**Failure to Hold Preliminary Examination. — Harmless Error.** Where the trial court admits a witness without a preliminary examination as to his competency, if the appellate court is satisfied that the witness would have been held competent in any event, the failure to hold such preliminary examination is no error. *Wright v. Southern Exp. Co.*, 80 Fed. 85.

**Examination as to Mental Capacity. — Unnecessary When.** — In *Cannady v. Lynch*, 27 Minn. 435. 8 N. W. 164, it is held that the court is under no obligation to examine into the competency of a witness objected to as mentally unsound, where there are no indications of such incapacity in the appearance of the witness.

**An Examination of a Witness at the Previous Trial** of the same case dispenses with the necessity of a re-examination on the second trial to determine her competency, where the only objection to the witness is her youth. *People v. Baldwin*, 117 Cal. 244, 49 Pac. 186.

47. *People v. Smith*, 104 N. Y. 491, 10 N. E. 873, 58 Am. Rep. 537; *Johnson v. State*, 47 Ala. 9.

48. *Gaines v. State*, 99 Ga. 703, 26 S. E. 760.

49. *California*. — *People v. Craig*, 111 Cal. 460, 44 Pac. 186.

*Connecticut*. — *Trumbull v. Hewitt*, 65 Conn. 60, 31 Atl. 492.

*Massachusetts*. — *O'Connor v. Hallinan*, 103 Mass. 547; *Com. v. Mullins*, 2 Allen 295; *Com. v. Morrell*, 99 Mass. 542; *Foster v. Mackay*, 7 Metc. 531.

*Missouri*. — *State v. Scanlon*, 58

Mo. 204; *State v. Jefferson*, 77 Mo. 136.

*New Jersey*. — Anonymous, 3 N. J. L. 487.

*North Carolina*. — *State v. Efler*, 85 N. C. 585; *State v. Manuel*, 64 N. C. 601; *State v. Williams*, 67 N. C. 12.

*Pennsylvania*. — *Taylor v. Taylor*, 2 Watts 357.

*Vermont*. — *Childs v. Merrill*, 66 Vt. 302, 29 Atl. 532.

**Court's Decision Conclusive.** — In *Dole v. Thurlow*, 12 Metc. (Mass.) 157, Shaw, J., says: "In every question of the competency of a witness on the ground of interest, there is a question of law and a question of fact, on both of which the judge at *nisi prius* must decide. Upon the question of fact, his decision is conclusive, unless, upon satisfactory considerations, he may think it proper to report the whole evidence, and reserve the question for the whole court, when perhaps the merits of the case may depend on it."

50. *England*. — *Cleave v. Jones*, 7 Ex. 42.

*United States*. — *Cliquot's Champagne*, 3 Wall. 114; *Nelson v. First Nat. Bank*, 69 Fed. 798.

*California*. — *People v. Daily*, 135 Cal. 104, 67 Pac. 16; *Webster v. San Pedro Lum. Co.*, 101 Cal. 326, 35 Pac. 871.

*Connecticut*. — *Cook v. Mix*, 11 Conn. 432.

*Georgia*. — *Miller v. State*, 109 Ga. 512, 35 S. E. 152; *Hicks v. State*, 105 Ga. 627, 31 S. E. 579; *Peterson v. State*, 47 Ga. 524; *Johnson v. State*, 61 Ga. 35.

*Illinois*. — *Featherstone v. People*, 194 Ill. 325, 62 N. E. 684.

B. COMPETENCY OF EVIDENCE. — The decision of the trial court as to the competency of evidence upon the preliminary hearing is reviewable, but the record must show the evidence taken and proper exceptions thereto.<sup>51</sup>

### III. WHEN DETERMINED.

**Conditional Admission.** — It is generally error for the court to defer its ruling on the competency of evidence and permit it to go to the jury conditionally,<sup>52</sup> except by consent,<sup>53</sup> or when counsel promises to introduce evidence to make it competent.<sup>54</sup> In some cases it may

*Indiana.* — *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 41 Am. St. Rep. 440, 24 L. R. A. 483; *Blackwell v. State*, 11 Ind. 196.

*Iowa.* — *State v. Severson*, 78 Iowa 653, 43 N. W. 533.

*Minnesota.* — *State v. Levy*, 23 Minn. 104, 23 Am. Rep. 678.

*New York.* — *Slocovich v. Orient Mut. Ins. Co.*, 108 N. Y. 56, 14 N. E. 802.

*North Carolina.* — *State v. Bryson*, 79 N. C. 651.

*Oklahoma.* — *Guthrie (City) v. Shaffer*, 7 Okla. 459, 54 Pac. 698.

*Texas.* — *Click v. State*, (Tex. Crim.), 66 S. W. 1,104; *Harris v. Daugherty*, (Tex.), 11 S. W. 921; *Brown v. State*, 2 Tex. App. 115; *Brown v. State*, 6 Tex. App. 286; *Burk v. State*, 8 Tex. App. 336.

*Vermont.* — *State v. Gorham*, 67 Vt. 365, 31 Atl. 845.

*West Virginia.* — *State v. Michael*, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605; *Uttermohlen v. Bogg's Run. Min. & Mfg. Co.*, 50 W. Va. 457, 40 S. E. 410, 88 Am. St. Rep. 884, 55 L. R. A. 910.

**Competency Immaterial.** — Where a witness was rejected because his testimony is incredible, on a trial by referee, it was held that the question of his competency was immaterial because his testimony, even if competent, would have been rejected as unworthy of credit. *Appeal of Ahl*, 129 Pa. 26, 18 Atl. 471.

51. *Vass v. Com.*, 3 Leigh (Va.) 786, 24 Am. Dec. 695; *Com. v. Mullins*, 2 Allen (Mass.) 295; *State v. Ward*, 39 Vt. 225; *State v. Jackson*, 9 Or. 457; *Rufer v. State*, 25 Ohio St. 464.

52. *Fuller v. Metropolitan L. Ins. Co.*, 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 54; *Wright v. Rensens*, 133 N. Y. 298, 31 N. E. 215; *McCurrey v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *Sharpe v. Freeman*, 45 N. Y. 802.

**Discretionary With Court.** — In *Fath v. Thompson*, 58 N. J. L. 180, 33 Atl. 391, it was held that the court may, in its discretion, defer its ruling on the competency of evidence and admit it conditionally.

**Examination After Testifying.** In *People v. Bernal*, 10 Cal. 66, it was held no error for the court to wait until a witness' testimony had been taken before determining his competency, where the witness is finally found to be competent.

53. *Dougherty v. Welch*, 53 Conn. 558, 5 Atl. 704; *Trumbull v. Hewitt*, 65 Conn. 60, 31 Atl. 492; *McKnight v. Dunlap*, 5 N. Y. 537, 55 Am. Dec. 370; *Hopkins v. Clark*, 69 N. Y. St. 849, 35 N. Y. Supp. 360.

**Failure to Object** is consent to a deferred ruling. *Bitzer v. Bobo*, 39 Minn. 18, 38 N. W. 609.

54. *Dougherty v. Welch*, 53 Conn. 558, 5 Atl. 704. See articles "RELEVANCY;" "ORDER OF PROOF."

**When Proper.** — In *Russell v. Farrell*, 102 Tenn. 248, 52 S. W. 146, it was held that the conditional admission of evidence upon a promise to introduce further evidence making it competent, is only proper when there is great probability that such evidence will be supplied.

**Trial by Court.** — Where the trial is by the court alone, such practice is not reversible error, where the evidence, although improper, is finally rejected. *Rogers v. Marlborough*

be necessary to hear the evidence before its competency can be determined.<sup>55</sup>

#### IV. COMPETENCY OF EVIDENCE.

**1. Generally.** — For the rules relating to competency of particular classes of evidence the appropriate titles must be consulted.

**2. Indecent and Immoral Evidence.** — A. **GENERALLY.** — The fact that evidence is indecent and immoral will not suffice to exclude it where necessary to criminal or civil justice.<sup>56</sup> But the examination into such matters should be conducted with all possible delicacy due to the dignity and decency of the court,<sup>57</sup> and the modesty<sup>58</sup> or youth<sup>59</sup> of the witness.

Co., 32 S. C. 555, 11 S. E. 383; *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491.

**55. Depending Upon Circumstances.** — "The better practice is, no doubt, to rule upon questions involving the admissibility of evidence as they arise; but it happens sometimes that the determination of the merits of the case turns upon a question touching the relevancy or incompetency of certain offered evidence, and in such event it would be entirely proper for the court to take the question under advisement, where neither party could be prejudiced by such a course. On the other hand, the practice which seems nowadays to be too freely indulged in, might in some cases seriously embarrass a party who, not knowing what the final ruling would be, could not determine what further evidence he should introduce. Therefore, whether such practice would be ground for reversal in any given case would depend upon the particular circumstances of that case." *Martin v. Lloyd*, 94 Cal. 195, 29 Pac. 491.

**Parol Evidence.** — Where there is a dispute as to whether the contract sued upon is in writing, parol evidence is admissible, subject to exclusion, if the contract shall be proved to be written. *Kehlor v. Wilton*, 99 Ill. App. 228.

**56.** *Melvin v. Melvin*, 58 N. H. 569, 42 Am. Rep. 605; *Greenl. Ev.* (16th ed.), § 254b, citing *Da Costa v. Jones*, Cowp. (Eng.) 729.

**57.** *Abernathy v. Abernathy*, 8 Fla. 243. See article "DIVORCE."

**Vulgarity Avoided.** — Where ob-

jection was taken to a remark of the trial judge that he would not require the witness to use language that would shock her modesty, the court on appeal said: "We find nothing in this effort of the judge to maintain the proprieties of the court room, and nothing in what he said, of which the prisoner can rightfully complain. Judicial investigations often involve inquiries into matters of a delicate nature, and vulgar words should never be required of a witness where the truth can be conveyed with equal clearness and accuracy in proper and becoming language. It is the duty of the judge to preserve the dignity of the court, and to see that the decencies of life are not needlessly violated." *State v. Laxton*, 78 N. C. 564.

#### **58. Modesty of the Witness.**

Where a question is put to a deaf and dumb witness in a criminal case which so shocks her modesty as to cause her to flee from the court room, the action of the court in allowing the interpreter, who followed her and brought her back, to state her answer obtained in private without repeating the question in open court cannot be successfully complained of by the accused, especially where it is not shown that he was injured thereby. *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695.

**59. Children.** — **Indelicate Questions.** — In a bastardy case the young child was asked as to the social intimacy of the parties. While holding the question proper the court says: "But we do not think it

**B. LIMITS OF SUCH EVIDENCE.** — Such evidence, however, will be excluded where it is injurious to the feelings of innocent third parties, and the matter is one in which the parties litigant have no real interest.<sup>60</sup>

**C. IMPROPER EXHIBITIONS AND EXPERIMENTS.** — So improper exhibitions of the witness' person will not be permitted,<sup>61</sup> and experiments which are cruel and shocking to the moral sense cannot be performed in court.<sup>62</sup>

**D. NON-ACCESS.** — Testimony of the husband or wife as to non-access in proof of legitimacy is said to be excluded on grounds of public policy, decency and morality,<sup>63</sup> but it is not because the evidence itself is indecent or immoral.<sup>64</sup>

**3. Evidence Wrongfully Obtained.** — **A. GENERALLY.** — Evidence will not be excluded because illegally or wrongfully obtained, since the court will not stop to inquire into such collateral matters.<sup>65</sup>

would be proper to put unclean questions on direct or cross-examination to such a child." *People v. White*, 53 Mich. 537, 19 N. W. 174. See also article "DIVORCE."

60. *Greenl. Ev.* (16th ed.), § 254b, citing *Ditchburn v. Goldsmith*, 4 Camp. (Eng.) 152; *Brown v. Lee-son*, 2 H. Bl. 43; *Henkin v. Gerss*, 2 Camp. 408.

61. See article "DEMONSTRATIVE EVIDENCE."

62. See articles "EXPERIMENTS;" "DEMONSTRATIVE EVIDENCE."

63. See article "BASTARDY," Vol. II, p. 240.

64. **Reason of Rule.** — The rule rendering the husband and wife incompetent witnesses as to non-access "does not mean that testimony of non-access is so obscene that it is against decency that it should be heard in court, and therefore is excluded, but the reason of it is that it is against sound public policy and morality to allow the husband and wife to bastardize their own issue. If the evidence were excluded because of its indecency, the same reason would exclude it when offered by other witnesses." *Melvin v. Melvin*, 58 N. H. 569, 42 Am. Rep. 605. See also *Tioga Co. v. South Creek*, 75 Pa. St. 433.

**Evidence Wrongfully Obtained.** "Evidence is not infrequently obtained by methods which are reprehensible in good morals, offensive to fair dealing, subjecting it to unfavorable inferences the party rely-

ing upon it must neutralize to entitle it to full credence. And evidence is sometimes obtained under circumstances which meet with the unqualified disapprobation of the courts. The evidence, however unfairly and illegally obtained, is not subject to exclusion, if it be of facts in themselves relevant, except when a party accused of crime has been compelled to do some positive, affirmative act inculcating himself, or an admission or confession has been extorted from him by force, or drawn from him by appliances to his hopes or fears." *Shields v. State*, 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17.

**A Copy of an Indictment**, though illegally obtained, is, nevertheless, competent evidence. *Jordan v. Lewis*, 14 East 305 (note); *Leggatt v. Tollervey*, 14 East 302; *Caddy v. Barlow*, 1 Man. & R. 275, 17 Eng. C. L. 252.

65. *England.* — *Leggatt v. Tollervey*, 14 East 302; *Jordan v. Lewis*, 14 East 305 (note).

*United States.* — *U. S. v. Distillery*, 25 Fed. Cas. No. 14,960; *U. S. v. Whittier*, 5 Dill. 35, 28 Fed. Cas. No. 16,688.

*Alabama.* — *Shields v. State*, 104 Ala. 35, 16 So. 85, 53 Am. St. Rep. 17.

*California.* — *People v. Alden*, 113 Cal. 264, 45 Pac. 327.

*Georgia.* — *Wood v. McGuire*, 21 Ga. 576.

*Iowa.* — *Sullivan v. Nicoulin*, 113 Iowa 76, 84 N. W. 978.

**B. TAKEN FROM DEFENDANT'S PERSON OR PREMISES.** — The fact that evidence has been secured by an unlawful search of the person or premises of the defendant in a criminal case will not serve to exclude it.<sup>66</sup> Nor does its introduction violate the constitutional immunity from unlawful seizures and searches, or require the defendant to furnish evidence against himself,<sup>67</sup> unless the unlawful act is done by the order of the court.<sup>68</sup>

**C. OBTAINED THROUGH IMPROPER CONFESSION.** — Evidence obtained by means of a confession improperly extorted from the defendant in a criminal case is, nevertheless, competent.<sup>69</sup>

**D. PRIVILEGED COMMUNICATIONS.** — When an otherwise privi-

*Louisiana.* — *Rouville v. Rouville*, 6 Mart. (O. S.) 702; *Kittridge v. Landry*, 2 Rob. 72.

*New Hampshire.* — *State v. Flynn*, 36 N. H. 64.

*North Carolina.* — *State v. Garrett*, 71 N. C. 85, 17 Am. Rep. 1; *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493.

*Texas.* — *Walker v. State*, 7 Tex. Crim. 245, 32 Am. Rep. 595; *Bruce v. State*, 31 Tex. Crim. 590, 21 S. W. 681.

**Eavesdropping.** — Statements of the defendant in a criminal case heard by an eavesdropper are not incompetent for that reason. *People v. Cotta*, 49 Cal. 166; *State v. Allen*, 37 La. Ann. 685. See article "PRIVILEGE."

**66. Admissions Under Duress.** Evidence obtained under an illegal search warrant is not objectionable as an admission made under duress. *State v. Flynn*, 36 N. H. 64. See also article "ADMISSIONS," Vol. I, p. 595, notes 11-15.

*England.* — *Stockfleth v. De Tassit*, 4 Camp. 10; *Jordan v. Lewis*, 14 East 305; *Leggatt v. Tollervey*, 14 East 302.

*Alabama.* — *Spicer v. State*, 69 Ala. 159; *Chastang v. State*, 83 Ala. 29, 3 So. 304.

*Arkansas.* — *Starchman v. State*, 62 Ark. 537, 36 S. W. 940.

*Connecticut.* — *State v. Griswold*, 67 Conn. 290, 34 Atl. 1,046, 33 L. R. A. 227.

*Georgia.* — *Ruohr v. State*, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175.

*Maine.* — *State v. Plunkett*, 64 Me. 534; *State v. Burroughs*, 72 Me. 479.

*Massachusetts.* — *Com. v. Smith*,

166 Mass. 370, 44 N. E. 503; *Com. v. Welch*, 163 Mass. 372, 40 N. E. 103; *Com. v. Brelsford*, 161 Mass. 61, 36 N. E. 677; *Com. v. Hurley*, 158 Mass. 159, 33 N. E. 342; *Com. v. Ryan*, 157 Mass. 403, 32 N. E. 349; *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *Com. v. Welsh*, 110 Mass. 359; *Com. v. Dana*, 2 Metc. 329; *Com. v. Lottery Tickets*, 5 Cush. 369.

*Michigan.* — *Cluett v. Rosenthal*, 100 Mich. 193, 58 N. W. 1,009, 43 Am. St. Rep. 446.

*Missouri.* — *State v. Kaub*, 15 Mo. App. 433; *State v. Pomeroy*, 130 Mo. 489, 32 S. W. 1,002.

*Nebraska.* — *Sanford v. Sornborger*, 26 Neb. 295, 41 N. W. 1,102.

*New Hampshire.* — *State v. Flynn*, 36 N. H. 64.

*New Jersey.* — *Wood v. Chetwood*, 27 N. J. Eq. 311.

*South Carolina.* — *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1,021, 42 Am. St. Rep. 877.

*Washington.* — *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382.

*West Virginia.* — *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

See also *State v. Griswold*, 67 Conn. 290, 34 Atl. 1,046, 33 L. R. A. 227 (note), and generally the article "PRIVILEGE."

**67.** *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1,085; *State v. Griswold*, 67 Conn. 290, 34 Atl. 1,046, 33 L. R. A. 227. See article "PRIVILEGE." See also 59 L. R. A. 465 (note).

**68.** *Boyd v. U. S.*, 116 U. S. 616; *U. S. v. Wong Quong Wong*, 94 Fed. 832.

**69.** *State v. Douglass*, 20 W. Va. 770; *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269. See articles "CONFESSIONS;" "PRIVILEGE."

leged communication has been wrongfully overheard or obtained by a third party, the latter is not incompetent for that reason to testify to the same.<sup>70</sup>

**4. Incompetent Evidence in Rebuttal of Similar Incompetent Evidence.**—A. GENERALLY.—The introduction without objection of incompetent evidence by one party does not generally give the other party a right to introduce similar incompetent evidence.<sup>71</sup>

B. EFFECT OF OBJECTION.—Where such evidence is admitted over the objection of one party, it has been held error for the court to exclude similar evidence when offered by the objecting party,<sup>72</sup> but other cases held that even such admission over an objection gives no right to introduce incompetent evidence.<sup>73</sup>

C. FAULT OF COMPLAINING PARTY.—The party, however, who has introduced incompetent evidence cannot object to similar evidence by his opponent in rebuttal.<sup>74</sup> But some courts hold that it is

70. *State v. Mathers*, 64 Vt. 101, 23 Atl. 590, 33 Am. St. Rep. 921. See also notes in 29 Am. St. Rep. 415, 15 L. R. A. 268. See article "PRIVILEGE."

71. *Illinois*.—*Wickenkamp v. Wickenkamp*, 77 Ill. 92.

*Indiana*.—*Sherfey v. Evansville & T. H. R. Co.*, 121 Ind. 427, 23 N. E. 273.

*Maryland*.—*Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242, 59 Am. Dec. 72; *Hughes v. Howard*, 3 Har. & J. 9.

*Massachusetts*.—*Shaw v. Stone*, 1 Cush. 228.

*Pennsylvania*.—*Swank v. Phillips*, (Pa.), 6 Atl. 450.

*Vermont*.—*Stevenson v. Gunning*, 64 Vt. 601, 25 Atl. 697.

**Incompetent Evidence in Rebuttal.** In *Walkup v. Pratt*, 5 Har. & J. (Md.) 51, where incompetent testimony offered in rebuttal of similar incompetent testimony was rejected, the court says: "It has been contended for the petitioner that if this testimony was improper upon the general principles, it would render it admissible by the previous examination by the appellee. If the counsel for the appellee had offered improper evidence, the court, on application, would have rejected it, but the offering of the improper evidence by one of the litigant parties never can justify the introduction of similar evidence by the other party; such doctrine would lead to endless con-

fusion and destroy all the established rules of evidence."

72. **Effect of Objection.**—If, after objection is made to testimony, the trial court admits it, the plainest principles of justice, to say nothing of consistency in the court's ruling, would require that the other party be permitted to meet it. The ruling of the court in the first instance determines it to be competent, and the party offering it should not be permitted to object to the other side contradicting or explaining it on the ground that it is incompetent, when the court has held at his instance that evidence on that subject is admissible.

"If the evidence be clearly irrelevant, it should not be admitted on the ground that other irrelevant evidence had already been introduced, unless the latter was admitted by the court after objection." *Lake Roland El. R. Co. v. Weir*, 86 Md. 273, 37 Atl. 714; *Milburn v. State*, 1 Md. 1.

73. *Swank v. Phillips*, (Pa.), 6 Atl. 450.

74. *United States*.—*Bogk v. Gassert*, 149 U. S. 17, 37 L. ed. 631; *Sun Prtg. & Pub. Ass'n v. Edwards*, 113 Fed. 445; *Atchison, T. & S. F. R. Co. v. Reese*, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768; *Ward v. Blake Mfg. Co.*, 56 Fed. 437, 5 C. C. A. 538.

*Alabama*.—*Winslow v. State*, 92 Ala. 78, 9 So. 728; *Morgan v. State*, 88 Ala. 223, 6 So. 761; *Sharp v. Hall*,

86 Ala. 110, 5 So. 497, 11 Am. St. Rep. 23; *Gandy v. State*, 86 Ala. 20, 5 So. 420; *Ford v. State*, 71 Ala. 385; *Findlay v. Pruitt*, 9 Port. 195.

*Arkansas*.—*Little Rock R. Co. v. Tankersley*, 54 Ark. 14 S. W. 1,099.

*Connecticut*.—*Grannis v. Branden*, 5 Day 260, 5 Am. Dec. 143.

*Illinois*.—*Cleveland C. C. & St. L. R. Co. v. Highsmith*, 59 Ill. App. 651.

*Indiana*.—*Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Meranda v. Spurlin*, 100 Ind. 380; *Ewing v. Bass*, 149 Ind. 1, 48 N. E. 241.

*Iowa*.—*Kendall v. Albia (City)*, 73 Iowa 241, 34 N. W. 833.

*Louisiana*.—*Mousseau v. Reynolds*, 19 La. Ann. 516; *Patton v. Philadelphia & New Orleans*, 1 La. Ann. 98.

*Massachusetts*.—*Young v. Mason*, 8 Pick. 551.

*Michigan*.—*Fowler v. Gilbert*, 38 Mich. 292; *Padgett v. Jacobs*, 128 Mich. 632, 87 N. W. 898; *Ransom v. Bartley*, 70 Mich. 379, 38 N. W. 287.

*Missouri*.—*Wilson v. Gibson*, 63 Mo. App. 656; *Nelson Dist. Co. v. Hubbard*, 53 Mo. App. 23; *Trustees Christian Univ. v. Hoffman*, 95 Mo. App. 488, 69 S. W. 474.

*New Hampshire*.—*Grafton Bank v. Woodward*, 5 N. H. 301.

*New York*.—*Scattergood v. Wood*, 79 N. Y. 263, 35 Am. Rep. 515.

*Pennsylvania*.—*McCarthy v. Scanlan*, 176 Pa. St. 262, 35 Atl. 189.

*South Carolina*.—*Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 1, 19 S. E. 206.

*Tennessee*.—*Record v. Chickasaw Co-op. Co.*, 108 Tenn. 657, 69 S. W. 334.

*Utah*.—*Murphy v. Graney*, 23 Utah 633, 66 Pac. 190.

*Vermont*.—*Stevenson v. Gunning*, 64 Vt. 601, 25 Atl. 697.

*Virginia*.—*Wilkinson v. Jett*, 7 Leigh 115, 30 Am. Dec. 493.

*Wisconsin*.—*Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679.

**Reason of Rule.**—In *Furbush v. Goodwin*, 25 N. H. 425, where the party who had improperly introduced secondary evidence objected to the use of the same sort of evidence by his opponent, the court says: "It would seem but even-handed justice

that, if one party should give evidence in proof of some point of his case, of a particular character, not strictly competent, in point of law, for the purpose for which it was offered, the opposite party should be allowed the benefits of proof of a like character, in disproof of the fact in issue. It would seem but just and proper to hold the party first offering the incompetent proof to be precluded from regarding it as incompetent, when the same character of evidence is offered in the same cause, and to the same point, by the other party."

**Extent of Right.**—"The question then arises, how far the admission of incompetent and irrelevant evidence offered by one party, to which no objection is taken, renders it competent for the opposite party to introduce evidence of a similar character. There certainly must be some limit beyond which parties can not be permitted to go, in extending issues of fact and bringing into a case matters which have no essential bearing on its real merits. Without indicating a general rule applicable to all cases of this nature, we think it may be safely said that a party should not be allowed to go further than to prove facts which have a direct tendency to contradict and control the irrelevant or incompetent evidence which his adversary has introduced into the case. To this extent, it may be properly held that the latter has waived the strict rule of law applicable to such evidence, and is estopped from objecting to the proof of facts, by the opposite party, which can be properly deemed to be contradictory or in rebuttal of those offered by himself." *Mowry v. Smith*, 9 Allen (Mass.) 67. See also *State v. Witham*, 72 Me. 531.

**Asking Same Question.**—Where one party has asked a question not strictly competent, it is error to exclude the same question when asked by the other party. *Kelley v. Detroit L. & N. R. Co.*, 80 Mich. 237, 45 N. W. 90, 20 Am. St. Rep. 514.

**Inadmissible Under the Pleadings.** Where one party has introduced evidence inadmissible under the pleadings, he cannot object to evidence as to the same matter by the other party.



never proper to admit incompetent evidence.<sup>75</sup>

**D. PAROL EVIDENCE.** — Where one party introduces parol testimony to vary a writing, he cannot object to similar evidence on the part of his adversary.<sup>76</sup>

**E. SECONDARY EVIDENCE.** — So, also, where he resorts to secondary evidence, he waives the right to require the other party to produce the best evidence to the same point.<sup>77</sup> There must, however, be more than a mere reference to the contents of the writing.<sup>78</sup>

**F. CHARACTER, OPINION AND HEARSAY.** — In the same way character evidence otherwise incompetent, may become admissible,<sup>79</sup>

*Mousseau v. Reynolds*, 19 La. Ann. 516; *San Antonio & A. P. R. Co. v. Griffith*, (Tex. Civ. App.), 70 S. W. 438.

**Form of Question. — Conclusion.** A party is not in a position to complain of the form of a question propounded to a witness, on the ground that it calls for the conclusion or opinion of the witness, when he himself has used the same form of question. *Nelson Dist. Co. v. Hubbard*, 53 Mo. App. 23.

**75.** *Edwards v. Phifer*, 121 N. C. 388, 28 S. E. 548, *overruling* *Cheek v. Watson*, 90 N. C. 302; *Phifer v. Carolina Cent. R. Co.*, 122 N. C. 940, 29 S. E. 578; *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321; *Dodge v. Kiene*, 28 Neb. 216, 44 N. W. 191.

**Never Competent.** — "The admission of improper evidence on the one side furnishes no warrant to the other to meet it by that which is clearly bad." *McCartny v. Territory*, 1 Neb. 121.

**Explaining Incompetent Evidence.** While the introduction of incompetent evidence does not justify the admission of other incompetent evidence, yet the former may be explained or rebutted. *McCartny v. Territory*, 1 Neb. 121. See also *Thomson v. Brothers*, 5 La. 279.

**76.** *Bank v. Cushman*, 66 Mo. App. 102; *Hobbs v. Tipton Co. Com's*, 116 Ind. 376, 19 N. W. 186; *Arbuckle v. Smith*, 74 Mich. 568, 42 N. W. 124; *Archenhold v. Evans*, 11 Tex. Civ. App. 138, 32 S. W. 795; *Vermont Farm. Mach. Co. v. Batchelder*, 68 Vt. 430, 35 Atl. 378.

**77.** *Massachusetts*. — *Shaw v. Stone*, 1 Cush. 228.

*Missouri*. — *Nelson Dist. Co. v. Hubbard*, 53 Mo. App. 23.

*New Hampshire*. — *Furbush v. Goodwin*, 25 N. H. 425.

*New York*. — *Foster v. Newbrough*, 66 Barb. 645; *Lovell v. Houghton*, 54 N. Y. Super. Ct. 60; *Morss v. Stone*, 5 Barb. 516.

*North Carolina*. — *Walters v. Walters*, 27 N. C. 435.

*Texas*. — *Wolf v. Lachman*, (Tex. Civ. App.), 20 S. W. 867; *Archenhold v. Evans*, 11 Tex. Civ. App. 138, 32 S. W. 795.

*Vermont*. — *Orr v. Clark*, 62 Vt. 136, 19 Atl. 929.

**78.** *Ross v. Pleasants*, 3 Pa. St. 408.

**Limits of Rule.** — Where a witness testifies that he saw a bond delivered, and being asked what bond, replied, "the defendant's bond to maintain his father and mother during their lives," it was held that this examination on the part of the plaintiff did not dispense with the necessity of the defendant's producing the bond, or showing that he had used the proper means to procure its production before introducing secondary evidence as to its contents. *Walters v. Walters*, 27 N. C. 435.

**79.** *Findlay v. Pruitt*, 9 Port. (Ala.) 195; *Grannis v. Branden*, 5 Day (Conn.) 260, 5 Am. Dec. 143.

**Evidence as to Character. — Particular Acts.** — Where, on trial for assault, the defendant, after testifying in his own behalf and without effort of the state to impeach his character for truth, has offered evidence of his reputation for truth and veracity, he cannot complain, on appeal, of the introduction in rebuttal by the state of evidence of particular acts tending to show his low and immoral associations, since it is illegal evidence in rebuttal of illegal evidence.

as may also opinion<sup>80</sup> or hearsay evidence.<sup>81</sup>

**G. IRRELEVANT AND IMMATERIAL EVIDENCE.** — It has often been ruled that one who has introduced irrelevant and immaterial evidence cannot complain that similar evidence has been admitted in rebuttal.<sup>82</sup> But many cases hold that the failure to object creates no right to rebut such evidence.<sup>83</sup>

*Morgan v. State*, 88 Ala. 223, 6 So. 761.

80. *Spaulding v. Chicago*, St. P. & K. C. R. Co., 98 Iowa 205, 67 N. W. 227; *Taylor v. Penquite*, 35 Mo. App. 389; *Endowment Rank K. P. v. Steele*, 108 Tenn. 624, 69 S. W. 336; *Goodman v. Kennedy*, 10 Neb. 270, 4 N. W. 987.

81. *Ewing v. Bass*, 149 Ind. 1, 48 N. E. 241; *Cleveland, C. C. & St. L. R. Co. v. Highsmith*, 59 Ill. App. 651.

82. *United States*. — *Evening Post Pub. Co. v. Voight*, 72 Fed. 885, 19 C. C. A. 224.

*Alabama*. — *Flinn v. Barber*, 59 Ala. 446; *Havis v. Taylor*, 13 Ala. 324; *Mobile & B. R. Co. v. Ladd*, 92 Ala. 287, 9 So. 169.

*California*. — *San Diego L. & T. Co. v. Neale*, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; *s. c.* 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604; *Donnelly v. Curran*, 54 Cal. 282.

*Iowa*. — *Hale v. Philbrick*, 47 Iowa 217.

*Kansas*. — *Swofford v. Zeigler*, 2 Kan. App. 296, 42 Pac. 592.

*Kentucky*. — *Corley v. Lancaster*, 81 Ky. 171.

*Louisiana*. — *Prevost v. Simeon*, 4 La. (O. S.) 472.

*Maine*. — *State v. Sargent*, 32 Me. 429.

*Massachusetts*. — *Alexander v. Kaiser*, 149 Mass. 321, 21 N. E. 376; *Brown v. Perkins*, 1 Allen 89.

*Missouri*. — *State v. Mounce*, 106 Mo. 226, 17 S. W. 226; *Crabtree v. Vanhoozier*, 53 Mo. App. 405.

*Nevada*. — *Richardson v. Hoole*, 13 Nev. 492.

*New York*. — *Waldron v. Romaine*, 22 N. Y. 368; *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747; *Drucker v. Metropolitan El. R. Co.*, 56 N. Y. St. 130, 25 N. Y. Supp. 922; *Wallis v. Randall*, 81 N. Y. 164.

*Ohio*. — *Krause v. Morgan*, (Ohio), 40 N. E. 886.

*Pennsylvania*. — *Sherwood v. Titman*, 55 Pa. St. 77.

*West Virginia*. — *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721.

**Cross-examination. — Rebuttal.** "The rule that testimony collateral to the issue cannot be contradicted does not apply to testimony introduced by the opposite party, but is confined to testimony introduced by cross-examination of an opponent's witness, or otherwise by the party which proposes to contradict it." *State v. Sargent*, 32 Me. 429.

83. *United States*. — *Stringer v. Lessee of Young*, 3 Pet. 320; *Philadelphia & T. C. R. Co. v. Stimpson*, 14 Pet. 448, 10 L. ed. 535.

*Connecticut*. — *Phelps v. Hunt*, 43 Conn. 194.

*Indiana*. — *Shank v. State*, 25 Ind. 207; *Horne v. Williams*, 12 Ind. 324.

*Iowa*. — *Manning v. Burlington, C. R. & N. R. Co.*, 64 Iowa 240, 20 N. W. 169.

*Kentucky*. — *Norton v. Doe*, 1 Dana 14.

*Maryland*. — *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Mitchell v. Sellman*, 5 Md. 376; *Bannon v. Warfield*, 42 Md. 22; *Ruhl v. Corner*, 63 Md. 179.

*Massachusetts*. — *Davis v. Keyes*, 112 Mass. 436; *Carr v. West End St. R. Co.*, 163 Mass. 360, 40 N. E. 185; *Phillips v. Marblehead*, 148 Mass. 326, 19 N. E. 547.

*Missouri*. — *Stinde v. Blesch*, 42 Mo. App. 578; *Redman v. Piersol*, 39 Mo. App. 173.

*New York*. — *Farmers' & Mfgs. Bank v. Winfield*, 24 Wend. 420; *People v. Dowling*, 84 N. Y. 478.

**Incompetent Evidence in Rebuttal.** The admission, by stipulation, of certain incompetent evidence by one party gives the other party no right

H. DISCRETION OF THE COURT. — The true rule seems to be that the admission or rejection of such rebuttal evidence is discretionary with the court.<sup>84</sup>

I. PREJUDICE FROM IMPROPER EVIDENCE. — Some courts have distinguished between improper evidence which does and that which does not prejudice the complaining party's case, allowing rebuttal of the former as a matter of right.<sup>85</sup> But such right extends only to matter strictly necessary to contradict the harmful inference.<sup>86</sup>

J. CROSS-EXAMINATION. — REBUTTAL. — The fact that matters either incompetent, irrelevant or immaterial have been touched upon or brought out on cross-examination does not justify the admission of rebuttal evidence which would otherwise have been incompetent.<sup>87</sup>

to introduce incompetent evidence in rebuttal. *Wilkinson v. Jett*, 7 Leigh (Va.) 115, 30 Am. Dec. 493.

**Cross-examination as to Irrelevant Matters.** — In *Phelps v. Hunt*, 43 Conn. 194, where questions on cross-examination as to irrelevant matters were ruled out, the court says: "It is doubtless true that the inquiries ruled out on the cross-examination were in the main pertinent to the matter testified to in chief, and if the irrelevant matter in chief was allowed to have any effect it would have been more just and fair to have allowed a reasonable opportunity for cross-examination upon the same subject; and if, when the questions on cross-examination were excluded, the plaintiff had asked the court to reject also all the kindred matter previously received, and the court had refused, the plaintiff would have had a just ground for a new trial."

84. *Treat v. Curtis*, 124 Mass. 348; *Brooks v. Acton*, 117 Mass. 204; *Hathaway v. Evans*, 113 Mass. 264; *Keeler v. Delevan*, 4 Barb. (N. Y.) 317; *Ellsworth v. Potter*, 41 Vt. 685.

85. *Blewett v. Tregonning*, 3 Ad. & E. 554, 30 Eng. C. L. 151; *Gorsuch v. Rutledge*, 70 Md. 272, 17 Atl. 76; *Frost v. Rosecrans*, 66 Iowa 407, 23 N. W. 805; *Stringer v. Lessee of Young*, 3 Pet. 320.

**Prejudicial Effect.** — The introduction of evidence, by one party, that might have been excluded, had the other party objected to it, does not necessarily open the door to the other party to introduce incompetent evidence. But when the evidence intro-

duced is a circumstance tending to render the disputed fact more probable, even if so remote as not to be admissible as legal evidence, the other party has the right to do away with the impression it may create in the minds of the jury, by evidence of the same character and force tending directly to meet and explain it. *Lytle v. Bond*, 40 Vt. 618. See articles "CROSS-EXAMINATION;" "DIRECT EXAMINATION OF WITNESSES."

86. "The introduction of immaterial testimony to meet immaterial testimony on the other side is generally within the discretion of the presiding judge. But if one side introduces evidence irrelevant to the issue, which is prejudicial and harmful to the other party, then, although it come in without objection, the other party is entitled to introduce evidence which will directly and strictly contradict it." *State v. Witham*, 72 Me. 531.

87. **Rebutting Incompetent Cross-examination.** — "The mere suggestion of drunkenness at other times, implied by the course of the cross-examination of the plaintiff, did not open the matter to him for the introduction of testimony not otherwise competent. The evidence being incompetent and calculated to influence the minds of the jury improperly upon the real question before them, we cannot regard it as immaterial." *McCarty v. Leary*, 118 Mass. 509; *Shurtleff v. Parker*, 130 Mass. 293, 39 Am. Rep. 454; *Harrington v. Lincoln*, 2 Gray (Mass.) 133; *Artz v. C. R. & I. P. R. Co.*, 44 Iowa 284.

This rule, however, must be distinguished from the right to rebut on redirect examination new matter brought out on cross-examination.<sup>88</sup>

**5. Exclusion of Competent Evidence.** — A party who has secured the exclusion of competent evidence offered by his adversary cannot complain when similar evidence offered by himself is rejected.<sup>89</sup>

**6. Competent for One Purpose.** — A. GENERALLY. — Evidence competent for one purpose, though incompetent for another, is, nevertheless, admissible,<sup>90</sup> and may be applied to all the issues or facts for which it is competent.<sup>91</sup>

B. COMPETENT AS TO ONE PARTY. — So evidence competent as to one party, although incompetent and highly prejudicial as to a co-party, is admissible.<sup>92</sup>

C. CAUTIONARY INSTRUCTIONS. — a. Generally. — Whenever evidence is incompetent for some purposes, or against some parties,

88. *State v. Cardoza*, 11 S. C. 195; *Greenl. Ev.*, § 468. See article "DIRECT EXAMINATION OF WITNESSES."

89. *United States*. — *Silby v. Foote*, 55 U. S. 218, 14 L. ed. 394; *Nitche v. Earle*, 117 Ind. 270, 19 N. E. 749.

*Indiana*. — *Dinwiddie v. State*, 103 Ind. 101, 2 N. E. 290, 53 Am. Rep. 491; *Hinton v. Whittaker*, 101 Ind. 344.

*Iowa*. — *Trott v. Chicago*, R. I. & P. R. Co., 115 Iowa 80, 87 N. W. 722; *Crawford v. Wolf*, 29 Iowa 567; *Ingram v. Wackernagel*, 83 Iowa 82, 48 N. W. 998.

*New York*. — *Mooney v. New York El. R. Co.*, 30 N. Y. St. 561, 9 N. Y. Supp. 522.

90. See articles "CREDIBILITY;" "IMPEACHMENT."

*United States*. — *Kansas City Star Co. v. Carlisle*, 108 Fed. 344.

*Illinois*. — *Farwell v. Warren*, 51 Ill. 467; *Mighell v. Stone*, 175 Ill. 261, 51 N. E. 906.

*Indiana*. — *Davis v. Hardy*, 76 Ind. 272.

*New York*. — *Chapman v. Erie R. Co.*, 55 N. Y. 579.

*Oregon*. — *Joseph v. Furnish*, 27 Or. 260, 41 Pac. 424.

*Texas*. — *Clark v. Clark*, 21 Tex. Civ. App. 371, 51 S. W. 337; *Western U. T. C. v. Seals*, (Tex. Civ. App.) 45 S. W. 964.

91. *Connecticut Mut. L. Ins. Co. v. Hillman*, 188 U. S. 208.

"Evidence legal for some purpose cannot be excluded because the jury may erroneously apply it otherwise. The court, on request, will always guard against such an error." *Trenton P. R. Co. v. Cooper*, 60 N. J. L. 219, 37 Atl. 730.

92. *Alabama*. — *Williams v. State*, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133.

*California*. — *Tuffree v. Stearns R. Co.*, (Cal.), 54 Pac. 826.

*Georgia*. — *Johnson v. State*, 70 Ga. 725; *Clarke v. East Atlanta L. Co.*, 113 Ga. 21, 38 S. E. 323.

*Illinois*. — *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

*Indiana*. — *Pape v. Ferguson*, 28 Ind. App. 298, 62 N. E. 712; *Pittsburg C. C. & St. L. R. Co. v. Parrish*, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. Rep. 120.

*Massachusetts*. — *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560.

*Minnesota*. — *Appleton Mill Co. v. Warder*, 42 Minn. 117, 43 N. W. 791.

*Pennsylvania*. — *Brandt v. Com.*, 94 Pa. St. 290.

*Vermont*. — *State v. Cram*, 67 Vt. 650, 32 Atl. 502.

**Joint Trial.** — Where several separate actions are joined in one, evidence competent in any one of the actions, if held separately, is admissible on the joint trial. *Kimball v. Thompson*, 4 Cush. (Mass.) 441, 50 Am. Dec. 799.

it is not only proper,<sup>93</sup> but it is the court's duty when so requested<sup>94</sup> to limit by proper instructions to the jury the effect of such evidence to those matters or parties as to whom it is competent.<sup>95</sup>

b. *Necessity of Such Instructions* — (1.) *Criminal Cases*. — (A.) *GENERALLY*. — In criminal cases it is the court's duty, of its own motion, to give instructions limiting the effect of evidence competent only for a special purpose, or against one defendant, and likely to be misapplied by the jury,<sup>96</sup> and a failure to object or except will not

93. *Giddings v. Baker*, 80 Tex. 308, 16 S. W. 33; *Harrington v. State*, 19 Ohio St. 264; *Winfrey v. State*, 41 Tex. Crim. 538, 56 S. W. 919.

**Weight of Evidence.** — An instruction limiting the scope and effect of evidence admissible for a particular purpose is not an instruction on the weight of the evidence. *Houston T. C. R. Co. v. Harris*, (Tex. Civ. App.), 70 S. W. 335; *Ledbetter v. State*, 35 Tex. Crim. 195, 32 S. W. 903.

**Failure to Object.** — **Effect.** — Evidence competent for one purpose only, admitted without objection, cannot be confined to such particular purpose by an instruction of the court. *Dolphin v. Plumley*, 175 Mass. 304, 56 N. E. 281. See article "OBJECTIONS."

94. *Alabama*. — *Jordan v. State*, 81 Ala. 20, 1 So. 577.

*Colorado*. — *Anson v. Evans*, 19 Colo. 274, 35 Pa. 47.

*Illinois*. — *Purdy v. People*, 140 Ill. 46, 29 N. E. 700.

*Indiana*. — *Black v. Marsh*, (Ind. App.), 67 N. E. 201.

*Kansas*. — *State v. Wellington*, 43 Kan. 121, 23 Pac. 156.

*Missouri*. — *State v. Weeden*, 133 Mo. 70, 34 S. W. 473.

*New Hampshire*. — *Guertin v. Hudson*, 71 N. H. 505, 53 Atl. 736.

*New Jersey*. — *Trenton P. R. Co. v. Cooper*, 60 N. J. L. 219, 37 Atl. 730.

*North Carolina*. — *Tankard v. Romanoke R. & L. Co.*, 117 N. C. 558, 23 S. E. 46.

*Texas*. — *Lumpkin v. Minor*, (Tex. Civ. App.), 46 S. W. 66; *Interstate Bldg. & L. Ass'n v. Gofroth*, (Tex. Civ. App.), 57 S. W. 700.

*Virginia*. — *Cohen v. Bellenot*, (Va.), 32 S. E. 455.

*Wisconsin*. — *Fossdahl v. State*, 89 Wis. 482, 62 N. W. 185.

95. **Necessity of Limitation When Admitted.** — In *Byrne v. Byrne*, 113 Cal. 294, 45 Pac. 536, it was held error for the court to refuse, on request of counsel, to limit evidence competent only for a particular purpose to that specific point, at the time it is admitted.

96. *Alabama*. — *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182.

*California*. — See *People v. Rogers*, 71 Cal. 565, 12 Pac. 679.

*Iowa*. — *State v. Miller*, 81 Iowa 72, 46 N. W. 751.

*Kansas*. — *State v. Marshall*, 2 Kan. App. 792, 44 Pac. 49.

*Kentucky*. — *Fueston v. Com.*, 91 Ky. 230, 15 S. W. 177; *Gills v. Com.*, 18 Ky. L. Rep. 560, 37 S. W. 269.

*Louisiana*. — *State v. Donelson*, 45 La. Ann. 744, 12 So. 922.

*Massachusetts*. — *Com. v. Shepard*, 1 Allen 575. But see *Massachusetts* cases in following note.

*Michigan*. — *People v. Arnold*, 46 Mich. 268, 9 N. W. 406.

*Nevada*. — *State v. Ah Tom*, 8 Nev. 213; *State v. McLane*, 15 Nev. 345.

*North Carolina*. — *State v. Oxendine*, 107 N. C. 783, 12 S. E. 573; *State v. Collins*, 121 N. C. 667, 28 S. E. 520.

*Vermont*. — *State v. Cram*, 67 Vt. 650, 32 Atl. 502.

*Virginia*. — *Jones v. Com.*, 31 Gratt. 836.

*Wisconsin*. — *Kollock v. State*, 88 Wis. 663, 60 N. W. 817.

*Texas*. — *Mask v. State*, 34 Tex. Crim. 136, 31 S. W. 408; *West v. State*, (Tex. Crim.), 33 S. W. 227; *Martin v. State*, 36 Tex. Crim. 125, 35 S. W. 976; *McCall v. State*, 14 Tex. App. 353; *Alexander v. State*, (Tex. App.), 17 S. W. 139; *Thompson v. State*, 29 Tex. App. 208, 15 S. W. 206; *Mahoney v. State*, 33 Tex. Crim. 388, 26 S. W. 622; *Oliver*

cure an error in this respect.<sup>97</sup> This rule, however, is not universally applied.<sup>98</sup>

(B.) LIMITS OF RULE. — But failure to so instruct is not reversible error when it appears that such evidence was used only for its proper purpose,<sup>99</sup> or that no injury resulted from its improper application.<sup>1</sup>

(2.) Civil Cases. — In civil cases, however, the rule is quite general that no such cautionary instructions are necessary, unless requested.<sup>2</sup>

*v. State*, 33 Tex. Crim. 541, 28 S. W. 202; *Shackleford v. State*, (Tex. Crim.), 27 S. W. 8; *Phillips v. State*, 35 Tex. Crim. 480, 34 S. W. 272; *Ball v. State*, (Tex. Crim.), 36 S. W. 448.

**Limits of the Rule.** — "As we understand the law with reference to the admission of extraneous crimes, whenever they are admitted in evidence, and the effect has a tendency or might bring about a conviction for the extraneous crime, the court must limit the effect of the testimony in his charge to the jury. And this is the case, also, where the testimony, being admitted, has a tendency to injure the rights of the appellant in any other direction. The testimony must be limited. But where the testimony is simply used to prove up the case as *res gestae*, or to prove any other fact that forms a part and parcel of the case, so as to show the defendant's guilt, and there is no probability of the jury convicting for the offense not charged, it is not necessary to limit the effect of the testimony. In fact, it is only necessary for the court to charge upon and limit said testimony when there is danger of a conviction for the offense not charged, or of an unwarranted use of the testimony to the prejudice of the defendant in the case in which he is being tried." *Thornley v. State*, 36 Tex. Crim. 118, 35 S. W. 981.

**When Instruction Would Be Prejudicial.** — When, however, an instruction limiting the effect of such evidence would serve to prejudice rather than to benefit the defendant by drawing undue attention to such evidence, the court should not charge with respect to it. *Thornley v. State*, 36 Tex. Crim. 118, 34 S. W. 264. But see *s. c.* 35 S. W. 981.

<sup>97</sup> *People v. Maunusan*, 60 Mich. 15, 26 N. W. 797; *Davis v.*

*State*, 23 Tex. App. 210, 4 S. W. 590; *Paris v. State*, 35 Tex. Crim. 82, 31 S. W. 855.

**Changed by Statute.** — Apparently by a recent statute this rule has been changed in Texas, and exception to such error of the court must be reserved. *Magee v. State*, (Tex. Crim.), 43 S. W. 512.

<sup>98</sup> *Alabama*. — *Wills v. State*, 74 Ala. 21; *Blackman v. State*, 36 Ala. 295.

*California*. — *People v. Gray*, 66 Cal. 271, 5 Pac. 240.

*Georgia*. — *Johnson v. State*, 70 Ga. 725.

*Indiana*. — *Long v. State*, 95 Ind. 481.

*Massachusetts*. — *Com. v. Keating*, 133 Mass. 572; *Com. v. Wunsch*, 129 Mass. 477.

*Missouri*. — *State v. Berry*, 24 Mo. 466; *State v. Kilgore*, 70 Mo. 546. *distinguishing State v. Branstetter*, 65 Mo. 149. But see *State v. Ware*, 62 Mo. 597.

*Nebraska*. — *Gettinger v. State*, 13 Neb. 308, 14 N. W. 403.

*New York*. — *People v. McLaughlin*, 73 N. Y. St. 496, 37 N. Y. Supp. 1,005.

<sup>99</sup> *State v. Helm*, 97 Iowa 378, 66 N. W. 751; *State v. Gaston*, 96 Iowa 505, 65 N. W. 415; *Holly v. Com.*, 18 Ky. L. Rep. 441, 36 S. W. 532.

<sup>1</sup> *Gentry v. State*, 25 Tex. App. 614, 8 S. W. 925; *Purcelley v. State*, 29 Tex. App. 1, 13 S. W. 993.

<sup>2</sup> *Alabama*. — *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

*Iowa*. — *Puth v. Zimbleman*, 99 Iowa 641, 68 N. W. 895; *Connors v. Chingren*, 111 Iowa 437, 82 N. W. 934.

*Kansas*. — *Taylor v. Deverell*, 43 Kan. 469, 23 Pac. 628.

*Massachusetts*. — *Crandell v. White*, 164 Mass. 54, 41 N. E. 204.

But there are cases to the contrary.<sup>3</sup>

c. *Statement in Lieu of Instructions.* — In civil cases a statement by the court at the time of its introduction, limiting the scope of such evidence, renders a formal instruction to the same effect unnecessary,<sup>4</sup> but not so in a criminal case.<sup>5</sup>

d. *Nature of Such Instructions.* — Ordinarily it is sufficient for the court to call the jury's attention to the purpose for which such evidence was introduced, and instruct them to apply it only to that particular purpose.<sup>6</sup> In some cases, however, there may be such

*Missouri.* — Schlicker v. Gordon, 19 Mo. App. 479.

*Nebraska.* — Chicago, R. I. & P. R. Co. v. Holmes, (Neb.), 94 N. W. 1,007; Carleton v. State, 43 Neb. 373, 61 N. W. 699.

*New Jersey.* — Trenton Pass. R. Co. v. Cooper, 60 N. J. L. 219, 37 Atl. 730.

*Texas.* — Mutual L. Ins. Co. v. Baker, 10 Tex. Civ. App. 515, 31 S. W. 1,072.

**Purpose Ceasing.** — Where testimony competent against only one defendant was admitted, and a nonsuit as to him was granted, the court should have instructed the jury to disregard such evidence. Marks v. Culmer, 6 Utah 419, 24 Pac. 528.

*Wisconsin.* — Domasek v. Kluck, 113 Wis. 336, 89 N. W. 139; Viellesse v. City, 110 Wis. 160, 85 N. W. 665; Hacker v. Heiney, 111 Wis. 313, 87 N. W. 249.

3. Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30; Barlow Bros. v. Parsons, 73 Conn. 696, 49 Atl. 205.

**Admonition Necessary.** — In an action against a railroad company, a statement by one of its servants that a fellow servant was "not a good railroad man" was admitted only to show the company's knowledge of his incompetency. The failure of the court to admonish the jury of the sole purpose for which this matter was admitted was held reversible error. McDermott v. Hannibal & St. J. R. Co., 87 Mo. 285. See also Worthing v. Worthing, 64 Me. 335.

**Prejudicial Effect.** — Where evidence tending to prejudice one party is properly admitted for one purpose, it is the duty of the court to instruct the jury that it is to be considered

for that purpose only. Cohen v. Bellenot, (Va.), 32 S. E. 455.

4. D'Arrigo v. Texas Produce Co., 18 Tex. Civ. App. 41, 44 S. W. 531.

5. Thompson v. State, 29 Tex. App. 208, 15 S. W. 206.

**Failure to Ask Instruction.** — In State v. Kilgore, 93 N. C. 533, the court, at the time the evidence was admitted, distinctly called the jury's attention to the sole purpose for which it was competent, saying that an instruction would be given at the proper time. It was held that the failure to instruct was not error under the circumstances, since counsel for accused had himself overlooked the matter and failed to ask any cautionary instruction. See also Gettinger v. State, 13 Neb. 308, 14 N. W. 403.

6. **The Nature of Such Instructions.** — "Instructions advising the jury of the object for which particular items of evidence are admitted, and cautioning them against being misled by their improper use, are certainly proper, and are often called for by the circumstances of the case; but the instructions ought to be so given as neither to withdraw the evidence from their consideration, nor to restrain them from giving to it, in connection with other evidence in the case, such weight in respect of the matter which it tends to prove, as, in the light of reason and good sense, they may, as thus advised, believe it to deserve." Harrington v. State, 19 Ohio St. 264.

**General Instruction Sufficient.** In State v. Rainsbarger, 79 Iowa 745, 45 N. W. 302, an instruction that certain evidence should be regarded only to the extent of determining the weight and credit to be given to a

danger of misapplication that great care and particularity in the instructions are necessary.<sup>7</sup>

**7. Stipulations.** — **A. GENERALLY.** — Parties or their attorneys may, by proper stipulations, remove or waive objection to the competency of the evidence directly,<sup>8</sup> or accomplish the same result indirectly by a stipulation of facts,<sup>9</sup> and such agreements will be strictly enforced.<sup>10</sup> These agreements must, however, be sufficient to cover all the objections which may be taken.<sup>11</sup>

witness' testimony, was held sufficiently explicit.

**7. Great Particularity Required.** When, under a joint indictment, testimony is received of a confession by one of the defendants in the absence of the other, it is the duty of the court to state such testimony carefully and specifically to the jury, and explain to them the exclusive purpose for which it was received, and admonish them against its use for any other purpose, and it is not sufficient to charge in general terms that the confession of one defendant, in the absence of the other, is not evidence against the latter. *State v. Oxendine*, 107 N. C. 783, 12 S. E. 573. See also *State v. Swain*, 68 Mo. 605.

**8. Waiver.** — "As the rules of evidence are made for the security and benefit of parties, all exceptions may be waived by mutual consent," *Shaw v. Stone*, 1 Cush. 228; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Buddicum v. Kirk*, 3 Cranch (U. S.) 293; *Hellman v. McWhennie*, 3 Rich. L. (S. C.) 364; *Heilner v. Battin* 27 Pa. St. 517; *Lally v. Rossman*, 82 Wis. 147, 51 N. W. 1,132; *West v. Berry*, 98 Ga. 402, 25 S. E. 508.

**Constitutional Objection.** — **Waiver.** The constitutional objection that a defendant in a criminal case is entitled to be confronted by the witnesses against him may be waived by stipulation. *Rosenbaum v. State*, 33 Ala. 354.

**Absent Witness.** — **Conclusion.** Where a stipulation provides that an affidavit made for a continuance may be read on the trial as the evidence of the absent witness, such stipulation renders admissible every fact which it is alleged in the affidavit that the absent witness would testify to, which is competent, material and relevant under the issues, and the fact that such evidence is stated in

the form of a conclusion is no objection to its admission. *Blaine v. Poyer*, 42 Neb. 709, 60 N. W. 865.

**Competency of Witness.** — A stipulation allowing a deposition to be used in evidence waives the right to object to the competency of the witness. *Shields v. Guffey*, 9 Iowa 322.

**Rules of Court.** — **Waiver.** — Where a rule of court requires depositions to be taken within a certain time, and the parties stipulate that the testimony may be taken orally at the trial, such stipulation is binding. *Baker v. Jamison*, 73 Iowa 698, 36 N. W. 647. See article "DEPOSITIONS."

**9. Evidentiary Use Implied.** The stipulation that an abstract shows the true condition of the title to lands therein abstracted, is sufficient to authorize such abstract to be introduced in evidence. *Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256; *People v. Cooper*, 139 Ill. 46, 29 N. E. 872; *People v. Murray*, 52 Mich. 288, 17 N. W. 843.

**10. Excluding Witness.** — A stipulation agreeing to exclude a witness, if his deposition might be read, is binding, and such witness cannot be examined. *Marvin v. Sager*, 145 Ind. 261, 44 N. E. 310.

**11. Stipulation Must Include All Objections.** — A stipulation that a deed was duly executed and acknowledged, as expressed in the certificates purporting acknowledgment affixed thereto, does not render it competent evidence where the officer taking acknowledgment had no authority to do so. *Kruger v. Walker*, (Iowa), 59 N. W. 65.

**Copies.** — **Genuineness of Original.** Where counsel agreed that copy deeds from the records might be used in lieu of the originals "without exhibiting primary evidence or accounting for it," such agreement merely



**B. CONTRARY TO PUBLIC POLICY.** — When, however, such stipulations are contrary to public policy, and serve to oust the court of its jurisdiction, they will not be enforced.<sup>12</sup>

**C. AS TO EVIDENCE IN ANOTHER PROCEEDING.** — a. *Generally.* It may be stipulated that the record of evidence taken in another proceeding shall be competent in a later trial of the same or a different matter,<sup>13</sup> but such an agreement renders such evidence competent only so far as it is material and relevant to the case in question.<sup>14</sup>

dispensed with the necessity for laying the foundation for the introduction of secondary evidence, but did not estop the plaintiff from attacking as a forgery, the original. *Patterson v. Collier*, 75 Ga. 419; *Central R. & Bkg. Co. v. Gamble*, 77 Ga. 584, 3 S. E. 287. See also *Gulf C. & S. F. R. R. v. Frost*, (Tex. Civ. App.), 34 S. W. 167.

**12. Contrary to Public Policy.** In *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913, the court said: "The clause in the policy requiring direct and positive proof that the death was caused by external violence and accidental means, and was not the result of design, either on the part of the insured or of any other person, cannot be allowed to govern the courts in cases of this kind. The intent of Berry is locked within his own breast, and can only be determined by his own evidence, or the inferences to be drawn from his acts, which latter would be in the nature of circumstantial proof. If Berry himself had been killed, it would have been impossible, by 'direct and positive proof,' to show what his real design was, and it would also be manifestly against the policy of the law, and diametrically opposed to justice, to allow his own testimony of his motives, however unsatisfactory it might be, to be controlling, when all the facts of his actions and language at the time contradicted his positive assertions of his intent upon the trial. If this clause can be allowed to stand, any person accidentally killed, when no one is by, is debarred from the benefit of his insurance. Circumstances may plainly and almost certainly indicate that he was killed by accident, and yet no positive and direct proof can be furnished. If an accident happen

upon a railroad by the fault of one of its employees, who is killed by the accident, his design in causing such accident cannot be shown by direct and positive proof, and the beneficiaries of an insured person killed by such accident cannot recover. The design of the person responsible for the killing can in no case be directly and positively proven except by his own evidence or admissions. Courts will not permit the course of justice, upon trials before them, to be stipulated or contracted in such manner as to defeat the ends to be subserved by such trials. The parties to the contract cannot agree to oust the courts of jurisdiction over such contract. The operation of this clause, requiring direct and positive proof, in many cases would, in effect, preclude the court from jurisdiction, and bar a recovery. If they can make this agreement, they can also stipulate that the evidence must come from certain persons, or make any agreement they see fit, controlling and directing the course of proceeding upon the trial."

**13. Any and All Testimony.** — A stipulation that any and all testimony taken in a former case involving the same questions could be used, means that all testimony taken in such case, whether before or after stipulation, is admissible. *Saffold v. Horne*, 72 Miss. 470, 18 So. 433; *Erwin v. English*, 57 Conn. 562, 19 Atl. 238; *Magnes v. Sioux City N. & S. Co.*, 14 Colo. App. 219, 59 Pac. 879; *Proutt v. Starr*, 188 U. S. 537; *State Natl. Bank v. Bennett*, 8 Ind. App. 679, 36 N. E. 551; *State v. Polson*, 29 Iowa 133; *Furlong v. Carraher*, 108 Iowa 492, 79 N. W. 277; *State v. Olds*, 106 Iowa 110, 76 N. W. 644.

**14.** *People v. Brennan*, 121 Cal.

And the mere agreement that in case a witness be unavailable for a second trial, the record of his testimony may be used as a substitute for the witness himself, is not a waiver of any objection to the competency of such witness or his testimony.<sup>16</sup>

b. *Objections and Exceptions* to the competency of the evidence taken in the former trial are not carried by the stipulation into the subsequent proceedings.<sup>16</sup>

D. DEPOSITIONS. — Technical or other objections to the competency of depositions may be waived by stipulation.<sup>17</sup> But an agreement as to the method of taking depositions is not a waiver of any objection to the competency of the evidence therein contained.<sup>18</sup>

E. SECONDARY EVIDENCE. — So secondary evidence otherwise incompetent may become admissible by stipulation,<sup>19</sup> but such an agreement does not render primary evidence of the same fact incompetent.<sup>20</sup>

F. CONSTRUCTION. — a. *Generally.* — Agreements of this char-

495, 53 Pac. 1,098; *Blaine v. Poyer*, 42 Neb. 709, 60 N. W. 865.

15. *Waiver of Competency.* — In *Robbins v. Spencer*, 140 Ind. 483, 38 N. E. 522, the parties stipulated that in all cases where any witness has heretofore testified, and has since died, or is not present to testify orally, and such testimony is contained in the transcript or bill of exceptions, either party shall have the right to use such testimony of any such witness, and such evidence shall be taken as the evidence of such witness; it was held that this agreement did not waive any objection to the competency of the witness nor of the testimony, because it appeared that the parties only intended such evidence as a substitute for the production of the witness in court.

*Deposition Partially Incompetent.* In the Appeal of *Bridgham*, 82 Me. 323, 19 Atl. 824, it was held that a stipulation that a deposition taken at a former trial might be used in evidence, did not waive any objection to the incompetent portions thereof.

16. *Furlong v. Carraher*, 108 Iowa 492, 79 N. W. 277.

*Such Portions as Counsel May Desire.* — A stipulation that either party may read in evidence such portions of the testimony in another action as counsel may desire, does not make exceptions taken in the other action to the rulings on the admission of testimony so read avail-

able on appeal, in the action in which the testimony was read. *Carroll v. New York El. R. Co.*, 12 App. Div. 278, 43 N. Y. Supp. 524.

17. *United States.* — *Stewart v. Townsend*, 41 Fed. 121.

*California.* — *Crowther v. Rowlandson*, 27 Cal. 376; *Robinson v. Placerville & S. V. R. Co.*, 65 Cal. 263, 3 Pac. 878; *Palmer v. Uncas Min. Co.*, 70 Cal. 614, 11 Pac. 666.

*Michigan.* — *Matson v. Melchor*, 42 Mich. 477, 4 N. W. 200.

*Minnesota.* — *Tyson v. Kane*, 3 Minn. 197.

*Nevada.* — *Lockhart v. Mackie*, 2 Nev. 294; *Sargent v. Collins*, 3 Nev. 260; *Blackie v. Cooney*, 8 Nev. 41.

*New Hampshire.* — *Shute v. Robinson*, 41 N. H. 308.

See article "DEPOSITIONS."

18. *Atlantic Mut. Ins. Co. v. Fitzpatrick*, 2 Gray 279; *Fox v. Tay*, 89 Cal. 339, 24 Pac. 855, 23 Am. St. Rep. 474; *Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380; *Douglass v. Rogers*, 4 Wis. 304; *Middleton v. White*, 5 W. Va. 572. See also *Pioneer Sav. & L. Co. v. St. Paul F. & M. Ins. Co.*, 68 Minn. 170, 70 N. W. 979.

19. *Mosher v. Scofield*, 55 Ill. App. 271; *Boardman v. Kibbee*, 10 Cush. (Mass.) 545.

20. *Taffinder v. Merrill*, 95 Tex. 95, 65 S. W. 177, 93 Am. St. Rep. 814; *Levy v. Rich*, 106 La. Ann. 243, 30 So. 377.

acter will be very liberally construed.<sup>21</sup>

*b. Application to Subsequent Trial.*—A stipulation in general terms making certain evidence competent in order to facilitate proceedings will, in the absence of any indication of a contrary intention, be construed to apply also to a second trial of the same cause.<sup>22</sup>

*c. Effect on Other Parties.*—Stipulations between some of the parties in a case cannot make admissible evidence which is incompetent as to other parties against their objection.<sup>23</sup>

**G. STIPULATIONS AS TO FACTS.**—An agreed statement of facts,

21. *Levy v. Rich*, 106 La. Ann. 243, 30 So. 377; *Strippelman v. Clark*, 11 Tex. 296; *Swotara R. Co. v. Brune*, 6 Gill (Md.) 41; *Dowden v. Wilson*, 108 Ill. 257.

**Liberal Construction.**—Where a stipulation provided for the introduction of the record of the final decree in a former trial "so far as the same is material," the fact that it was not competent under the state of pleadings because not properly proved did not serve to exclude it, the court saying: "The evident meaning of the stipulation is that the matters offered should all be received in evidence, subject only to the question of their bearing upon the merits of the controversy. It was a waiver, in our opinion, of all formal objections. . . . It is clear to our minds that the only reservation made in the stipulation was the question of the influence of the evidence upon the controversy between the parties—whether the evidence tendered was of substance as affecting the matter in dispute. The stipulation ignores all formal requirements or technical objections with respect to the pleadings." *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 57 Fed. 980.

**Liberal Construction.**—"Such stipulations should always receive a fair and liberal construction, so as to carry out the apparent intentions of the parties and promote fair trials on the merits, rather than a narrow, contracted, technical interpretation, calculated to take parties by surprise and defeat the ends of justice." *O'Neale v. Cleveland*, 3 Nev. 485.

**Contradictory Testimony.**—Where the parties agreed that the evidence given on a former trial, as shown by the statement of facts on a former appeal, might be offered in evidence,

with the provision that either side might introduce any other testimony which did not contradict the statement of facts by their own witnesses, it was held that a witness who testified on the former trial that he had found nothing which he could identify as the corner of the survey, was not precluded by the agreement from testifying that since the former trial he had made another survey and found objects identifying the corner. *Cable v. Jackson*, 16 Tex. Civ. App. 579, 42 S. W. 136.

**Copy of Bill of Exceptions.**—A stipulation that the bill of exceptions, in which appears the testimony of the respective witnesses of plaintiff and defendant, may be read in evidence, cannot properly be extended to cover a copy of the bill of exceptions, without accounting for the original. *Thomas v. Star & Crescent Milling Co.*, 104 Ill. App. 110.

22. *Central Bridge Corp. v. Lowell*, 15 Gray (Mass.) 106; *U. S. Exp. Co. v. Jenkins*, 73 Wis. 471, 41 N. W. 957; *Hinckley v. Beckwith*, 23 Wis. 328.

23. *French v. C. S. R. Co.*, 42 Mich. 64, 3 N. W. 257.

**Incompetent as to Other Parties.** A stipulation between two of the parties to a case that certain otherwise incompetent evidence might be used was not binding on a third party who interpleaded in the case. *Noble v. Worthy*, 1 Ind. Ter. 523, 42 S. W. 431.

**Introduction of New Party.** Where a new party is introduced into a suit, and he stipulates that evidence previously taken should be received, as to him, subject to all legal exceptions, such stipulation makes available to him all exceptions

unless clearly intended to cover the whole case, will not serve to exclude evidence not inconsistent therewith.<sup>24</sup>

**8. Rules of Court.** — The court may adopt rules of practice regulating the method of taking evidence, but they cannot alter a rule of evidence so that competent evidence is excluded or incompetent evidence admitted against the objection of a party.<sup>25</sup>

## V. COMPETENCY IN FEDERAL COURTS.

**1. Generally.** — The rules of the state in which the federal court sits are rules of decision,<sup>26</sup> both as to the competency of the evi-

taken at the time the evidence was introduced. *Burgess v. Simonson*, 45 N. Y. 225.

**24.** *Schaller v. R. R.*, 97 Wis. 31, 71 N. W. 1,042; *Dillon v. Cockcroft*, 90 N. Y. 649. See *Abb. Tr. Br.*; *Burnham v. North Chicago St. R. Co.*, 88 Fed. 627.

**25.** *Kennedy v. Meredith*, 3 Bibb (Ky.) 465; *Sellars v. Carpenter*, 27 Me. 497; *Fox v. Conway F. Ins. Co.*, 53 Me. 107; *Mills v. Bank*, 11 Wheat. (U. S.) 431.

**Distinction Illustrated.** — In *Odenheimer v. Stokes*, 5 Watts & S. (Pa.) 175, a rule of court was upheld which required an affidavit denying the execution of a document, the copy of which had been filed, in order to raise such objection on the trial. The court said: "The distinction between a rule of court which tends to alter the law of evidence, and one which is established merely for the regulation of practice, is strikingly illustrated in the two cases on this subject decided in the supreme court of the United States. In *Doe v. Winn*, 5 Pet. 233, it was held that the circuit court could not by rule of court change the right of a party to introduce secondary proof of a writing alleged to be lost; and therefore a rule requiring the oath of a party, in addition to the usual proof, was invalid. But in *Mills v. The Bank of the United States*, 11 Wheat. 431, it was determined that the court might make a rule dispensing with proof of a bond, note, etc., unless the defendant filed with his plea an affidavit denying the execution of the instrument; and that is the case now before us. The reasons given for this decision

by Mr. Justice Story are satisfactory and conclusive. The object of such rule is to prevent unnecessary expense, and useless delays or objections, often frivolous. It does not interfere with the rules of evidence. It does not take away the right to demand proof of execution, but only requires the party to give notice by affidavit that he means to contest the fact. Not doing so is a waiver of objection."

**Extent of Court's Authority.** — In *Doe v. Winn*, 5 Pet. (U. S.) 233, a rule of court requiring an affidavit by the party offering secondary evidence, of his belief in the loss of the original as a prerequisite to its admission, was held void, where the circumstances were otherwise sufficient to justify the resort to such evidence. Story, J., says: "We think that according to the rules of evidence at the common law, this preliminary proof afforded a sufficient presumption of the loss or destruction of the originals to let in the secondary proof; and that it was not competent for the court to exclude it by its own rule. However convenient the rule might be to regulate the general practice of the courts, we think that it could not control the rights of the parties in matters of evidence admissible by the general principles of law."

**26. United States.** — *Brandon v. Loftus*, 45 U. S. 127; *Wright v. Bales*, 67 U. S. 535; *Sims v. Hundley*, 6 How. 1; *Logan v. U. S.*, 144 U. S. 263; *Connecticut Mut. L. Ins. Co. v. Union T. Co.*, 112 U. S. 250; *Vance v. Campbell*, 66 U. S. 427; *Thompson v. R. R.*, 73 U. S. 134; *Phillips v. Seymour*, 91 U. S. 646;

dence<sup>27</sup> and of witnesses, in civil trials at common law, in equity and admiralty,<sup>28</sup> unless the constitution, treaties or laws of the United States otherwise provide.<sup>29</sup>

**2. Rule in Criminal Cases.** — This rule, however, has no application to the trial of crimes against the federal government, and the rules of the common law as it was at the passage of the judiciary act of 1789, and as since modified by acts of congress, govern in this class of cases.<sup>30</sup>

*Parker v. Moore*, 111 Fed. 470; *Alexander v. Gordon*, 101 Fed. 90; *Inter. Tooth Co. v. Hauks*, 101 Fed. 306; *Travis v. Nederland L. Ins. Co.*, 104 Fed. 486; *Nelson v. First Natl. B.*, 69 Fed. 798; *Hinds v. Keith*, 57 Fed. 10.

**27.** *Wright v. Bales*, 67 U. S. 535; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Berry v. Fletcher*, 1 Dill. 66, 3 Fed. Cas. No. 1,356; *Dibblee v. Furniss*, 4 Blatch. 262, 7 Fed. Cas. No. 3,888; *White v. Wansey*, 116 Fed. 345; *Butler v. Fayweather*, 91 Fed. 458; *Wright v. Taylor*, 2 Dill. 23, 30 Fed. Cas. No. 18,096; *Witters v. Sowles*, 32 Fed. 130; *Fowler v. Hecker*, 4 Blatch. 425, 9 Fed. Cas. No. 5,001. See *U. S. v. Tarlton*, 4 Cranch C. C. 682, 28 Fed. Cas. No. 16,433.

**Privileged Communications.** — In *Connecticut Mut. L. Ins. Co. v. Schaeffer*, 94 U. S. 457, it was held that a privileged communication between attorney and client was not competent, notwithstanding the fact that by the state law such communication would not have been privileged.

**Territorial Courts** are not courts of the United States under these provisions regarding competency. *Osgood v. Martin*, 95 U. S. 90.

**28.** *U. S. v. Cigars, Woolw.* 123, 25 Fed. Cas. No. 14,793a; *Rison v. Cribbs*, 1 Dill. 181, 20 Fed. Cas. No. 11,860.

**Rule in Equity.** — Under the judiciary act of 1789 this rule applied only to actions at law. *Segee v. Thomas*, 3 Blatchf. (U. S.) 11, 21 Fed. Cas. No. 12,633. This, however, was changed by the act of July 6, 1862 (Rev. Stat., § 858,) to include cases in equity and admiralty. *U. S. v. Brown*, 1 Sawy. 531, 24 Fed. Cas. No. 14,671.

**29.** *Connecticut Mut. L. Ins. Co. v. Schaeffer*, 94 U. S. 457; *Potter v. National B.*, 102 U. S. 163; *King v. Worthington*, 104 U. S. 44; *Bradley v. U. S.*, 104 U. S. 442; *Ex parte Fisk*, 113 U. S. 713; *Stephens v. Barnays*, 42 Fed. 488.

**Parol Evidence of Contract of Endorsement.** — In *Van Fleet v. Sledge*, 45 Fed. 743, it was held that parol evidence to explain an indorsement was inadmissible, notwithstanding the fact that in the courts of the state in which the court was then sitting, such evidence would have been competent, the reason stated being that the federal courts are not bound by state decisions upon questions of general commercial law.

**30.** *U. S. v. Brown*, 1 Sawy. 531, 24 Fed. Cas. No. 14,671; *In re Dugan*, 2 Lowell 367, 7 Fed. Cas. No. 4,120; *U. S. v. Hawthorne*, 1 Dill. 422, 26 Fed. Cas. No. 45,332; *U. S. v. Black*, 1 Hask. 570, 24 Fed. Cas. No. 14,602; *Logan v. U. S.*, 144 U. S. 263; *U. S. v. Hall*, 53 Fed. 352.

**No Application to Criminal Cases.** In *U. S. v. Reid*, 12 How. (U. S.) 361, the court said: "The language of this section cannot, upon any fair construction, be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that congress had the power to establish. And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the states. But it could not be supposed, without very plain words to show it, that congress intended to give to the states the power of prescribing the rules of evidence in trials for

**3. Federal Provision Exclusive.** — When congress has enacted laws governing the competency of evidence or of witnesses in the federal courts in certain respects, such legislation on that point is exclusive, and no rule of the state can enlarge or abridge its scope and effect, notwithstanding the fact that the state laws are rules of decision unless otherwise provided by federal laws.<sup>31</sup>

## VI. COMPETENCY OF WITNESSES.

**1. Presumptions and Burden of Proof.** — In general, every offered witness is presumed to be competent, and the burden is on the objecting party to show his incompetency.<sup>32</sup> But the latter once shown to

offenses against the United States. For this instruction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of congress, and that the statute of Virginia was not the law by which the admissibility of Clements as a witness ought to have been decided. Neither could the court look altogether to the rules of the English common law, as it existed at the time of the settlement of this country, for reasons that will presently be stated. Nor is there any act of congress prescribing in express words the rule by which the courts of the United States are to be governed in the admission of testimony in criminal cases. But we think it may be found with sufficient certainty not indeed in direct terms, but by necessary implication, in the acts of 1789 and 1790, establishing the courts of the United States, and providing for the punishment of certain offenses. And the law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the judiciary act of 1789." *Travis v. Nederland L. Ins. Co.*, 104 Fed. 486.

**31. Federal Law Conclusive.** — In *White v. Wansey*, 116 Fed. 345, it was contended that a state statute rendering the witness incompetent against the representative of a deceased person, as to matters within his knowledge, was not in conflict

with the federal statute (Rev. Stat. 858) upon the same subject, because "in going further than the federal statute upon the same subject provides for a matter not covered by that statute." But the court held that the congressional action covered the same subject and was therefore exclusive, notwithstanding the provision that "in all other respects the laws of the state in which the court is held shall be the rules of decision." *Travis v. Nederland L. Ins. Co.*, 104 Fed. 486.

**32. United States.** — *Pittsburg & W. R. Co. v. Thompson*, 82 Fed. 720; *Wright v. Southern Exp. Co.*, 80 Fed. 85.

*Alabama.* — *Densler v. Edwards*, 5 Ala. 31.

*California.* — *Wright v. Carilla*, 22 Cal. 596.

*Delaware.* — *State v. Brown*, 2 Marv. 380, 36 Atl. 458.

*Georgia.* — *Adams v. Barrett*, 3 Ga. 277.

*Kansas.* — *State v. Clark*, 60 Kan. 450, 56 Pac. 767.

*Kentucky.* — *Smith v. White*, 5 Dana 376.

*Maryland.* — *Pegg v. Warford*, 7 Md. 582.

*Michigan.* — *Norris v. Hurd*, Walk. Ch. 102.

*Nebraska.* — *Sorensen v. Sorensen*, 56 Neb. 729, 77 N. W. 68.

*New Jersey.* — *Hulshart v. Hart*, 1 N. J. L. 52.

*New York.* — *Duel v. Fisher*, 4 Denio 515.

*Pennsylvania.* — *Com. v. Mudgett*, 174 Pa. St. 211, 34 Atl. 588.

exist is presumed to continue.<sup>33</sup> As to the modifications or exceptions to the general rule in the case of infants or insane persons, those titles must be consulted.

**2. At What Time Competent.** — A. GENERALLY. — It is, of course, essential that the witness be competent at the time his testimony is offered,<sup>34</sup> though some courts make an exception to this rule in the case of deposition of a witness, competent when his testimony was taken, but incompetent when it is offered.<sup>35</sup> And it seems that competency at the time of the trial is all that is required, the witness' natural incapacity at the time of the occurrences related going only to his credibility.<sup>36</sup> It has been suggested, however, that inability to perceive at the time of the occurrences related renders the witness incompetent as to those matters.<sup>37</sup>

B. BY STATUTE. — In Texas, by statute, the insanity of the witness either at the time the facts occurred or when the testimony

33. *State v. Clark*, 60 Kan. 450, 56 Pac. 767. See article "INSANITY."

34. **Subsequent Competency No Cure.** — Under a statute allowing the survivor to testify to transactions with the deceased in the presence of a third party competent to testify, and who does so testify, such survivor is not a competent witness until after such third party has already testified. The fact that he subsequently testified in a case will not cure an error in admitting the survivor's testimony. *Ebert v. Ross*, 150 Pa. St. 261, 24 Atl. 685.

**Subsequent Enabling Statute.** Where a witness was incompetent at the time of a hearing before a master, the fact that he was rendered competent by a subsequent enabling statute will not render his testimony competent. *Garretson v. Brown*, 185 Pa. St. 447, 40 Atl. 293.

35. See article "DEPOSITIONS."

36. *Holcomb v. Holcomb*, 28 Conn. 177; *Coleman v. Com.*, 25 Gratt. (Va.) 865, 18 Am. Rep. 711; *Evans v. Hettich*, 7 Wheat. (U. S.) 453; *Campbell v. State*, 23 Ala 44; *Smith v. Proffitt*, 82 Va. 832, 1 S. E. 67.

**Competent When Offered.** — In *Sarbach v. Jones*, 20 Kan. 497, the testimony of an offered witness was objected to on the ground that the facts to which he was to testify occurred while he was under guardianship as an insane person; the court held that since he was sane at the

time his testimony was offered he was a competent witness. "While it is true great doubt must necessarily attach itself to the evidence of persons who, having recovered from a state of insanity, seek to testify to facts occurring during its existence, it is proper to admit the testimony, and it is for the jury to judge of the credit that is to be given to it." The court held that this decision is no violation of the rule quoted from *Wharton on Ev.*, § 403, that "if a witness appears, on examination by the judge, or by evidence *aliunde*, to have been incapable, at the time of the occurrences which he is called to relate, of perceiving, or to be incapable at the time of the trial of relating, then he is to be ruled out."

**Incompetency of Witness Occurring During His Examination.** In *Comins v. Hetfield*, 80 N. Y. 261, during the progress of plaintiff's examination as a witness in the case, the defendant died. A motion was made to strike out his testimony already taken, on the ground that it related to transactions with a deceased person. The overruling of the motion was held no error, on the ground that the competency of the witness "depended entirely upon the facts as they existed when he gave his testimony, and not upon any change which subsequently occurred before the examination was completed."

37. *Whart. Ev.*, § 403.

is offered renders him incompetent.<sup>38</sup>

**3. Mental Capacity.** — A. **GENERALLY.** — A witness to be competent to testify at all must possess sufficient mental capacity<sup>39</sup> to appreciate the obligation of an oath, and to relate the facts testified to in an intelligible manner.<sup>40</sup>

B. **INTOXICATION.** — One who is so intoxicated when offered as a witness as to be mentally incapacitated is incompetent to testify.<sup>41</sup>

C. **DEAF MUTES.** — a. *Generally.* — A deaf mute who can communicate his ideas by signs or writing is a competent witness, if he possesses sufficient mental capacity, and comprehends the obligation of an oath.<sup>42</sup>

38. *Lee v. State*, 43 Tex. Crim. 285, 64 S. W. 1,047; *Lopez v. State*, 30 Tex. App. 487, 17 S. W. 1,058, 28 Am. St. Rep. 935.

**Allegations in Indictment Conclusive.** — On the trial of an indictment for rape, an allegation that the prosecutrix was so unsound of mind as to be incapable of consenting to the act is sufficient showing of her incapacity to testify to the commission of the act charged, to prevent the state from introducing her evidence. *Lee v. State*, 43 Tex. Crim. 285, 64 S. W. 1,047.

**Waiver.** — The state, by making a person alleged to be insane at the time of the occurrences testified to its own witness, waives any objection to her competency on that ground. *Thompson v. State*, 33 Tex. Crim. 472, 26 S. W. 987.

**39. For a Full Discussion of Mental Capacity,** see articles "INFANCY;" "INSANITY;" "WITNESSES."

40. *District of Columbia v. Armes*, 8 App. D. C. 393, 167 U. S. 573; *Holcomb v. Holcomb*, 28 Conn. 177; *Clements v. McGinn*, (Cal.), 33 Pac. 920; *Wright v. Southern Exp. Co.*, 80 Fed. 85; *People v. McNair*, 21 Wend. (N. Y.) 608; *People v. Bernal*, 10 Cal. 66.

In *People v. Bernal*, 10 Cal. 66, Field, J., speaking of the competency of infants, says: "It is essential that they should possess sufficient intelligence to receive just impressions of the facts respecting which they are examined, sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath."

41. *Cannady v. Lynch*, 27 Minn.

435, 8 N. W. 164; *Hartford v. Palmer*, 16 Johns. (N. Y.) 143; *Gould v. Crawford*, 2 Pa. St. 89; *State v. Underwood*, 28 N. C. 96.

**Intoxication. — Degree. — Trial Court's Discretion.** — In *Hartford v. Palmer*, 16 Johns. (N. Y.) 143, the same rule as to mental capacity was held to apply to an intoxicated person as to other persons of alleged unsound mind. And the trial court must of necessity be left a large discretion in the determination of the case before him. So also in *Gould v. Crawford*, 2 Pa. St. 89; *State v. Underwood*, 28 N. C. 96.

**Habitual Drunkard.** — One who has been legally adjudged an habitual drunkard is not thereby rendered incompetent to testify. He must be intoxicated at the time he is offered as a witness. *Gebhart v. Shindle*, 15 Serg. & R. (Pa.) 235.

**Morphine Eater.** — A confessed habitual morphine eater who admits that he was under the influence of the drug when the facts to which he testifies occurred, and also at the time of testifying, is, nevertheless, a competent witness. *State v. White*, 10 Wash. 611, 39 Pac. 160.

**Incapacity from Drugs.** — Where the witness, during the transactions related, had been drugged so that he did not realize that he was being defrauded and robbed, he was nevertheless not incompetent under the statute excluding persons insane at the time the related facts happened. *Pones v. State*, 43 Tex. Crim. 201, 63 S. W. 1,021.

42. *England.* — *Morrison v. Lennard*, 3 Car. & P. 127, 14 Eng. C. L. 238.



b. *Method of Communication.* — He may communicate his knowledge either in writing, or by signs with the aid of an interpreter. The method selected should be the one by which the witness can most correctly and completely make himself understood,<sup>43</sup> and while it has been suggested that the written method is the better,<sup>44</sup> it seems that a resort to either is proper.<sup>45</sup>

*Colorado.* — *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272.

*Connecticut.* — *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

*Indiana.* — *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695; *Snyder v. Nations*, 5 Blackf. 295.

*Missouri.* — *State v. Howard*, 118 Mo. 127, 24 S. W. 41.

*New Mexico.* — *Territory v. Duran*, 3 Johns. 134, 3 Pac. 53.

*New York.* — *People v. McGee*, 1 Denio 19.

*South Carolina.* — *State v. Weldon*, 39 S. C. 318, 24 S. E. 688, 24 L. R. A. 126.

*Vermont.* — *Quinn v. Halbert*, 55 Vt. 224.

**Degree of Intelligence. — Ability to Communicate.** — In *Territory v. Duran*, 3 Johns. (N. M.) 134, 3 Pac. 53, the chief witness against the defendant was a deaf and dumb child nine years of age. His mother could communicate with him by means of arbitrary signs, but was unable to make him understand any questions as to his knowledge of the obligation of an oath, nor on subsequent examination could he be made to understand other questions put to him. The trial court admitted his testimony on the ground that, owing to his peculiar condition, he would be incapable of inventing a falsehood with such circumstantial exactness in details. The witness by signs and drawings gave a complete account of the murder which he had witnessed and identified the defendant. But the lower court was reversed on the grounds that the witness failed to show sufficient understanding of an oath, that he had not sufficient ability to communicate, and that the defendant was thereby deprived of the right of cross-examination. *Bristol, J.*, in a dissenting opinion concurred with the lower court, saying: "In the light of all the evidence, including the limited

mental capacity of the child and his inability to receive or to communicate ideas as to passing events, except as they came to him through the sensation of sight, it was impossible for him to have fabricated the details of the tragedy with such wonderful accuracy and precision. . . . If he cannot be considered competent as an ordinary witness . . . then under the very extraordinary circumstances attending the case, his communications ought to have been considered as having been properly received as circumstantial evidence, proven by his mother, who understands them, in precisely the same manner as tracks or a trail leading to an identification of the murderers might have been proven and received as competent evidence."

**Mere Difficulty in Examining a deaf mute** is no objection to his testimony. *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272.

**43. Best Method Should Be Adopted.** — In *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90, it appeared that the witness "understood the language of signs and was capable of relating facts *correctly*, in that manner," and that "she could read and write, and communicate her ideas *imperfectly*, by writing." Objection was made to taking her testimony by signs, but overruled. This was held no error, since under the circumstances the court adopted the most perfect method.

**44. Morrison v. Lennard**, 3 Car. & P. 127, 14 Eng. C. L. 238.

**45. State v. Howard**, 118 Mo. 127, 24 S. W. 41; *State v. Weldon*, 39 S. C. 318, 24 S. E. 688, 24 L. R. A. 126.

**Written Conversations. — Necessity of Producing.** — Where a deaf mute testifies concerning written conversations held by him in the past, it is not necessary to produce such writings before questioning him as to

c. *Extent of Ability to Communicate.* — It is not essential that he be able to communicate by any of the sign languages in general use if an interpreter can be found who understands the meaning of his arbitrary signs.<sup>46</sup> And the testimony of a dumb witness has been admitted who understood no sign language at all.<sup>47</sup> On the other hand, it has been held that there must not be such a lack of the ability to communicate as to deprive an opponent of the right of cross-examination.<sup>48</sup>

4. **Moral Capacity.** — A. GENERALLY. — Mere immorality does not in itself render an offered witness incompetent.<sup>49</sup>

B. RELIGIOUS BELIEF. — At common law a proposed witness must profess a belief in a supreme being, and in punishment for wrongdoing. By modern statutes, however, this requirement has in many jurisdictions been abolished.<sup>50</sup>

C. OBLIGATION OF OATH. — a. *Generally.* — But all witnesses must take an oath or affirmation of some sort,<sup>51</sup> unless waived,<sup>52</sup> and they must be able to appreciate its binding obligation to speak the truth.<sup>53</sup>

b. *Amenability to Punishment.* — It is not essential, however, that a witness be amenable to criminal prosecution for perjury.<sup>54</sup>

their contents. *Ritchey v. People*, 23 Colo. 314, 47 Pac. 272; *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

46. See *Territory v. Duran*, 3 Johns. (N. M.) 134, 3 Pac. 53.

**Deaf and Dumb Interpreter.** — In *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695, two interpreters were appointed, one of whom was deaf and dumb, the latter acting as interpreter between the first interpreter and the witness. This was held no error, since the manner of conducting such an examination rests in the discretion of the trial court.

47. **Ignorance of Sign Language.** In *Quinn v. Halbert*, 55 Vt. 224, the plaintiff was held to be a competent witness, though dumb and ignorant of any sign language whatever, and incapable of conveying his ideas except in a very limited degree. The objection by defendant that he was deprived of the substantial benefits of a cross-examination was held untenable. Redfield, J., says: "The tendency of modern times is to permit all persons that have knowledge of matters in litigation and capacity to throw light upon them, . . . and allow the jury to consider their relation to the case, and condition as affecting their credit."

48. *Territory v. Duran*, 3 Johns. (N. M.) 134, 3 Pac. 53. But see *Quinn v. Halbert*, 55 Vt. 224.

49. *Smithwick v. Evans*, 24 Ga. 461; *State v. Randolph*, 24 Conn. 363; *Craft v. State*, 3 Kan. 450; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550.

50. **Religious Belief.** — As to the right to cross-examine the witness and to show his previous declarations concerning his religious belief, see article "*Atheist*," Vol. II, p. 64, note 10-11.

51. See article "DIRECT EXAMINATION OF WITNESSES."

52. *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *Texas & P. R. Co. v. Reid*, (Tex. Civ. App.), 74 S. W. 99. See article "OBJECTIONS."

53. *Com. v. Lynes*, 142 Mass. 577, 8 N. E. 408, 56 Am. Rep. 709; *Priest v. State*, 10 Neb. 393, 6 N. W. 468; *State v. Belton*, 24 S. C. 185, 58 Am. Rep. 245; *Brugier v. U. S.*, (Dak.), 46 N. W. 502; *Lawson v. State*, (Tex. Crim.), 50 S. W. 345. See articles "INFANCY;" "INSANITY."

54. **Amenability to Punishment Unnecessary.** — In *Johnson v. State*, 61 Ga. 35, a child was objected to as an incompetent witness because not amenable to punishment for per-

D. INFAMY. — a. *Generally.* — The disqualification of a witness for infamy, while quite generally abolished by statute,<sup>55</sup> still remains in some jurisdictions, either wholly or partially.<sup>56</sup> Since the rule was based on the untrustworthy character of the witness, his infamy may still be shown to affect his credibility,<sup>57</sup> and this is specifically provided for by statute in most jurisdictions.<sup>58</sup>

jury; the court held that "The competency of the child as a witness does not depend upon her capacity to commit crime. Capacity to commit crime is one thing; competency to give testimony is another. It is not the punishment for perjury that must be in the apprehension of the witness when swearing, but the capacity to understand the nature of the oath."

But in *State v. Michael*, 37 W. Va. 565, 16 S. E. 803, 19 L. R. A. 605, the court seems to regard the fact that a proposed witness is not amenable to the law for false swearing as a strong reason for holding him incompetent.

55. See state statutes. See also 6 and 7 Vict. c. 85; 15 and 16 Vict. c. 27.

**Retroactive Effect.** — A statute in general terms removing the disqualification of infamy, has no retroactive effect and does not operate to restore the competency of persons then undergoing punishment. *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218.

**Production of Convict by Habeas Corpus.** — A statute providing that the attendance of a convict as a witness cannot be secured by *habeas corpus* is constitutional, and renders it impossible to secure the attendance of even a competent witness by such process. *Ex parte Marmaduke*, 91 Mo. 228, 4 S. W. 91, 60 Am. Rep. 250.

56. **Perjury and Subornation of Perjury** alone serve to disqualify the witness in some states.

*Alabama.* — *Smith v. State*, 129 Ala. 89, 29 So. 699, 87 Am. St. Rep. 47.

*Kentucky.* — *Com. v. McGuire*, 84 Ky. 57; *Combs v. Com.*, 15 Ky. L. Rep. 660, 25 S. W. 590; *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387; *Com. v. Minor*, 89 Ky. 555, 13 S. W. 5.

*New Jersey.* — *State v. Henson*, 66 N. J. L. 601, 50 Atl. 468.

*Pennsylvania.* — *Diehl v. Rodgers*, 169 Pa. St. 316, 32 Atl. 424, 47 Am. St. Rep. 908; *Com. v. Clemmer*, 190 Pa. St. 202, 42 Atl. 675.

*West Virginia.* — *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626.

**Criminal Cases Only.** — In Kansas the disqualification applies only in criminal cases. *State v. Clark*, 60 Kan. 450, 56 Pac. 767; *Winter v. Sass*, 19 Kan. 556.

**Civil Cases Only.** — In Arkansas the disqualification extends only to civil cases. *Werner v. State*, 44 Ark. 122; *Warner v. State*, 25 Ark. 447.

**Total Exclusion.** — In Virginia the exclusion is total as to conviction for all felonies. 1898 Supp. Va. Code, §§ 3,896, 3,899; but convicts are competent against each other. *Johnson v. Com.*, 2 Gratt. (Va.) 581.

In South Carolina the common law disability seems to be still in force. *State v. Green*, 48 S. C. 136, 26 S. E. 234.

**Particular Crimes** enumerated in statutes. See *Yates v. State*, (Fla.), 29 So. 965; *Werner v. State*, 44 Ark. 122; *Evans v. State*, 7 Baxt. (Tenn.) 12.

**Statutes Making the Defendant Competent.** — Vol. 20, U. S. statutes at large, p. 30, which provide that a defendant charged with crime shall, at his own request, but not otherwise, be a competent witness, does not render competent a defendant who, by previous conviction of an infamous crime, has lost the privilege of testifying. *U. S. v. Hollis*, 43 Fed. 248.

*Contra.* — But in New York, under a similar statute, the contrary has been held. *Delamater v. People*, 5 Lans. (N. Y.) 332; *Newman v. People*, 63 Barb. (N. Y.) 630.

57. See article "CREDIBILITY."

58. **What Crimes May Be Shown.** As to whether any crime infamous at common law may be shown to

b. *What Constitutes Infamy.* — (1.) **Generally.** — In order to be totally disqualified the witness must have been convicted of a crime making him infamous. While certain punishments or penalties were formerly held to render the person infamous,<sup>59</sup> infamy now depends wholly upon the nature of the crime.<sup>60</sup>

(2.) **At Common Law.** — (A.) **GENERALLY.** — At common law the infamous crimes consisted of treason,<sup>61</sup> felonies generally,<sup>62</sup> and all forms of the *crimen falsi*.<sup>63</sup>

(B.) **CRIMEN FALSI.** — Just what the term *crimen falsi* includes is not entirely clear, but in general it comprehends all crimes which involve fraud or falsehood, rendering the guilty person entirely untrustworthy, and injuriously affecting the administration of justice.<sup>64</sup>

affect the witness' credit, or only those which by statute formerly rendered the witness incompetent, *see* article "CREDIBILITY."

59. *People v. Whipple*, 9 Cow. (N. Y.) 707; *Pendock v. Mackinder*, Willes 665.

60. *England.* — *Pendock v. Mackinder*, Willes 665.

*United States.* — *U. S. v. Yates*, 6 Fed. 861; *Ex parte Wilson*, 114 U. S. 417.

*Alabama.* — *Smith v. State*, 129 Ala. 89, 29 So. 699, 87 Am. St. Rep. 47; *Sylvester v. State*, 71 Ala. 17; *Taylor v. State*, 62 Ala. 164.

*Illinois.* — *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97.

*New York.* — *People v. Whipple*, 9 Cow. 707.

*Pennsylvania.* — *Schuylkill Co. v. Copley*, 67 Pa. St. 386, 5 Am. Rep. 441.

**Sentence to Reformatory.** — In *People v. Park*, 41 N. Y. 21, it was held that a youth of sixteen, though exempt from imprisonment in the penitentiary is, nevertheless, rendered infamous by committing a felony and being sentenced to the state reformatory. *See also Poage v. State*, 3 Ohio St. 229.

In a similar case in *Kansas* (*State v. Clark*, 60 Kan. 450, 56 Pac. 767,) it was held that the fact that the prisoner might have been sentenced to the penitentiary, in the court's discretion, was sufficient to render him infamous. The character of the punishment which *might be* inflicted was held to be the test under the *Kansas* law.

61. *Utley v. Merrick*, 11 Metc. (Mass.) 302; *Com. v. Shaver*, 3 Watts & S. (Pa.) 338; *Ex parte Wilson*, 114 U. S. 417.

62. *Utley v. Merrick*, 11 Metc. (Mass.) 302; *Com. v. Shaver*, 3 Watts & S. (Pa.) 338; *Ex parte Wilson*, 114 U. S. 417.

**By Statute** in some states the disability attaches to all felonies.

63. *See I Greenl. Ev.*, § 373.

64. *U. S. v. Yates*, 6 Fed. 861; *Utley v. Merrick*, 11 Metc. (Mass.) 302. *See I Greenl. Ev.*, § 373.

**Crimes Included in Crimen Falsi.** Inasmuch as statutory provisions have superseded the common law in this matter, except in one or two states, it is not considered profitable to go fully into this question, and a collection of some of the cases discussing the matter is deemed sufficient. In the following the crime involved was held infamous: *Rex v. Ford*, 2 Salk. 690; *Bushel v. Barrett*, Ryan & M. 434; *Anonymous*, 3 Salk. 155; *State v. Candler*, 3 Hawks (N. C.) 393; *Poage v. State*, 3 Ohio St. 229; *Pendock v. Mackinder*, Willes 665; *Com. v. Rogers*, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; *Com. v. Shaver*, 3 Watts & S. (Pa.) 338.

The following are some of the cases holding that the crimes involved were not infamous:

*England.* — *Rex v. Grant*, Ryan & M. 270.

*United States.* — *U. S. v. Brockins*, 3 Wash. 99; *Fisher v. Crescent Ins. Co.*, 33 Fed. 544.

*Alabama.* — *Campbell v. State*, 23

(C.) BY STATUTE. — In those jurisdictions retaining the disqualification for infamy, the statutes generally specify the disqualifying crimes, and such provisions exclude all crimes not therein mentioned.<sup>65</sup>

c. *Necessity of Sentence or Judgment.* — A witness is not rendered incompetent by a mere verdict of guilty, but the conviction is not complete until the court has rendered final judgment<sup>66</sup> in the case, and in some states not until sentence.<sup>67</sup> This rule applies even

Ala. 44; *Harrison v. State*, 55 Ala. 239.

*Connecticut.* — *State v. Randolph*, 24 Conn. 363.

*Kentucky.* — *Holloway v. Com.*, 11 Bush 344.

*Massachusetts.* — *Utley v. Merrick*, 11 Metc. 302; *Com. v. Dame*, 8 Cush. 384.

*Missouri.* — *Deer v. State*, 14 Mo. 348.

*New Hampshire.* — *Little v. Gibson*, 39 N. H. 505.

*Pennsylvania.* — *Schuylkill Co. v. Copley*, 67 Pa. St. 386, 5 Am. Rep. 441.

*South Carolina.* — *State v. Green*, 48 S. C. 136, 26 S. E. 234.

*Texas.* — *Jones v. State*, 13 Tex. 176, 62 Am. Dec. 550.

65. See *Com. v. McGuire*, 84 Ky. 57; *Wilcox v. State*, 3 Heisk. (Tenn.) 110; *Cheatham v. State*, 59 Ala. 40; *Burns v. Campbell*, 71 Ala. 271; *Foster v. State*, 9 Baxt. (Tenn.) 353; *Com. v. Clemmer*, 190 Pa. St. 202, 42 Atl. 675; *Yates v. State*, (Fla.), 29 So. 965; *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97.

66. *England.* — *Lee v. Gansel*, 1 Cowp. 1.

*United States.* — *U. S. v. Dickenson*, 2 McLean 325, 24 Fed. Cas. No. 14,958; *U. S. v. Wilson*, 60 Fed. 890.

*Florida.* — *Bishop v. State*, 41 Fla. 522, 26 So. 703; *Yates v. State*, (Fla.), 29 So. 965.

*Illinois.* — *Faunce v. People*, 51 Ill. 311.

*Indiana.* — *Dawley v. State*, 4 Ind. 128.

*Massachusetts.* — *Com. v. Gorham*, 99 Mass. 420; *Cushman v. Loker*, 2 Mass. 106.

*Mississippi.* — *Keithler v. State*, 10 Smed. & M. 192.

*Nebraska.* — *Marion v. State*, 16 Neb. 349, 20 N. W. 289.

*New York.* — *People v. Whipple*, 9 Cow. 707; *Jackson v. Osborn*, 2 Wend. 555, 20 Am. Dec. 649; *Blaufus v. People*, 69 N. Y. 107, 25 Am. Rep. 148.

*North Carolina.* — *State v. Valentine*, 29 N. C. 225.

*Pennsylvania.* — *Skinner v. Perot*, 1 Ashm. 57.

*Tennessee.* — *Boyd v. State*, 94 Tenn. 505, 29 S. W. 901.

*Texas.* — *Wright v. State*, (Tex. Crim.), 45 S. W. 723; *Stanley v. State*, 39 Tex. 482, 46 S. W. 645.

*Virginia.* — *Brown v. Com.*, 86 Va. 935, 11 S. E. 799. *Contra.* — *State v. Anderson*, 5 Harr. (Del.) 493.

67. *Sentence Distinguished from Judgment.* — In Texas, under the statute, a distinction is made between the judgment and the sentence. In *Arcia v. State*, 26 Tex. App. 193, 9 S. W. 685, it is said: "In the absence of any statutory provisions affecting this question, we would hold, in accordance with what seems to be the well-settled rule, that a verdict followed by a judgment renders the conviction complete, and the disqualification at once attaches, but in no case attaches until judgment has been rendered upon the verdict. There are, however, some peculiar provisions in our code which, we think, require more than a verdict and judgment to be shown in order to establish a forfeiture of civil rights. Under our code, in all felony cases a sentence must follow the judgment. This sentence is distinct from, and independent of, the judgment, and is, in fact, the final judgment in the cause. . . . It is the sentence, therefore, and not the judgment, which under our code concludes the prosecution in the trial

though the defendant has pleaded guilty and only waits for the sentence to be imposed.<sup>68</sup> An appeal serves to stay the judgment, and prevents the disability from attaching,<sup>69</sup> in some states, but not in others.<sup>70</sup>

d. *Conviction in Another Jurisdiction.* — The authorities are in conflict as to the effect of conviction in a foreign jurisdiction for a crime infamous in the state where the witness is offered. Some courts have held that since the objection is founded on the witness' untrustworthiness, a foreign judgment is as conclusive on this question as that of a domestic court.<sup>71</sup> Other courts hold that the disqualification is in its nature penal, and will not be enforced outside of the state imposing it.<sup>72</sup>

e. *Continuance of Disability.* — This disability at common law was permanent unless removed by pardon or a reversal of the judgment;<sup>73</sup> but by statute in some states it terminates with the punishment.<sup>74</sup>

f. *How Proved.* — (1.) *Record of Judgment.* — Such conviction must be proved by the record of the judgment or a certified copy

court; until it has been pronounced it cannot be said that the conviction in the trial court is complete, so as to work a forfeiture of civil rights." *Flournoy v. State*, (Tex. Crim.), 59 S. W. 902; *Luna v. State*, (Tex. Crim.), 47 S. W. 656.

*Reason of the Rule.* — This rule is founded on the reason that it is always within the power of the court, on motion in arrest or for a new trial, to set aside a verdict illegally or improperly rendered, at any time before judgment; and the prosecution may in the end result in the defendant's acquittal. *Com. v. Gorham*, 99 Mass. 420.

68. *Wright v. State*, (Tex. Crim.), 45 S. W. 723; *U. S. v. Wilson*, 60 Fed. 890.

69. *Foster v. State*, 39 Tex. Crim. 399, 46 S. W. 231; *Jones v. State*, 32 Tex. Crim. 135, 22 S. W. 404; *Underwood v. State*, 38 Tex. Crim. 193, 41 S. W. 618.

70. *Pending Appeal.* — *Ground for Continuance.* — In *State v. Harras*, 22 Wash. 57, 60 Pac. 58, a motion was made for continuance until the supreme court had passed on an appeal which would determine the competency of an important witness convicted in the court below of an infamous crime. The motion was overruled, and pending an appeal, the judgment of conviction in the other

case was reversed. The refusal to grant the continuance was held error on the ground that the defendant had been deprived of a constitutional right through no fault of his.

71. *State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458; *Chase v. Blodgett*, 10 N. H. 22; *State v. Candler*, 10 N. C. 393; *Barbour v. Com.*, 80 Va. 287.

*By Statute*, in Texas, a person convicted of felony in another state is not a competent witness on a criminal trial. *Pitner v. State*, 23 Tex. App. 366, 5 S. W. 210. But this rule does not apply to civil cases. *Missouri, K. & T. R. Co. v. De Bord*, (Tex. Civ. App.), 53 S. W. 593.

72. *Sims v. Sims*, 75 N. Y. 466; *Com. v. Green*, 17 Mass. 515; *National Trust Co. v. Gleason*, 75 N. Y. 400, 33 Am. Rep. 632; *Langdon v. Evans*, 3 Mackey (D. C.) 1; *Logan v. U. S.*, 144 U. S. 263; *Missouri, K. & T. R. Co. v. De Bord*, (Tex. Civ. App.), 53 S. W. 593. See also *State v. Ridgely*, 2 Har. & M. (Md.) 120; *Clarke v. Hall*, 2 Har. & M. (Md.) 378.

73. *State v. Benoit*, 16 La. Ann. 273; *People v. Bowen*, 43 Cal. 439, 13 Am. Rep. 148; *State v. Harras*, 22 Wash. 57, 60 Pac. 58.

74. *Removal by Completion of Punishment.* — By § 3,898, Supp. of Va. Code 1898, punishment removes

thereof.<sup>76</sup> But like other rules of evidence, this requirement may be waived by a failure to object at the proper time.<sup>76</sup>

(2.) **Admission of Witness.** — The admission of the witness himself is not competent evidence of his infamy for the purpose of disqualifying him,<sup>77</sup> although it may be shown to affect his credibility.<sup>78</sup>

(3.) **Privilege of Witness.** — A witness is not compelled to answer questions as to his infamy, asked for the purpose of rendering him incompetent.<sup>79</sup> Such questions, however, are competent to affect his credibility,<sup>80</sup> but when allowed for this purpose his answers cannot

the disability except as to perjury. See also *U. S. v. Hall*, 53 Fed. 352; *State v. Williams*, 14 W. Va. 851.

75. *England.* — *Rex v. Castle Careinion*, 8 East 75.

*United States.* — *U. S. v. Biebusch*, 1 McCrary 42.

*Illinois.* — *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97.

*Louisiana.* — *Castellano v. Peillon*, 2 Mart. N. S. 466.

*Massachusetts.* — *Com. v. Green*, 17 Mass. 515.

*New York.* — *People v. Herrick*, 13 Johns. 82, 7 Am. Dec. 364.

*Tennessee.* — *Boyd v. State*, 94 Tenn. 505, 29 S. W. 901.

*Texas.* — *Baldwin v. State*, 39 Tex. Crim. 245, 45 S. W. 714; *Perez v. State*, 10 Tex. App. 327.

*Washington.* — *State v. Payne*, 6 Wash. 563, 34 Pac. 317.

**Secondary Evidence** has been admitted where the record was destroyed, *Hilts v. Colvin*, 14 Johns. (N. Y.) 182; or unavailable, *State v. Ridgely*, 2 Har. & M. (Md.) 120; *Clarke v. Hall*, 2 Har. & M. (Md.) 378. But see *Perez v. State*, 10 Tex. App. 327.

**Defective Record.** — Where the record does not show by what authority the indictment was found, it is inadmissible. *Cooke v. Maxwell*, 2 Stark. 183, 3 Eng. C. L. 305.

**Ground for Continuance.** — Where it is discovered for the first time at the trial that a witness is incompetent because of infamy, the court may grant a continuance for the purpose of procuring the record of his conviction, but the application for such postponement must be made as soon as the incompetency is discovered. *Moore v. State*, 39 Tex. Crim. 266, 45 S. W. 809.

**Collateral Attack. — Judgment**

**Conclusive.** — In *State v. Harras*, 22 Wash. 57, 60 Pac. 58, it was contended that a witness should have been admitted because the judgment of conviction by which he was rendered infamous was absolutely void, inasmuch as the information did not state facts constituting a crime. It was held, however, that such judgment was conclusive on collateral attack.

76. *State v. Green*, 48 S. C. 136, 26 S. E. 234; *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68; *White v. State*, 33 Tex. Crim. 177, 26 S. W. 72; *Batson v. State*, 36 Tex. Crim. 606, 38 S. W. 48; *Moore v. State*, 39 Tex. Crim. 266, 45 S. W. 809.

77. *White v. State*, 33 Tex. Crim. 177, 26 S. W. 72; *People v. Herrick*, 13 Johns. (N. Y.) 82, 7 Am. Dec. 364; *Boyd v. State*, 94 Tenn. 505, 29 S. W. 901; *Perez v. State*, 8 Tex. App. 610, 10 Tex. App. 327; *Rex v. Castle Careinion*, 8 East 75; *Com. v. Hanlon*, 3 Brewst. (Pa.) 461. But see *State v. Green*, 48 S. C. 136, 26 S. E. 234; *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68.

**Admission Sufficient.** — In *Cash v. Cash*, 67 Ark. 278, 54 S. W. 744, the admission of the witness that she had been convicted of petit larceny was held sufficient to show her incompetency to testify.

78. *White v. State*, 33 Tex. Crim. 177, 26 S. W. 72. See article "CREDIBILITY" and cases in three following notes.

79. *People v. Herrick*, 13 Johns. (N. Y.) 82, 7 Am. Dec. 364; *White v. State*, 33 Tex. Crim. 177, 26 S. W. 72.

80. *Batson v. State*, 36 Tex. Crim. 606, 38 S. W. 48; *Moore v. State*, 39 Tex. Crim. 266, 45 S. W. 809.

be made the ground for excluding his testimony.<sup>81</sup>

*g. Restoration to Competency.* — (1.) *Pardon.* — (A.) *GENERALLY.* The incompetency arising from infamy is removed by a pardon of the offense,<sup>82</sup> and need not be specially mentioned therein, except by statute.<sup>83</sup> And it is no objection that it was given for the express purpose of making the witness competent at the trial.<sup>84</sup>

(B.) *NATURE OF PARDON.* — A pardon, however, in order to remove the disability in question, must be sufficient to cover the particular crime proved;<sup>85</sup> and it is held that a pardon for all offenses which

See articles "CREDIBILITY;" "IMPEACHMENT."

81. *Batson v. State*, 36 Tex. Crim. 606, 38 S. W. 48; *Moore v. State*, 39 Tex. Crim. 266, 45 S. W. 809. But see *Cash v. Cash*, 67 Ark. 278, 54 S. W. 744; *State v. Green*, 48 S. C. 136, 26 S. E. 234.

*Evidence Admitted Solely to Affect Credibility.* — In *Williams v. State*, (Tex. Crim.), 57 S. W. 837, exception was taken to the action of the trial court in allowing a witness to testify on the ground that on his *voir dire* by his own evidence he was shown to be incompetent because of infamy; it was held that since such evidence was admitted solely to affect the witness' credibility, it could not be considered for the purpose of rendering him incompetent.

*Objection Unnecessary.* — After the witness has testified, and on cross-examination he is asked as to his conviction of an infamous crime, such question being competent as to his credibility, no objection is necessary in order to prevent the witness' answer from rendering him incompetent. *Batson v. State*, 36 Tex. Crim. 606, 38 S. W. 48.

82. *United States.* — *Logan v. U. S.*, 144 U. S. 263; *Boyd v. U. S.*, 142 U. S. 450; *U. S. v. Wilson*, 7 Pet. 150.

*Arkansas.* — *Werner v. State*, 44 Ark. 122.

*Louisiana.* — *State v. Baptiste*, 26 La. Ann. 134.

*New Hampshire.* — *State v. Blaisdell*, 33 N. H. 388.

*Pennsylvania.* — *Com. v. Ohio & P. R. Co.*, 1 Grant's Cas. 329; *Hoffman v. Caster*, 2 Whart. 453.

*South Carolina.* — *State v. Dodson*, 16 S. C. 453.

*Texas.* — *Rivers v. State*, 10 Tex. App. 177.

*Perjury.* — In Virginia, by statute, the incompetency arising from perjury cannot be removed by pardon or otherwise. Supp. Code of Va. 1898, § 3,898. So also in Florida. *Bishop v. State*, 41 Fla. 522, 26 So. 703.

*Legislative Pardon.* — In U. S. v. Hall, 53 Fed. 352, a statute, providing that the completion of his punishment by a convict should have the same effect as a pardon by the governor, was held to be in substance a legislative pardon, and operated to remove the disability in the same manner as an executive pardon. But see *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218, in which it was held that the legislature has no power to grant a pardon. See note 34 L. R. A. 251.

83. *Rivers v. State*, 10 Tex. App. 177.

84. *State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458; *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430.

85. *State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458.

*A Pardon for a Later Offense* does not carry with it a pardon for earlier offenses of the same nature. *Hawkins v. State*, 1 Port. (Ala.) 475; *State v. McCarty*, 1 Bay (S. C.) 334.

*Restoration to Rights of Citizenship.* — A pardon providing for the restoration of a convict to all the rights of citizenship is not sufficiently definite to remove his incapacity as a witness. *State v. Bowen*, 43 Cal. 439, 13 Am. Rep. 148. See also *Singleton v. State*, 38 Fla. 297, 21 So. 21, 56 Am. St. Rep. 177, 34 L. R. A. 251.

*Explaining Mistake in Pardon.*



may have been committed will be effective only as to those specifically mentioned.<sup>86</sup> A pardon is, however, construed more strictly against the state.<sup>87</sup> And it is sufficiently definite if it refers in any way to the specific crimes.<sup>88</sup>

(C.) STATUTORY DISTINGUISHED FROM COMMON LAW DISABILITY. — In England and some states it is held that the common law incapacity arising from infamy is removed by pardon, but that incompetency resulting from the express words of the statute cannot be so removed.<sup>89</sup> This distinction, however, is repudiated by other courts as unsound under the American constitutional government.<sup>90</sup>

(D.) TIME OF GRANTING. — It is not necessary that the pardon be given at any particular time. If given before a conviction, no disability attaches.<sup>91</sup> A pardon given after punishment has been completed is, nevertheless, effective in removing the incapacity.<sup>92</sup>

(E.) CONDITIONAL PARDON. — While it is generally said that a pardon must be full and complete to remove the disability of infamy, yet it has been held that a condition in a pardon providing that the legal disabilities should not be removed was void for repugnancy.<sup>93</sup> But in Texas it is held that if the prisoner is conditionally pardoned before the completion of his sentence, the condition is good, and

Where a pardon offered to remove a witness' incompetency recites a date of conviction different from that stated in the record, extrinsic evidence is admissible to show that the pardon was intended to, and did in fact, cover the particular offense of which the witness had been convicted. *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430. See also *Petty v. State*, (Tex. Crim.), 65 S. W. 917.

86. 2 Hawk. Pl. Cr. Ch. 37, p. 534-5; 4 Bl. Com. 400; *State v. Leak*, 5 Ind. 359; *State v. McIntire*, 46 N. C. 1, 59 Am. Dec. 566; *Redd v. State*, 65 Ark. 475, 47 S. W. 119.

87. *Redd v. State*, 65 Ark. 475, 47 S. W. 119; citing 4 Bl. Com., 1 Bish. New Crim. L., § 908; *Ex parte Hunt*, 10 Ark. 284.

88. *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *Martin v. State*, 21 Tex. App. 1, 17 S. W. 430; *Hunnicutt v. State*, 18 Tex. App. 498, 51 Am. Rep. 330; *Com v. Ohio & P. R. Co.*, 1 Grant's Cas. (Pa.) 329.

89. *Rex v. Greepe*, 2 Salk. 513; *Rex v. Crosby*, 2 Salk. 689; *Rex v. Ford*, 2 Salk. 690; *Foreman v. Baldwin*, 24 Ill. 208; *Houghtaling v. Kelderhouse*, 1 Park. Crim. Rep. (N. Y.) 241; *Holridge v. Gillespie*, 2

*Johns. Ch. (N. Y.)* 35; 2 Russ. Crim. 975; 1 Greenl. Ev., § 378.

90. *Perkins v. Stevens*, 24 Pick. (Mass.) 277; *Diehl v. Rodgers*, 169 Pa. St. 316, 32 Atl. 424, 47 Am. St. Rep. 908, (containing an extended discussion of the subject). See *Wood v. Fitzgerald*, 3 Or. 568.

91. *Ex parte Garland*, 4 Wall. (U. S.) 333; *State v. Baptiste*, 26 La. Ann. 134. But in some jurisdictions pardons cannot be given before conviction. See note 59 Am. Dec. 574.

92. *United States*. — *Boyd v. U. S.*, 142 U. S. 450; *Logan v. U. S.*, 144 U. S. 263; *U. S. v. Jones*, 2 Wheeler Crim. Cas. 451, 26 Fed. Cas. No. 15,493.

*California*. — *People v. Bowen*, 43 Cal. 439, 13 Am. Rep. 148.

*Louisiana*. — *State v. Baptiste*, 26 La. Ann. 134.

*Nevada*. — *State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458.

*New Hampshire*. — *State v. Blaisdell*, 33 N. H. 388.

*Texas*. — *Hunnicutt v. State*, 18 Tex. App. 498, 51 Am. Rep. 330; *Thornton v. State*, 20 Tex. App. 519.

93. *Perkins v. Stevens*, 24 Pick. (Mass.) 277; *People v. Pease*, 3 Johns. Cas. (N. Y.) 333.

the witness incompetent,<sup>94</sup> but if after the punishment has been completed, then the condition is void and the disqualification is removed.<sup>95</sup>

(F.) **PROOF OF THE PARDON.** — The pardon must be proved by offering the original,<sup>96</sup> or a certified copy<sup>97</sup> thereof, but the objecting party may, by his own acts, waive this requirement.<sup>98</sup> Delivery and acceptance of a pardon must be shown,<sup>99</sup> but the latter will be presumed in the absence of a contrary showing.<sup>1</sup>

(2.) **Commutation of Sentence.** — A commutation of the sentence or remission of the punishment is not a pardon for the offense, and does not restore competency.<sup>2</sup> But this must be distinguished from a pardon after part of the punishment has been endured.<sup>3</sup>

*h. Affidavit of Infamous Person.* — An infamous person, though incompetent to testify, may nevertheless make an affidavit in a case where he is a party and such affidavit is necessary to secure his rights.<sup>4</sup> But his affidavit cannot be made the foundation for an in-

94. *Carr v. State*, 19 Tex. App. 635, 53 Am. Rep. 395; *McGee v. State*, 29 Tex. App. 596, 16 S. W. 422; *Dudley v. State*, 24 Tex. App. 163, 53 S. W. 649.

95. **Conditional Pardon After Completion of Sentence.** — In *Taylor v. State*, 41 Tex. Crim. 148, 51 S. W. 1,106, the earlier cases cited in the preceding note were explained on the ground that in them the conditional pardon was given before the convict had served out his term and was subject to revocation. But where the punishment was complete the ex-convict could not be restored to citizenship without regaining all the corresponding rights.

96. *State v. Blaisdell*, 33 N. H. 388.

97. *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *Hunnicut v. State*, 18 Tex. App. 498, 51 Am. Rep. 330; *Cooper v. State*, 7 Tex. App. 194.

**Loss of Original.** — Where the original pardon has been lost, the next best evidence is a certified copy of the record, and parol proof cannot be resorted to. *Brown v. State*, (Tex. Crim.), 28 S. W. 536.

98. **Waiver.** — Where the objecting party has himself elicited both the fact of conviction and pardon by cross-examination of the witness, he cannot require that the pardon be produced. *Howser v. Com.*, 51 Pa. St. 332.

99. *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *U. S. v. Wilson*, 7 Pet.

(U. S.) 150; *Hunnicut v. State*, 18 Tex. App. 498, 51 Am. Rep. 330.

1. *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *Hunnicut v. State*, 18 Tex. App. 498, 51 Am. Rep. 330.

2. *Perkins v. Stevens*, 24 Pick. (Mass.) 277; *State v. Timmons*, 2 Harr. (Del.) 529; *State v. Page*, 60 Kan. 664.

3. **Punishment and Sentence Distinguished.** — In *Perkins v. Stevens*, 24 Pick. (Mass.) 277; the words "remit the residue of the punishment he was sentenced to endure" were held not to constitute a pardon, but a mere relief from punishment. However, in *Hoffman v. Coster*, 2 Whart. (Pa.) 453, the words "remit . . . the remainder of said sentence" were construed to mean a pardon for the offense and removed the disability of infamy. "Sentence" was held to include the disabilities as well as punishment. (See briefs of counsel in latter case.)

4. *Skinner v. Perot*, 1 Ashm. (Pa.) 57; *Ritter v. Stutts*, 43 N. C. 240, citing *Davis v. Carter*, 2 Salk. 626; *Hall v. Cox*, 1 Mart. (N. C.) 24; — *v. Kimbrough*, 1 Mart. (N. C.) 25; 1 Greenl. Ev., § 374; citing in addition to above cases *R. v. Gardiner*, 2 Burr. 1,117; *Atcheson v. Everett*, Cowp. 382.

*Contra.* — In *People v. Lord*, 26 How. Pr. (N. Y.) 90, it was held, however, that a person incompetent to testify because of infamy was likewise incompetent to make an

formation or criminal charge.<sup>5</sup>

**5. Exclusions Based on Public Policy. — A. INTEREST AND PARTIES.**

a. *In Civil Suits.* — (1.) **Generally.** — The common law disqualification of a witness because of interest in a civil suit, either as a party or otherwise, has, except in a few particulars, been everywhere abolished by statute.<sup>6</sup>

(2.) **Remnants of Rule.** — The sole survivals of this disqualification are found in the rules governing the testimony of husband and wife,<sup>7</sup> for or against each other, and the testimony of a party or interested witness as to transactions between himself and a deceased or otherwise incompetent witness in actions against the latter's representative.<sup>8</sup>

b. *In Criminal Cases.* — (1.) **Defendants.** — Defendants in a criminal case are now quite generally competent witnesses in their own behalf, but can not be compelled to testify.<sup>9</sup>

(2.) **Co-Defendants.** — (A.) **AT COMMON LAW.** — (a.) **Generally.** — At common law, persons jointly indicted and tried together are, of course, incompetent witnesses because parties to the action.<sup>10</sup> When, however, they are separately tried, such co-defendants become, by the great weight of authority, competent to testify for the prosecution.<sup>11</sup> As to the right of co-defendants separately tried to testify

affidavit to his petition for a discharge from imprisonment under the insolvent laws.

5. *Perez v. State*, 10 Tex. App. 327; 1 Greenl. Ev., § 374.

6. **U. S. Court of Claims.** — The disqualification as witnesses of parties and interested persons in the U. S. Court of Claims was expressly provided for after its abolishment in all other federal courts. *Clark v. U. S.*, 96 U. S. 37. But by act of congress March 3, 1887, Ch. 356, § 8, this was repealed.

7. See article "HUSBAND AND WIFE."

8. See article "EXECUTORS AND ADMINISTRATORS."

9. See note 6 *supra*.

10. **Joint Indictment for Separate Offenses.** — Where several defendants are jointly indicted for separate and distinct offenses and not with a joint commission of the same, the rule disqualifying co-defendants has no application. *Strawhern v. State*, 37 Miss. 422.

11. **Competent for State.**

*England.* — *Winsor v. Queen*, L. R. 1 Q. B. Cas. 390.

*United States.* — *Benson v. U. S.* 146 U. S. 325.

*Alabama.* — *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95.

*Florida.* — *Keech v. State*, 15 Fla. 591; *Bishop v. State*, 41 Fla. 522, 26 So. 703.

*Georgia.* — *State v. Calvin*, R. M. Charl. 151.

*Louisiana.* — *State v. Mason*, 38 La. Ann. 476; *State v. Hamilton*, 35 La. Ann. 1,043; *State v. Russell*, 33 La. Ann. 135; *State v. Prudhomme*, 25 La. Ann. 522.

*Maine.* — *State v. Barrows*, 76 Me. 401, 49 Am. Rep. 629.

*Mississippi.* — *Evans v. State*, 61 Miss. 157; *George v. State*, 39 Miss. 570.

*Nebraska.* — *Carroll v. State*, 5 Neb. 31.

*New Jersey.* — *Noyes v. State*, 41 N. J. L. 418; *Munyon v. State*, 62 N. J. L. 1, 42 Atl. 577.

*New York.* — *Taylor v. People*, 12 Hun 212; *Wixson v. People*, 5 Park. Crim. Rep. 119.

*Ohio.* — *Brown v. State*, 18 Ohio St. 496; *Allen v. State*, 10 Ohio St. 287.

**Incompetent for State.**

*Kentucky.* — *Edgerton v. Com.*, 7 Bush 142.

in behalf of each other, the courts seem to be about equally divided.<sup>12</sup>

(b.) *Removal of Disability.* — This disability to testify may be removed by a plea of guilty on the part of the proposed witness,

*Minnesota.* — *State v. Thaden*, 43 Minn. 325, 45 N. W. 614.

*Missouri.* — *State v. Chyo Chiagk*, 92 Mo. 395, 4 S. W. 704, *reviewing and overruling* previous cases to the contrary.

*North Carolina.* — *State v. Bruner*, 65 N. C. 499; *State v. Smith*, 24 N. C. 402.

**12. Competent for Co-defendant.**

*Alabama.* — *Marler v. State*, 67 Ala. 55, 42 Am. Rep. 95.

*California.* — *People v. Newberry*, 20 Cal. 439; *People v. Labra*, 5 Cal. 183.

*Colorado.* — *Barr v. People*, (Colo.), 71 Pac. 392.

*Georgia.* — *Armistead v. State*, 18 Ga. 704; *Jones v. State*, 1 Ga. 610.

*Indiana.* — *State v. Spencer*, 15 Ind. 249; *Marshall v. State*, 8 Ind. 498; *Everett v. State*, 6 Ind. 495.

*Kansas.* — *State v. Bogue*, 52 Kan. 79, 34 Pac. 410.

*Louisiana.* — *State v. Angel*, 52 La. Ann. 485, 27 So. 214.

*New Jersey.* — *State v. Brien*, 32 N. J. L. 414.

*Ohio.* — *Noland v. State*, 19 Ohio 131.

*Tennessee.* — *Poteete v. State*, 9 Baxt. 261, 40 Am. Rep. 90; *Delozier v. State*, 1 Head (Tenn.) 45, *overruling State v. Mooney*. 1 Yerg. (Tenn.) 431.

*Washington.* — *Edwards v. State*, 2 Wash. 291.

*Wyoming.* — *McGinnis v. State*, 4 Wyo. 115, 31 Pac. 978.

**Incompetent for Co-defendant.**

*United States.* — *U. S. v. Reed*, 12 How. 361.

*Arkansas.* — *Foster v. State*, 45 Ark. 328; *McKenzie v. State*, 24 Ark. 636; *Collier v. State*, 20 Ark. 36; *Moss v. State*, 17 Ark. 327, 65 Am. Dec. 433.

*Florida.* — *Ballard v. State*, 31 Fla. 266, 12 So. 865.

*Kentucky.* — *Adwell v. Com.*, 17 B. Mon. 310; *Chandler v. Com.*, 1 Bush 41.

*Maine.* — *State v. Jones*, 51 Me. 125.

*Massachusetts.* — *Com. v. Marsh*, 10 Pick. 57.

*Michigan.* — *Grimm v. People*, 14 Mich. 300.

*Minnesota.* — *State v. Thaden*, 43 Minn. 325, 45 N. W. 614.

*Missouri.* — *State v. Loney*, 82 Mo. 82; *State v. Edwards*, 19 Mo. 674; *State v. Roberts*, 15 Mo. 28.

*New Hampshire.* — *State v. Young*, 39 N. H. 283.

*New York.* — *McIntyre v. People*, 9 N. Y. 38; *People v. Bill*, 10 Johns. 95; *People v. Williams*, 19 Wend. 377.

*North Carolina.* — *State v. Bruner*, 65 N. C. 499; *State v. Smith*, 24 N. C. 402; *State v. Mills*, 13 N. C. 420.

*Pennsylvania.* — *Kehoe v. Com.*, 85 Pa. St. 127; *Shay v. Com.*, 36 Pa. St. 305.

*Texas.* — *Anderson v. State*, 27 Tex. App. 177, 11 S. W. 33, 11 Am. St. Rep. 189, 3 L. R. A. 644; *Williams v. State*, 4 Tex. App. 5.

*Virginia.* — *Lazier v. Com.*, 10 Gratt. 708.

In *Benson v. U. S.*, 146 U. S. 325, in which a co-defendant was held competent to testify against the accused on his separate trial, Brewer, J., commenting on the competency of co-defendants generally under modern statutes, says: "If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a co-defendant, not on trial, be adjudged incompetent? The conviction or acquittal of the former does not determine the guilt or innocence of the latter, and the judgment for or against the former will be no evidence on the subsequent trial of the latter. Indeed, so far as actual legal interest is concerned, it is a matter of no moment to the latter. While the co-defendant not on trial is a party to the record, yet he is only technically so. Confessedly, if separately indicted, he would be a competent witness for the government; but a separate trial under a joint indictment makes in fact as independent a proceeding as a trial

without sentence or judgment of the court,<sup>18</sup> by his acquittal<sup>14</sup> or conviction,<sup>15</sup> if not thereby rendered infamous; or by the dismissal of the action as to him.<sup>16</sup>

on a separate indictment. In view of this, very pertinent is the observation of Chief Justice Beasley, in *State v. Brien*, (32 N. J. L. 414): "The only reason for the rejection of such a witness is that his own accusation of crime is written on the same piece of paper, instead of on a different piece, with the charge against the culprit whose trial is in progress. It is obvious such a rule could only stand, in any system of rational law, on the basis of uniform precedent and ancient usage. I have discovered no such basis." But he suggests that public policy may be an additional reason for excluding the testimony of one defendant in favor of a co-defendant separately tried.

**13. Sentence or Judgment Unnecessary.**—*England*.—Reg. v. George, 1 Car. & M. 110, 41 Eng. C. L. 66.

*Florida*.—Ballard v. State, 31 Fla. 266, 12 So. 865.

*Illinois*.—Loehr v. People, 132 Ill. 504, 24 N. E. 68.

*Louisiana*.—State v. Asbury, 49 La. Ann. 174, 23 So. 322.

*Maine*.—State v. Jones, 51 Me. 125.

*Massachusetts*.—Com. v. Smith, 12 Metc. 238.

*Mississippi*.—Lee v. State, 51 Miss. 566.

*Missouri*.—State v. Young, 153 Mo. 445, 55 S. W. 82.

*New Jersey*.—State v. Brien, 32 N. J. L. 414.

*Oregon*.—State v. Savage, 36 Or. 191, 60 Pac. 610; State v. Magone, 32 Or. 206, 51 Pac. 452.

**Judgment Necessary.**

*Alabama*.—Henderson v. State, 70 Ala. 23, 45 Am. Rep. 72. See Woodley v. State, 103 Ala. 23, 15 So. 820; South v. State, 86 Ala. 617, 6 So. 52.

*New Hampshire*.—State v. Young, 39 N. H. 283.

**14.** Reg. v. Owen, 9 Car. & P. 83, 38 Eng. C. L. 44; Rex v. Rowland, Ryan & M. 401; State v. Minor, (Mo.), 22 S. W. 1,085; State v. Hunt, 91 Mo. 491, 3 S. W. 868; Wil-

liams v. State, 4 Tex. App. 5; State v. Graham, 41 N. J. L. 15, 32 Am. Rep. 174; Henderson v. State, 70 Ala. 23, 45 Am. Rep. 72.

**Pendency of Second Indictment.**

The competency of co-defendants jointly indicted with the defendant, who have been rendered competent by an acquittal and *nolle prosequi* is not affected by the pendency of another joint indictment for a different offense. *State v. Walker*, 98 Mo. 95, 9 S. W. 646.

**15.** *State v. Loney*, 82 Mo. 82.

**Conviction Without Sentence** does not remove the disability since such co-defendant may be still interested until he has ceased his efforts to reverse the judgment of conviction. *Kehoe v. Com.*, 85 Pa. St. 127. *Contra*.—See Delozier v. State, 1 Head (Tenn.) 45.

**Payment of the Fine** is not necessary to remove the incapacity. *State v. Stotts*, 26 Mo. 307. But the contrary is also held. *Ellege v. State*, 24 Tex. 78.

**16.** *England*.—Rex v. Rowland, Ryan & M. 401, 21 Eng. C. L. 471.

*Arkansas*.—McKenzie v. State, 24 Ark. 636.

*Illinois*.—Love v. People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139.

*Louisiana*.—State v. Banks, 40 La. Ann. 736, 5 So. 18.

*Missouri*.—State v. Steifel, 106 Mo. 129, 17 S. W. 227; State v. Beauchleigh, 92 Mo. 490, 4 S. W. 666.

*New Jersey*.—State v. Graham, 41 N. J. L. 15.

*North Carolina*.—State v. Lyon, 81 N. C. 600, 31 Am. Rep. 518.

*Texas*.—Brown v. State, 42 Tex. Crim. 176, 58 S. W. 131.

**When There Is a Failure of Evidence** against one defendant, the case against him may be dismissed to render him competent for his co-defendants.

*Florida*.—Adams v. State, 28 Fla. 511, 10 So. 106.

*Maine*.—State v. Jones, 51 Me. 125.

(B.) STATUTORY MODIFICATION OF RULE. — (a.) *Generally.* — It is difficult to say just what is the present status of the rule disqualifying such co-defendants, since the statutory modifications of the law as to witnesses vary considerably in form and scope, and are differently construed. In many states the incompetency of co-defendants is removed either directly or indirectly;<sup>17</sup> in many others it seems to still remain.

(b.) *Effect of Statutes.* — Some courts have held that the basis of the rule is public policy<sup>18</sup> and not interest, hence general statutes removing the incapacity of parties and interested persons would not seem to affect this rule. Again, such statutes have been held not to apply to criminal proceedings at all.<sup>19</sup> The removal of the incapacity of defendants in criminal cases has been held to make co-

*Missouri.* — *Fitzgerald v. State*, 14 Mo. 413.

*New Hampshire.* — *State v. Bean*, 36 N. H. 122.

17. *California.* — *People v. Bruzoz*, 24 Cal. 41.

*Illinois.* — *Collins v. People*, 98 Ill. 584, 38 Am. Rep. 105.

*Indiana.* — *Conway v. State*, 118 Ind. 482, 21 N. E. 285.

*Iowa.* — *State v. Nash*, 10 Iowa 81, *overruling State v. Nash*, 7 Iowa 347.

*Kentucky.* — *Kidwell v. Com.*, 97 Ky. 538, 31 S. W. 131.

*Massachusetts.* — *Com. v. Brown*, 130 Mass. 279.

*Michigan.* — *People v. Van Alstine*, 57 Mich. 69, 23 N. W. 594.

*Minnesota.* — *State v. Thaden*, 43 Minn. 325, 45 N. W. 614.

*Mississippi.* — *Holman v. State*, 72 Miss. 108, 16 So. 294; *Evans v. State*, 61 Miss. 157.

*Montana.* — *State v. Geddes*, 22 Mont. 68, 55 Pac. 919.

*New York.* — *People v. Dowling*, 84 N. Y. 478.

*North Carolina.* — *State v. Smith*, 86 N. C. 705; *State v. Weaver*, 93 N. C. 595.

In *State v. Gigher*, 23 Iowa 318, a statute making all persons competent witnesses in both civil and criminal cases, except as otherwise provided therein, but containing a provision that the defendant in a criminal case should be incompetent either for or against himself, was held broad enough to render competent co-defendants for or against each other on a joint trial. And see also *State v. Nash*, 10 Iowa 81.

In *Collins v. People*, 98 Ill. 584, 38 Am. Rep. 105, the statute making parties and interested persons competent witnesses in criminal cases, but providing that defendants shall only be competent at their own request, was held to remove entirely the incompetency of co-defendants to testify in any case.

**Competent Only for State.** — In Texas, by statute, co-defendants are competent witnesses for the state but not for each other. *Underwood v. State*, 38 Tex. Crim. 193, 41 S. W. 618. See also *Perry v. State*, (Tex. Crim.) 34 S. W. 618.

**Kentucky Statute.** — At one time in Kentucky, the statute provided that co-defendants should be competent witnesses for or against each other, except where charged with conspiracy, but this statute is no longer in force, and they are now fully competent. *Kidwell v. Com.*, 97 Ky. 538, 31 S. W. 131.

18. *Arkansas.* — *Foster v. State*, 45 Ark. 328.

*Massachusetts.* — *Com. v. Marsh*, 10 Pick. 57.

*Missouri.* — *State v. Martin*, 74 Mo. 547; *State v. Roberts*, 15 Mo. 28.

*New Hampshire.* — *State v. Young*, 39 N. H. 283.

*North Carolina.* — *State v. Mills*, 13 N. C. 420.

See *State v. Nash*, 10 Iowa 81; *State v. Henderson*, 70 Ala. 23, 45 Am. Rep. 72; *Benson v. U. S.*, 146 U. S. 325.

19. *Williams v. People*, 33 N. Y. 688.

**No Application to Criminal Cases.**

defendants competent but not compellable to testify for or against each other on a joint trial;<sup>20</sup> but other courts have held the contrary.<sup>21</sup>

The cases must be read with the fact in mind that the statutes are seldom exactly alike.<sup>22</sup>

**B. JUDICIAL OFFICERS. — a. In Case Pending Before Them.**

**(1.) Judge of Court of Record. —** A judge of a court of record,<sup>23</sup>

Statutes removing the incapacity of a witness because he is interested or a party, do not apply to criminal cases, especially where the statute further provides that the accused may make a statement in his own behalf. *Ballard v. State*, 31 Fla. 266, 12 So. 865.

**20. United States. —** *Benson v. U. S.*, 146 U. S. 325.

*Illinois. —* *Smith v. People*, 115 Ill. 17, 3 N. E. 733.

*South Dakota. —* *State v. Smith*, 8 S. D. 547, 67 N. W. 619.

*Wyoming. —* *McGinnis v. State*, 4 Wyo. 115, 31 Pac. 978.

In *State v. Thaden*, 43 Minn. 325, 45 N. W. 614, it is held that where, by statute, the defendant himself is a competent witness, the disqualification of co-defendants as witnesses for or against each other is by implication also abolished. The court says: "It can hardly be questioned that upon a joint trial either defendant would be a competent witness at his own option; and it would be singular if a different or more stringent rule should prevail in case of separate trial. We think no such distinction is contemplated by the statute."

**21. State v. Franks**, 51 S. C. 259, 28 S. E. 908; *State v. Peterson*, 35 S. C. 279, 14 S. E. 617. And see *Foster v. State*, 45 Ark. 328; *State v. Martin*, 74 Mo. 547.

**Effect of Defendant's Becoming a Witness. —** But where defendant chooses to make himself a witness, he may also be examined by his co-defendants. *Harris v. State*, 78 Ala. 482.

In *People v. Van Alstine*, 57 Mich. 69, 23 N. W. 594, it is held that a statute providing that no person shall be disqualified as a witness in any criminal case by reason of his interest as a party, or otherwise, does not change the common law as to the competency of co-defendants, in view

of the further provision that a defendant in any criminal case shall be deemed a competent witness only at his own request.

In *State v. Breaux*, 104 La. 540, 29 So. 222, it is held that, although a defendant may testify in his own behalf, he is not a competent witness for his co-defendants on trial with him, even as to matters forming part of the *res gestae*. His testimony, however, is competent as to any matter which supports his own defense. See *State v. Angel*, 52 La. Ann. 485, 27 So. 214, to the same effect.

**22. For Construction of Statutes,** see following cases: *State v. Drake*, 11 Or. 396; *State v. Dee*, 14 Minn. 35; *Grimm v. People*, 14 Mich. 300; *State v. Franks*, 51 S. C. 259, 28 S. E. 908; *State v. Peterson*, 35 S. C. 279, 14 S. E. 617; *State v. Smith*, 8 S. D. 547, 67 N. W. 619; *Brown v. State*, 42 Tex. Crim. 176, 58 S. W. 131; *Smith v. Com.*, 90 Va. 745, 19 S. E. 843.

**23. Alabama. —** *Dabney v. Mitchell*, 66 Ala. 495.

*Arkansas. —* See *Rogers v. State*, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154.

*Georgia. —* *Shockley v. Morgan*, 103 Ga. 567, 29 S. E. 694.

*Kansas. —* *Gray v. Crockett*, 35 Kan. 66, 10 Pac. 452.

*New York. —* *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349; *Morss v. Morss*, 11 Barb. 510; *People v. Miller*, 2 Park. Crim. Rep. 197.

*Ohio. —* *McMillen v. Andrews*, 10 Ohio St. 112.

**Probate Judge. —** This rule of exclusion applies to a probate judge. *Estes v. Bridgforth*, 114 Ala. 221, 21 So. 542.

**Reasons for Rule. —** In *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349, where the court was composed of two justices of the sessions and a county judge, one of the justices was sworn as a witness in the case. This

or a referee,<sup>24</sup> is not at common law a competent witness in a case pending before him, on grounds of public policy. And this rule holds where the court is composed of more than one judge, when the

action was held error. *Folger, J.*, says: "It was erroneous, not because in this instance any harm came either to the people or to the defendant, for neither made objection, and both consented; but because such practice, if sanctioned, may lead to unseemly and embarrassing results, to the hindering of justice, and to the scandal of the courts. Thus, it has been sanctioned that two of the members of a court constituted by especial commission might be sworn and testify as witnesses against one on trial before it. But in that case it would seem that without them there was a court of legal fullness and capacity to conduct the business; for they did not, after being improved as witnesses, return to their seats on the bench. (*Rex v. Hacker*, Kel. 12, cited in *Hawk. P. C.*, Ch. 46, § 17.) It is asserted that in *Reg. v. Lee* and *Reg. v. Blunt* (1 St. Tr. 1,403, 1,415,) in the year 1600, Popham, Ch. J., was both judge and witness; but one would not wish to build on the precedents alone of those trials in those times. When a nobleman is tried by the house of lords, any of the peers is a competent witness. (Lord Strafford's Case, 7 How. St. Trials 1,384, 1,458, 1,552; Earl of Macclesfield Case, 16 id. 1,252, 1,391.) In those cases certain lords were not only witnesses, but afterward gave their votes upon the question, guilty or not guilty. But the same reason was there, that, without them, peers enough were present to form a court. . . . Other considerations may be added. If a judge is put upon the stand as a witness, he has all the rights of a witness, and he is subject to all the duties and liabilities of a witness. It may chance that he may, for reasons sufficient for himself, but not sufficient for another of equal authority in the court, decline to answer a question put to him, or in some other way bring himself in conflict with the court. Who shall decide what course shall be taken with him? Shall he return to

the bench and take part in disposing of the interlocutory question thus arising, and, upon the decision being made, go back to the stand, or go into custody for contempt? The first would be unseemly, if not unlawful, for it would be passing judicially upon his own case. The last would disorganize the court and suspend its proceedings. Other like results may be conceived as possible, equally as contrary to the good conduct of judicial proceedings."

**Affidavit of Judge.**—In *Dabney v. Mitchell*, 66 Ala. 495, the affidavit of a probate judge was held incompetent in a case pending before him, for the same reasons which would exclude his testimony.

*Contra.*—In *Hopkins v. Scott*, 38 Neb. 661, 57 N. W. 391, in a proceeding to remove a county officer held before the board of supervisors, one of the board was admitted as a witness. This action was held not erroneous, even though the proceeding be regarded as strictly judicial, since "a judge or juror may be called as a witness, and is not from that fact alone disqualified from sitting in judgment on a case."

**24. Referees.**—In *Morss v. Morss*, 11 Barb. (N. Y.) 510, one of the three referees appointed to try a case was called to testify during its progress. This action was held error. *Parker, J.*, after reviewing the authorities on the competency of a judge to testify in a case pending before him, says: "I have shown that the objection to a juror's being a witness rests mainly on a question of public policy, and that the objection to a judge being sworn depends on an additional and different ground, viz., that of want of power to discharge the duties of a court while acting as a witness. But these objections combined apply in full force to the case of a referee who is to discharge the duties of both judge and jury. He decides both the law and the fact. The referees must have full power to decide upon the



presence of the whole number is necessary to a legally constituted court.<sup>25</sup> When, however, one judge may legally retire, he may be sworn as a witness, provided he do not return to the bench during the progress of the pending case.<sup>26</sup>

(2.) *Justice of Peace.* — The same rule applies with even greater force to testimony of a justice of the peace in a similar case, because there is no one qualified to administer the oath to him.<sup>27</sup>

(3.) *Arbitrators* seem to be likewise incompetent witnesses in such a case.<sup>28</sup>

(4.) *Statutes.* — By statute in some states judges are made competent witnesses in a case pending before them, with the discretionary right, however, to transfer the case to another court when the presiding judge is a material witness;<sup>29</sup> such a statute has been held not to apply to criminal cases.<sup>30</sup>

b. *As to Proceedings Before Them.* — *Generally.* — Judges are not only privileged witnesses<sup>31</sup> as to matters occurring during proceedings before them, and the grounds of their judgments, but it has been held that on grounds of public policy they are incompetent to testify as to any such matters.<sup>32</sup> But other cases treat this as a question of

competency of every witness and the relevancy of every question; and where a cause is referred to three referees, that full number must be present, free from all bias, and competent to decide every question of law presented. And public policy strongly demands, as in the case of a juror, that they should be equally indifferent and unbiased as to all the evidence, and every question of fact before them for decision."

25. *Morss v. Morss*, 11 Barb. (N. Y.) 510; *People v. Miller*, 2 Park. Crim. Rep. (N. Y.) 197.

26. *Morss v. Morss*, 11 Barb. (N. Y.) 510; see 2 Hawkins, P. C. Ch. 46, § 17, citing *Hacker's Case*, 2 State Tr. 257, 652; Kel. 12, Sid. 133. In *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349, the old cases of *Rex v. Hacker*, Kel. 12; *Reg. v. Lee*, and *Reg. v. Blunt*, 1 How. St. Tr. 1,403, 1,414; *Lord Strafford's Case*, 7 How. St. Tr. 1,384, 1,458, 1,552; *Earl of Macclesfield Case*, 16 How. St. Tr. 1,252, 1,391, are cited and explained on this ground.

27. *Perry v. Weyman*, 1 Johns. (N. Y.) 520; *Baker v. Thompson*, 89 Ga. 486, 15 S. E. 644.

28. *Bollmann v. Bollmann*, 6 S. C. 29.

29. Cal. Code Civ. Proc., § 1,883; Comp. Stat. Neb., § 5,922, p. 1,259.

*By Statute.* — Under a statute in Louisiana, judges in all courts having a clerk may testify in a cause pending before them, the clerk administering the oath. *Babin v. Nolan*, 10 Rob. (La.) 373.

30. *Criminal Case.* — In *Rogers v. State*, 60 Ark. 76, 29 S. W. 894, 46 Am. St. Rep. 154, it was held that a provision of the civil code that a judge or juror may be called as a witness by either party, has no application to criminal cases, in view of the further provision that the judge in such case may suspend the trial and order it to take place in another court.

31. See articles "PRIVILEGE;" "PRIVILEGED COMMUNICATIONS."

32. *Delaware Lodge v. Allmon*, 1 Pen. (Del.) 160, 39 Atl. 1,098; *Spurck v. Crook*, 19 Ill. 415; *Reg. v. Gazard*, 8 Car. & P. 595. But a justice of the peace may testify as to what was said in the court room immediately after the trial. *State v. Brown*, 1 Pen. (Del.) 286, 40 Atl. 938.

The Deliberations of a Judicial Body cannot be shown by its members. *Phillips v. Marblehead*, 148 Mass. 326, 19 N. E. 547.

privilege, and allow such testimony when the witness consents.<sup>33</sup>

C. JURORS AS WITNESSES. — a. *In Trial Pending Before Them.*  
(1.) **Generally.** — It is not entirely clear to what extent, in the absence of statute, a petit juror may act as a witness in a case pending before him.<sup>34</sup> There are expressions in numerous cases to the effect that if he is to give testimony he must be examined as other witnesses in open court;<sup>35</sup> from which it has been inferred that he may be both witness and juror in the same case.<sup>36</sup> And jurors have in some instances been called from the jury box to testify.<sup>37</sup>

In *State v. Hindman*, 159 Ind. 586, 65 N. E. 911, a former judge was held competent to prove that in a proceeding before him the forfeiture of a recognizance was taken after the court had adjourned. The court further held that the fact that he was no longer a judge placed him on the same footing as any other witness.

33. *State v. Duffy*, 57 Conn. 525, 18 Atl. 791; *Welcome v. Batchelder*, 23 Me. 85; *Taylor v. Larkin*, 12 Mo. 103, 49 Am. Dec. 119. See *Sigourney v. Sibley*, 21 Pick. (Mass.) 101, 32 Am. Dec. 248; *Schall v. Miller*, 5 Whart. (Pa.) 156.

34. **Review of Cases.** — For a review and discussion of the cases, see 4 Alb. L. J. 371.

35. *Rex v. Rosser*, 7 Car. & P. 648; *Foster's Will*, 34 Mich. 21; *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349; *McKain v. Love*, 2 Hill (S. C.) 506, 27 Am. Dec. 401; *Schmidt v. New York U. & M. F. Ins. Co.*, 1 Gray (Mass.) 529; *Chattanooga R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. 853; *Green v. Hill*, 4 Tex. 465; *Murdock v. Sumner*, 22 Pick. (Mass.) 156; *People v. Thiede*, 11 Utah 241, 39 Pac. 837; *State v. Parker*, 25 Wash. 405, 65 Pac. 776; and cases in following note.

36. Whart. Ev. (2d ed.) § 602 (citing *Rex v. Rosser*, 7 Car. & P. 648).

*England.* — *Manley v. Shaw*, 1 C. & M. 361, 41 Eng. C. L. 200; *Fitz-James v. Moys*, 1 Sid. 133; *Andr.* 231, *arg.*; *Rex v. Heath*, 18 How. St. Tr. 123; *Rex v. Sutton*, 4 M. & S. 532, 541; 6 How. St. Tr. 1,012n.

*New Jersey.* — *State v. Powell*, 2 Halst. 244.

*Pennsylvania.* — *Howser v. Com.*, 51 Pa. St. 332.

*South Carolina.* — *McKain v. Love*, 2 Hill 596, 27 Am. Dec. 401.

*Vermont.* — *Dunbar v. Parks*, 2 Tyler 217.

### 37. Order Excluding Witnesses.

It is no objection to the swearing of a juror as a witness in a case, that an order has been made excluding the witnesses from the court room. *State v. Vari*, 35 S. C. 175, 14 S. E. 392.

### The Juror Competent as Witness.

Where, in an action on a bill of exchange, one of the jurymen said that the stamp on the bill was a forgery, it was held that the jurymen must be sworn as a witness if he was to give evidence to his brother jurors, but he refused to be sworn. *Manley v. Shaw*, 1 Car. & M. 361, 41 Eng. C. L. 200.

**No Violation of Right to Confront Witnesses.** — The practice of admitting jurors to testify in a case pending before them is no violation of the constitutional right to confront witnesses. *Howser v. Com.*, 51 Pa. St. 332.

**Every-day Practice.** — In *Rondeau v. Banking Co.*, 15 La. 160, it was held no ground for the rejection of a proposed jurymen that he was a witness in the case; the court says: "It is every-day practice to swear jurors to give evidence to their fellow-jurors."

**Allowing Counsel to Confer with Juror,** with the view of making him a witness, is no error, if the same privilege is granted to the opposing counsel and proper instructions are given. *McDowell v. Sutlive*, 78 Ga. 142.

### To Prove Character of Defendant.

In *White v. State*, 73 Miss. 50, 19 So. 97, allowing two members of the

(2.) **Limits of Such Testimony.** — From *dicta* in some cases it would seem that there are no limits to the competency of such testimony;<sup>38</sup> but it has been held that the juror must not testify in such a way as to indicate his opinion on the merits,<sup>39</sup> and some cases suggest that he is competent only as to matters which do not go to the merits of the controversy.<sup>40</sup>

(3.) **Statutes.** — Statutes in some states provide that if a juror has knowledge of a fact connected with the cause on trial it is his duty to make it known before the case is finally submitted;<sup>41</sup> and if

jury to testify as to the defendant's character was held to be no error.

38. *Savannah & F. W. R. Co. v. Quo*, 103 Ga. 125, 29 S. E. 607, 68 Am. St. Rep. 85, 40 L. R. A. 483; *White v. State*, 73 Miss. 50, 19 So. 97.

**Fully Competent.** — In *Howser v. Com.*, 51 Pa. St. 332, where objection was made to the swearing of jurymen as witnesses in the case, the court, suggesting that there was no error because the facts testified to were only incidental and comparatively immaterial points that did not touch the main issue, says: "But let it be distinctly said that jurors are not incompetent witnesses in either criminal or civil issues. They have no interest that disqualifies, and there is no rule of public policy that excludes them. On the contrary, it has been our immemorial practice to examine jurors as witnesses when called by either party." (But in this state there is a statute which requires every juror to disclose his knowledge of anything relative to the matter in controversy in open court before the jury retires).

**Dictum.** — In *Mitchum v. State*, 11 Ga. 615, is a *dictum*, "If a jurymen has knowledge of facts pertinent to the issue he may be sworn." So also in *Fellows' Case*, 5 Me. 333.

39. *Dunbar v. Parks*, 2 Tyler (Vt.) 217.

40. **Competent to Prove Venue.** In a criminal case it was held no error to allow a juror to be called to prove the venue of the crime. The court says: "It is certainly not to be commended as a general practice to call a juror from the box to testify in the trial of a case then being heard; but it seems that there are certain cases where that will not be

regarded as sufficient to set aside a verdict, and notably in those cases where the juror is not called to testify as to the general facts and circumstances which constitute the alleged offense, but only as to some isolated, particular matter, such as 'value' or 'venue.'" *State v. Vari*, 35 S. C. 175, 14 S. E. 392.

**Facts Learned in Court.** — In a criminal action for abduction, a child, alleged to be the offspring of defendant and the girl with whose abduction he was charged was brought into court to be viewed by the jury. Defendant then asked to have the jurors sworn, so that he might examine them as witnesses to the fact that such child was too light complexioned to be his offspring. The trial court's refusal to allow this was held no error, on the ground that jurors are not competent witnesses as to "facts learned by them as jurors and by observation of the parties in open court." *Scruggs v. State*, 90 Tenn. 81, 15 S. W. 1,074.

41. *Anschicks v. State*, 6 Tex. App. 524; *Wharton v. State*, 45 Tex. 2; *Howser v. Com.*, 51 Pa. St. 332; *State v. Cavanaugh*, 98 Iowa 688, 68 N. W. 452.

**Georgia Statute.** — In *Savannah F. W. R. Co. v. Quo*, 103 Ga. 125, 29 S. E. 607, 68 Am. St. Rep. 85, 40 L. R. A. 483, exception was taken to the swearing of a juror as a witness in the case. The court says: "It is too well settled to admit of discussion that a juror is not incompetent to testify as a witness solely on account of having been impaneled and sworn in the case, if he is otherwise competent," citing Civ. Code, § 5,337, which provides that "a juror should not act on his private knowledge re-

he should fail to do so he may, even after the retirement of the jury, return with them and be sworn as a witness.<sup>42</sup> In California and Utah, by statute, the judge or juror may be called to testify by either party.<sup>43</sup>

*b. Impeaching Verdict.* — (1.) **Generally.** — It is an almost universally recognized common law principle that neither the testimony nor the affidavit of a petit juror as to the misconduct of himself or his fellow jurors will be received to impeach his verdict.<sup>44</sup> But

specting the facts, witnesses, or parties, unless sworn or examined as a witness in the case." See McDowell *v. Sutlive*, 78 Ga. 142.

<sup>42</sup> *State v. Cavanaugh*, 98 Iowa 688, 68 N. W. 452; *Anschicks v. State*, 6 Tex. App. 524.

<sup>43</sup> Cal. Code Civ. Proc., § 1,883; *People v. Thiede*, 11 Utah 24, 39 Pac. 837.

<sup>44</sup> *England*. — *Vaise v. Delaval*, 1 Term R. 11.

*Alabama*. — *Montgomery St. R. Co. v. Mason*, 133 Ala. 508, 32 So. 261.

*Arizona*. — *Torque v. Carrillo*, 1 Ariz. 336, 25 Pac. 526.

*Arkansas*. — *Griffith v. Mosley*, 70 Ark. 244, 67 S. W. 309.

*California*. — *People v. Deegan*, 88 Cal. 602, 26 Pac. 500; *People v. Pratt*, 78 Cal. 345, 20 Pac. 731; *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549; *Castro v. Gill*, 5 Cal. 40.

*Connecticut*. — *State v. Freeman*, 5 Conn. 348.

*Georgia*. — *Bowdoin v. State*, 113 Ga. 1, 150, 39 S. E. 478; *Southern R. Co. v. Sommer*, 112 Ga. 512, 37 S. E. 735; *City Council v. Hudson*, 94 Ga. 135, 21 S. E. 289; *McTyier v. State*, 91 Ga. 254, 18 S. E. 140; *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154; *King v. King*, 49 Ga. 622.

*Idaho*. — *Griffith v. Montandon*, (Idaho), 39 Pac. 548; *State v. Marquardsen*, (Idaho), 62 Pac. 1,034.

*Illinois*. — *Bertholf v. Quinlan*, 68 Ill. 297; *Chicago v. Dermody*, 61 Ill. 431; *Peck v. Brewer*, 48 Ill. 54; *Forresters v. Guard*, 1 Ill. 74, 12 Am. Dec. 141; *Marzen v. People*, 190 Ill. 81, 60 N. E. 102.

*Indiana*. — *Houk v. Allen*, 126 Ind. 568, 25 N. E. 897; *McKinley v. First Nat. Bank*, 118 Ind. 375, 21 N. E. 36; *Taylor v. Garnett*, 110 Ind. 287, 11 N. E. 309.

*Louisiana*. — *State v. Richmond*, 42 La. Ann. 299, 7 So. 459; *State v. Bird*, 38 La. Ann. 497; *State v. Nelson*, 32 La. Ann. 842; *Duhon v. Landry*, 15 La. Ann. 591; *State v. Brette*, 6 La. Ann. 652.

*Maine*. — *State v. Pike*, 65 Me. 111.

*Massachusetts*. — *Rowe v. Canney*, 139 Mass. 41, 29 N. E. 219; *Chadbourn v. Franklin*, 5 Gray 312; *Dorr v. Fenno*, 12 Pick. 521.

*Michigan*. — *In re Merriam's Appeal*, 108 Mich. 454, 66 N. W. 372.

*Minnesota*. — *Bradt v. Rommel*, 26 Minn. 505, 5 N. W. 680.

*Mississippi*. — *French v. Carson*, (Miss.), 6 So. 613.

*Missouri*. — *State v. Schaefer*, 116 Mo. 96, 22 S. W. 447; *State v. Palmer*, 161 Mo. 152, 61 S. W. 651.

*Montana*. — *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803.

*Nevada*. — *State v. Crutchley*, 19 Nev. 368, 12 Pac. 113.

*New Hampshire*. — *Dodge v. Carroll*, 59 N. H. 237.

*New Jersey*. — *Deacon v. Shreve*, 22 N. J. L. 176; *Randall v. Grover*, 1 N. J. L. 151; *Brewster v. Thompson*, 1 N. J. L. 32.

*New York*. — *Williams v. Montgomery*, 60 N. Y. 648; *Dana v. Tucker*, 4 Johns. 487; *Clum v. Smith*, 5 Hill 560.

*North Carolina*. — *State v. Best*, 111 N. C. 638, 15 S. E. 930; *State v. Harper*, 101 N. C. 761, 7 S. E. 730, 9 Am. St. Rep. 46; *State v. Royal*, 90 N. C. 755.

*Ohio*. — *Hulet v. Barnett*, 10 Ohio 459; but see *Farrer v. State*, 2 Ohio St. 54.

*Oregon*. — *Cline v. Broy*, 1 Or. 89.

*Pennsylvania*. — *Smalley v. Morris*, 157 Pa. St. 349, 27 Atl. 734; *White v. White*, 5 Rawle 61; *Cluggage v. Swan*, 4 Binn. 150, 5 Am. Dec. 400;

there are exceptions and modifications in many jurisdictions which make it difficult to formulate general rules applicable everywhere.<sup>45</sup>

(2.) **Misconduct in the Jury Room.**—(A.) **GENERALLY.**—This rule is applied with perhaps fewest exceptions to the conduct and deliberations of jurors in the jury room after they have retired to consider their verdict.<sup>46</sup>

but see qualification of rule in *Ritchie v. Holbrook*, 7 Serg. & R. 458.

*South Carolina.*—*Smith v. Culbertson*, 9 Rich. L. 106.

*South Dakota.*—*Gaines v. White*, 1 S. D. 434, 47 N. W. 524; *Murphy v. Murphy*, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820.

*Texas.*—*Johnson v. State*, 27 Tex. 758; *Gurley v. Clarkson*, (Tex. Civ. App.), 30 S. W. 360.

*Utah.*—*People v. Ritchie*, 12 Utah 180, 42 Pac. 209.

*Virginia.*—*Elam v. Commercial Bank*, 86 Va. 92, 9 S. E. 498; *Stephoe v. Flood*, 31 Gratt. 323; *Read's Case*, 22 Gratt. 924.

*West Virginia.*—*Graham v. Citizen's Natl. Bank*, 45 W. Va. 701, 32 S. E. 245.

*Wyoming.*—*Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23.

45. "It would perhaps be hardly safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them (jurors' affidavits) without violating the plainest principles of justice." By Taney, C. J., in *U. S. v. Reid*, 12 How. (U. S.) 361, (Quoted in *Browne v. Browne*, 22 Md. 103; *Knowlton v. McMahon*, 13 Minn. 386, 97 Am. Dec. 236.)

46. *Alabama.*—*Clay v. City Council*, 102 Ala. 297, 14 So. 646.

*California.*—*Clark v. His Creditors*, 57 Cal. 639; *Amsby v. Dickhouse*, 4 Cal. 102.

*Colorado.*—*Heller v. People*, 22 Colo. 11, 43 Pac. 124.

*Florida.*—*McMurray v. Basnett*, 18 Fla. 609.

*Georgia.*—*Hale v. State*, 91 Ga. 19, 16 S. E. 105; *Moughon v. State*, 59 Ga. 308.

*Illinois.*—*Niccolls v. Foster*, 89 Ill. 386; *Martin v. Ehrenfels*, 24 Ill. 187.

*Kentucky.*—*Steele's Heirs v. Logan*, 3 Marsh. 394.

*Louisiana.*—*Godfrey v. Soniat*, 33 La. Ann. 915.

*Maine.*—*Heffron v. Gallupe*, 55 Me. 563; *Studley v. Hall*, 22 Me. 198.

*Massachusetts.*—*Boston & W. R. Co. v. Dana*, 1 Gray 83.

*Michigan.*—*Hewitt v. Chapman*, 49 Mich. 4, 12 N. W. 888.

*Minnesota.*—*Rush v. St. Paul R. Co.*, 70 Minn. 5, 72 N. W. 733; *Svenson v. Chicago G. N. R. Co.*, 68 Minn. 14, 70 N. W. 795.

*Missouri.*—*State v. Fox*, 79 Mo. 109; *State v. Conpenhaver*, 39 Mo. 430.

*New Hampshire.*—*Walker v. Kenison*, 34 N. H. 257; *Leighton v. Sargent*, 31 N. H. 119, 64 Am. Dec. 323.

*New Jersey.*—*Titus v. State*, 49 N. J. L. 36, 7 Atl. 621.

*Rhode Island.*—*Darling v. New York P. & B. R. Co.*, 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643; *Tucker v. Town Council*, 5 R. I. 558.

*Texas.*—*St. Louis S. W. R. Co. v. Ricketts*, (Tex.), 70 S. W. 315; *Mason v. Russell*, 1 Tex. 721.

*Vermont.*—*Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488.

*West Virginia.*—*State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

*Wyoming.*—*Gustavenson v. State*, (Wyo.), 68 Pac. 1,006.

**Exception in a Criminal Case.**

In *Farrer v. State*, 2 Ohio St. 54, affidavits of jurors were offered to show that the jurors during their deliberations had held conversations with outside parties. The court held that in this case the affidavits were admissible because a *prima facie* case of misbehavior could be shown by other witnesses. Corwin, J., says: "I have no doubt the general rule of policy . . . is against the reception of such evidence, in an ordinary case; but in one where life, or even

(B.) CHANCE VERDICT. — Thus jurors are incompetent as witnesses to the fact that the verdict or damages were arrived at by a resort to chance,<sup>47</sup> unless otherwise provided by statute.<sup>48</sup>

(C.) IMPROPER MATTERS CONSIDERED. — Or that improper evidence not introduced at trial was considered,<sup>49</sup> or that they acted on their

liberty, is threatened by misconduct of the jury, it will readily be conceived that circumstances may exist which would not only admit, but demand, the examination of members of the jury as to their alleged bad behavior. In every such exceptional case, a foundation must undoubtedly be laid for the introduction of affidavits by jurors; and it would seem that this foundation ought, in general, to consist of knowledge acquired by the court by other means than the affidavits of the jurors themselves."

**Questions by Counsel.** — On polling the jury, it is error to allow counsel to ask jurors to state in what manner they arrived at the verdict or damages reported by them. *Roy v. Goings*, 112 Ill. 656.

**Questions by the Court.** — Where, after the verdict had been rendered, the court at the request of the defendant inquired of the jury as to the manner in which that body computed interest, it was held to be no error, since the jurors were not acting as witnesses, but in the discharge of their official duties. *Dorr v. Fenno*, 12 Pick. (Mass.) 521. See also *Sheldon v. Perkins*, 37 Vt. 550; *Haycock v. Greup*, 57 Pa. St. 438; *Dearborn v. Newhall*, 63 N. H. 301; *Clough v. Clough*, 26 N. H. 24; *Doster v. Brown*, 52 Ga. 543; *Johnson v. Oakes*, 80 Ga. 722, 6 S. E. 274.

47. *England*. — *Burgess v. Langley*, 5 Man. & Gr. 721, 44 Eng. C. L. 377.

*United States*. — *Consolidated I. M. Co. v. Trenton H. I. Co.*, 57 Fed. 898.

*Arkansas*. — *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624; *Pleasants v. Heard*, 15 Ark. 403.

*Delaware*. — *Croasdale v. Tatum*, 6 Houst. 218.

*Florida*. — *McMurray v. Basnett*, 18 Fla. 609.

*Illinois*. — *Phillips v. Scales Mound*, 195 Ill. 353, 63 N. E. 180; *Sanitary District of Chicago v. Cul-*

*lerton*, 147 Ill. 385, 35 N. E. 723; *Roy v. Goings*, 112 Ill. 656; *Read v. Thompson*, 88 Ill. 245.

*Indiana*. — *Haun v. Wilson*, 28 Ind. 296.

*Maine*. — *Hovey v. Luce*, 31 Me. 346.

*Massachusetts*. — *Wright v. Abbott*, 160 Mass. 395, 36 N. E. 62, 39 Am. St. Rep. 499.

*Minnesota*. — *Martin v. Desnoyer*, 1 Minn. 156.

*Missouri*. — *State v. Woods*, 124 Mo. 412, 27 S. W. 1,114; *Philips v. Stewart*, 69 Mo. 149; *State v. Branstetter*, 65 Mo. 149; *Sawyer v. Hannibal & St. J. R. Co.*, 37 Mo. 240.

*New York*. — *Dana v. Tucker*, 4 Johns. 487.

*North Carolina*. — *Purcell v. Southern R. Co.*, 119 N. C. 728, 26 S. E. 161; *Johnson v. Allen*, 100 N. C. 131, 5 S. E. 666.

*Oregon*. — *Cline v. Broy*, 1 Or. 89.

*Pennsylvania*. — *Cluggage v. Swan*, 4 Binn. 150, 5 Am. Dec. 400.

*Rhode Island*. — *Luft v. Lingnie*, 17 R. I. 420, 22 Atl. 942.

*South Carolina*. — *Smith v. Culbertson*, 9 Rich. L. 106.

*Texas*. — *International & G. N. R. R. v. Gordon*, 72 Tex. 44, 11 S. W. 1,033; *Texas & P. R. Co. v. Lyons*, (Tex. Civ. App.), 50 S. W. 161.

*Virginia*. — *Moses v. Cromwell*, 78 Va. 671.

*Contra*. — *Ruble v. McDonald*, 7 Iowa 90; *Wright v. Illinois & M. Tel. Co.*, 20 Iowa 195; *Johnson v. Husband*, 22 Kan. 277; *Harris v. State*, 24 Neb. 803, 40 N. W. 317; *Elledge v. Todd*, 1 Humph. (Tenn.) 43, 34 Am. Dec. 616.

48. See note 61 *infra*.

49. *Arkansas*. — *Smith v. State*, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20.

*California*. — *Fredericks v. Judah*, 73 Cal. 604, 15 Pac. 305.

*Dakota*. — *Territory v. King*, 6 Dak. 131, 50 N. W. 623.

*Indiana*. — *Jones v. State*, 89 Ind. 82.

own knowledge, or that of their fellows, improperly communicated to them.<sup>50</sup>

(3.) **Misconduct Outside of Jury Room.** — (A.) **GENERALLY.** — Under the general rule as commonly stated, no distinction is made in its application between misconduct occurring in the jury room and elsewhere;<sup>51</sup> this is expressly so declared in some courts,<sup>52</sup> but in other jurisdictions this rule of exclusion is applied only to matters transpiring in the secrecy of the jury room.<sup>53</sup>

(B.) **UNAUTHORIZED VIEW.** — Thus, by the weight of authority, an unauthorized view by a juror or jurors cannot be established by his testimony or affidavits.<sup>54</sup>

*Louisiana.* — *State v. Price*, 37 La. Ann. 215.

*South Carolina.* — *State v. Tindall*, 10 Rich. L. 212.

*Utah.* — *Homer v. Inter Mountain Abs. Co.*, 9 Utah 193, 33 Pac. 700.

*Virginia.* — *Taylor v. Com.*, 90 Va. 109, 17 S. E. 812.

*West Virginia.* — *Graham v. Citizens' Natl. Bank*, 45 W. Va. 701, 32 S. E. 245.

*Wyoming.* — *Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23.

50. *United States.* — *U. S. v. Daubner*, 17 Fed. 793.

*Georgia.* — *Estes v. Carter*, 105 Ga. 495, 30 S. E. 882; *McElven v. State*, 30 Ga. 869.

*Indiana.* — *Taylor v. Garnett*, 110 Ind. 287, 11 N. E. 309.

*Iowa.* — *Purcell v. Tibbles*, 101 Iowa 24, 69 N. W. 1,120.

*Kentucky.* — *Steele's Heirs v. Logan*, 3 Marsh. 394.

*Maine.* — *Shepherd v. Inhabitants of Camden*, 82 Me. 535, 20 Atl. 91.

*Massachusetts.* — *Com. v. Meserve*, 156 Mass. 61, 30 N. E. 166; *Folsom v. Manchester*, 11 Cush. 334.

*New Jersey.* — *Den v. McAllister*, 7 N. J. L. 46.

*North Carolina.* — *Lafoon v. Shearin*, 95 N. C. 391.

*Texas.* — *St. Louis S. W. R. Co. v. Ricketts*, (Tex.), 70 S. W. 315.

*Vermont.* — *Robbins v. Windover*, 2 Tyler 11.

*Contra.* — That improper facts were thus communicated may be shown by jurors' testimony, but not their effect or influence on the verdict. *Gottlieb Bros. v. Jasper*, 27 Kan. 770; *Wade v. Ordway*, 1 Baxt. (Tenn.) 229; *State v. Parker*, 25 Wash. 405, 65 Pac. 776.

51. See cases in note 44 *supra*.

52. *Chadbourn v. Franklin*, 5 Gray 312; but see *Johnson v. Witt*, 138 Mass. 79; *In re Merriam's Appeal*, 108 Mich. 454, 66 N. W. 372; *Deacon v. Shreve*, 22 N. J. L. 176; *Burns v. Paine*, 8 Tex. 159; *Downer v. Baxter*, 30 Vt. 467. And cases cited in note 54.

53. *Studley v. Hall*, 22 Me. 198; *Pierce v. Brennan*, 83 Minn. 422, 86 N. W. 417; *Rush v. St. Paul R. Co.*, 70 Minn. 5, 72 N. W. 733; *Twaddle v. Mendenhall*, 80 Minn. 177, 83 N. W. 135; *Peppercorn v. Black River Falls*, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818; *Hempton v. State*, 111 Wis. 127, 86 N. W. 596. See *McBean v. State*, 83 Wis. 206, 53 N. W. 497; *Smith v. Culbertson*, 9 Rich. L. (S. C.) 106.

**Occurrences in Open Court.** — In *Roberts v. Hughes*, 7 M. & W. 399, it is held that a juror's affidavit may be received as to what took place in open court. So also in *Hewitt v. Chapman*, 49 Mich. 4, 12 N. W. 888.

**Misconduct While an Organized Body.** — In *Heffron v. Gallepe*, 55 Me. 563, a juror's affidavit was held competent to show that he had secured a copy of the testimony at the former trial, but incompetent as to the discussion and use of such document in the jury room. "The rule which excludes the testimony of jurors as to any irregularity or misconduct of the jury applies to such acts when the jury is acting or deliberating as an organized body, and performing their official duty."

54. *Easley v. Missouri P. R. Co.*, 113 Mo. 236, 20 S. W. 1,073; *Deacon v. Shreve*, 22 N. J. L. 176; *Haight v. Elmira*, 42 App. Div.

(4.) **Motives and Grounds of Verdict.** — A juror cannot testify to the motive or inducements which influenced his action, nor to the grounds upon which he based his decision,<sup>55</sup> nor that he was unduly influenced by his fellows.<sup>56</sup>

(5.) **Explaining Verdict.** — Neither will he be permitted to explain what he or the jury generally intended by the verdict rendered.<sup>57</sup>

391, 59 N. Y. Supp. 193; *People v. Ritchie*, 12 Utah 180, 42 Pac. 209.

55. *England.* — *Everett v. Youells*, 4 Barn. & Ad. 681, 24 Eng. C. L. 141.

*United States.* — *Mattox v. United States*, 146 U. S. 140; *Morse v. Montana Ore Co.*, 105 Fed. 337; *Chandler v. Thompson*, 30 Fed. 38.

*California.* — *Fredericks v. Judah*, 73 Cal. 604, 15 Pac. 305.

*Colorado.* — *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265; *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78.

*Connecticut.* — *Haight v. Turner*, 21 Conn. 593.

*Florida.* — *Kelly v. State*, 39 Fla. 122, 22 So. 303; *Coker v. Hayes*, 16 Fla. 368.

*Georgia.* — *Carr v. State*, 96 Ga. 284, 22 S. E. 570; *Hoye v. State*, 39 Ga. 718.

*Illinois.* — *Illinois C. R. Co. v. Souders*, 79 Ill. App. 41; *Frank v. Taubmann*, 31 Ill. App. 592.

*Indiana.* — *Jones v. State*, 89 Ind. 82; *Hughes v. Listner*, 23 Ind. 396.

*Iowa.* — *State v. Lauderbeck*, 96 Iowa 258, 65 N. W. 158.

*Kansas.* — *State v. Plum*, 49 Kan. 679, 31 Pac. 308.

*Kentucky.* — *Lucas v. Cannon*, 13 Bush 650; *Taylor v. Giger*, 3 Hard. 586.

*Louisiana.* — *State v. Morris*, 41 La. Ann. 785, 6 So. 639; *State v. Wallman*, 31 La. Ann. 146; *State v. Fruge*, 28 La. Ann. 657.

*Maryland.* — *Browne v. Browne*, 22 Md. 103.

*Massachusetts.* — *Warren v. Spencer W. Co.*, 143 Mass. 155, 8 N. E. 606.

*Minnesota.* — *Svenson v. Chicago G. N. R. Co.*, 68 Minn. 14, 70 N. W. 795; *Koehler v. Cleary*, 23 Minn. 325.

*Missouri.* — *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 800; *State v. Burks*, 132 Mo. 363, 34 S. W. 48; *State v. Dusenberry*, 112 Mo. 277, 20

S. W. 461; *State v. Underwood*, 57 Mo. 40.

*New Hampshire.* — *Walker v. Kenison*, 34 N. H. 257.

*New Jersey.* — *Lindauer v. Teeter*, 41 N. J. L. 255; *Schenk v. Stevenson*, 2 N. J. L. 365.

*New York.* — *People v. Columbia Com. Pleas*, 1 Wend. 297; *Brownell v. McEwen*, 5 Denio 367; *Mais v. Ruh*, 57 App. Div. 15, 67 N. Y. Supp. 1,051; *Paige v. Chedsey*, 1 Misc. 396, 20 N. Y. Supp. 899.

*Rhode Island.* — *Tucker v. Town Council*, 5 R. I. 558.

*South Carolina.* — *State v. Bennett*, 40 S. C. 308, 18 S. E. 886; *State v. Senn*, 32 S. C. 392, 11 S. E. 292.

*Tennessee.* — *Fish v. Cantrell*, 2 Heisk. 578.

*Texas.* — *Wills Point Bank v. Bates*, 72 Tex. 137, 10 S. W. 348; *Wood v. Gulf C. & S. F. R. Co.*, 15 Tex. Civ. App. 322, 40 S. W. 24; *Newcomb v. Babb*, 2 Wils. 760; *Weatherford v. State*, 31 Tex. Crim. 530, 21 S. W. 251, 37 Am. St. Rep. 828.

*Vermont.* — *Sheldon v. Perkins*, 37 Vt. 550.

*Virginia.* — *Gordon v. Com.*, 100 Va. 825, 41 S. E. 746, 57 L. R. A. 744.

*Wisconsin.* — *Edmister v. Garrison*, 18 Wis. 594.

56. *Cowles v. Chicago, R. I. & W. R. Co.*, 32 Iowa 515; *Bingham v. Foster*, 37 Iowa 339; *Dunleavy v. Watson*, 38 Iowa 398; *Purcell v. Tibbles*, 101 Iowa 24, 69 N. W. 1,120; *Wester v. Hedberg*, 68 Minn. 434, 71 N. W. 616; *Pierce v. Pierce*, 38 Mich. 412.

57. *People v. Holmes*, 118 Cal. 444, 50 Pac. 675; *Clark v. Carter*, 12 Ga. 500, 58 Am. Dec. 485; *Sinclair v. Roush*, 14 Ind. 450; *Ford v. State*, 12 Md. 514; *Stevens v. Montgomery*, 27 Minn. 108, 6 N. W. 456; *Jones v. Edwards*, 57 Miss. 28; *Folsom v. Brawn*, 25 N. H. 114.



But to this rule there are some exceptions.<sup>58</sup>

(6.) **Misunderstanding.**—(A.) **INSTRUCTIONS.**—Nor will a juror be heard to say that he misunderstood or misapplied the instructions or charge of the court.<sup>59</sup>

**Explaining Verdict.**—In *Connor v. Winton*, 8 Ind. 315, 65 Am. Dec. 761, the verdict was rendered in the following words: "We, the jury, find for the plaintiff 1c. and costs to the defendant." A juror's affidavit was held inadmissible to show that the verdict meant that the defendant should pay the costs.

Jurors' affidavits are incompetent to show that they intended to convict the defendant of carrying concealed weapons, and not for shooting at a certain person. *State v. McNamara*, 100 Mo. 100, 13 S. W. 938.

<sup>58</sup>. In *Alexander v. Humber*, 86 Ky. 565, 6 S. W. 453, the verdict was returned: "We, the jury, find for plaintiff, one thousand dollars jointly." On a motion for a new trial it was held that though the affidavits of jurors are generally incompetent to show what they intended, yet perhaps they might in this case be admissible to show that the verdict intended to assess \$500.00 against each of two defendants, not \$1,000.00 against either of them. But "if such affidavits are ever to be received, it should be with the greatest caution, and only in cases of mistake clearly made out, and free from all misconduct upon the part of the jurors."

In *Jackson v. Dickinson*, 15 Johns. (N. Y.) 309, 8 Am. Dec. 236, on the delivery of the verdict by the jury, the court made certain inquiries of them as to its meaning, to which one of the jurors replied, but the court did not hear the answer. The affidavits of five of the jurors were held competent to show what the verdict really meant, on the ground that they related only to facts which transpired in open court and not to any of the jurors' deliberations.

In *Layman v. Graybill*, 14 Ind. 166, part of a claim sued upon was admitted and an interlocutory judgment entered for that amount. On motion by defendant to set aside this judgment and enter in its place the verdict of the jury, the jurors' affidavits

were held competent to show that they intended their verdict to cover the whole amount of plaintiff's claim including the sum named in the interlocutory judgment.

<sup>59</sup>. *United States.*—*Mirick v. Hemphill*, Hempst. 179, 17 Fed. Cas. No. 9,647a.

*Illinois.*—*Sanitary Dist. of Chicago v. Cullerton*, 147 Ill. 385, 35 N. E. 723; *Smith v. Eames*, 4 Ill. 76, 36 Am. Dec. 515.

*Iowa.*—*Clerist v. City*, 105 Iowa 119, 74 N. W. 743.

*Louisiana.*—*State v. Bates*, 38 La. Ann. 491; *State v. Millican*, 15 La. Ann. 557.

*Massachusetts.*—*Inhabitants of Bridgewater v. Inhabitants of Plymouth*, 97 Mass. 382; *Murdock v. Sumner*, 22 Pick. 156.

*Missouri.*—*Hanlon v. O'Keeffe*, 38 Mo. App. 273.

*New York.*—*White v. Jones*, 68 N. Y. St. 48, 34 N. Y. Supp. 203; *Moore v. N. Y. El. R. Co.*, 29 N. Y. St. 146, 8 N. Y. Supp. 329.

*North Carolina.*—*Jones v. Parker*, 97 N. C. 33, 2 S. E. 370.

*Ohio.*—*Holman v. Riddle*, 8 Ohio St. 384.

*Rhode Island.*—*Handy v. Providence M. F. Co.*, 1 R. I. 400.

*Tennessee.*—*Scruggs v. State*, 90 Tenn. 81, 15 S. W. 1,074; *Roller v. Bachman*, 5 Lea 163; *Richardson v. McLemore*, 5 Baxt. 586. But see *Nelson v. State*, 10 Humph. 518; *Norris v. State*, 3 Humph. 333, 39 Am. Dec. 175.

*Texas.*—*Davis v. State*, 43 Tex. 189; *Johnson v. State*, 27 Tex. 758; *Campbell v. Skidmore*, 1 Tex. 475; *Tolston v. State*, (Tex. Crim.), 42 S. W. 988.

*Utah.*—*People v. Flynn*, 7 Utah 378, 26 Pac. 1,114.

*Vermont.*—*Baker v. Sherman*, 71 Vt. 439, 46 Atl. 57.

*Virginia.*—*Danville Bank v. Wadhill*, 31 Gratt. 469; *Harnsberger v. Kinney*, 6 Gratt. 287.

*Wisconsin.*—*Schultz v. Catlin*, 78 Wis. 611, 47 N. W. 946.

(B.) EFFECT OF VERDICT. — Nor that he misunderstood the effect of the verdict and would not have agreed to it but for such misconception.<sup>60</sup>

(7.) **Mistake.** — (A.) **GENERALLY.** — Generally speaking, jurors are incompetent witnesses to prove their mistake, either of fact or law, in calculating or formulating their verdict.<sup>61</sup> But this rule has not always been rigidly followed.<sup>62</sup>

60. *United States.* — U. S. v. Daubner, 17 Fed. 793; Hurst v. Coley, 15 Fed. 645.

*California.* — Polhemus v. Heiman, 50 Cal. 438; People v. Soap, 127 Cal. 408, 59 Pac. 771.

*Georgia.* — Coleman v. Slade, 75 Ga. 61; Echols v. State, 109 Ga. 508, 34 S. E. 1,038; Clark v. Carter, 12 Ga. 500, 58 Am. Dec. 485.

*Illinois.* — Suver v. O'Riley, 80 Ill. 104.

*Indiana.* — Stanley v. Sutherland, 54 Ind. 339.

*Iowa.* — Ward v. Thompson, 48 Iowa 588.

*Kansas.* — State v. Burwell, 34 Kan. 312, 8 Pac. 470.

*Louisiana.* — Jeter v. Heard, 12 La. Ann. 3.

*Massachusetts.* — Inhabitants of Bridgewater v. Inhabitants of Plymouth, 97 Mass. 382; Hannum v. Belchertown, 19 Pick. 311.

*Mississippi.* — Jones v. Edwards, 57 Miss. 28.

*New York.* — People v. Columbia Com. Pleas, 1 Wend. 297.

*North Carolina.* — State v. Best, 111 N. C. 638, 15 S. E. 930.

*Rhode Island.* — Tucker v. Town Council, 5 R. I. 558.

*South Carolina.* — State v. Aughtry, 49 S. C. 285, 26 S. E. 619.

*Vermont.* — Newton v. Booth, 13 Vt. 320, 37 Am. Dec. 596.

*Virginia.* — Howard v. McCall, 21 Gratt. 205. But see Moffett v. Bowman, 6 Gratt. 219.

*West Virginia.* — State v. Cobbs, 40 W. Va. 718, 22 S. E. 310.

61. *United States.* — Rumford Chem. Wks. v. Finnie, 2 Flip. 459, 20 Fed. Cas. No. 12,130.

*Indiana.* — Withers v. Fiscus, 40 Ind. 131, 13 Am. Rep. 283; Elliott v. Mills, 10 Ind. 368.

*Iowa.* — Wilkins v. Bent, 66 Iowa 531, 24 N. W. 29.

*Minnesota.* — Stevens v. Montgomery, 27 Minn. 108, 6 N. W. 456.

*Missouri.* — State v. Schaefer, 116 Mo. 96, 22 S. W. 447.

*New York.* — *Ex parte* Caykendoll, 6 Cow. 53.

*North Carolina.* — Bellamy v. Pippin, 74 N. C. 46.

*Vermont.* — Tarbell v. Tarbell, 60 Vt. 486, 15 Atl. 104.

**Mistake of Law.** — In *State v. Cobbs*, 40 W. Va. 718, 22 S. E. 310, it was held that jurors' affidavits that they did not know that they could fix the defendant's punishment at life imprisonment instead of death were not competent on motion for new trial.

In *Jackson v. Williamson*, 2 Term Rep. 281, on motion for a new trial, affidavits of all the jurymen were offered to show that by their verdict for £30 damages, they meant to give £30 as damages for the conversion of the chattel, over and above the sum for which it appeared to have been sold, on the supposition that the court would itself add the two sums. But these affidavits were held to be incompetent.

In *Coil v. State*, 62 Neb. 15, 86 N. W. 925, a verdict was returned of murder in the second degree, with a request that the sentence be limited to five years' imprisonment. The verdict was entered without the request. The affidavit of two jurors that they consented to the verdict only because they thought the court was bound by their request, was held incompetent on motion for a new trial.

62. **Competent to Show Mistake.** In *Hodgkins v. Mead*, 119 N. Y. 166, 23 N. E. 559, where the amount of damage, if any, was not questioned, and the jury returned a sealed verdict for plaintiff without stating the amount, it was held proper for the court to receive their affidavits showing that they intended to find as damages the amount stated in the court's

(B.) MISTAKES IN RENDERING VERDICT. — There are cases in which mistakes in the delivery and recording of the verdict have been shown by jurors' affidavits;<sup>63</sup> and some go even to the extent of allowing such affidavits to prove that a verdict for one party was really meant for the other;<sup>64</sup> though such practice has not been

charge. So held in *Clark v. Lude*, 63 Hun 363, 18 N. Y. Supp. 271.

On the trial of an indictment for maliciously placing money in another's pocket with intent to charge him with felony, the affidavits of all the jurymen were offered to show that they intended simply to find defendant guilty of the act alleged, but not of the malicious intent. The affidavits were held competent even though the jury when polled answered that they found the defendant guilty. This rule was based on the ground of mistake and misunderstanding of both the court and the jury. *Rex v. Simmons*, 1 Wils. 329.

In *Sargent v. —*, 5 Cow. (N. Y.) 106, the affidavits of jurors were allowed, to show that they had applied a wrong rule of damages, owing to a misconception of the judge's charge, accentuated by the argument of counsel.

In an action for seduction, on a motion for a new trial, the affidavits of several jurors were offered to show that they agreed to the verdict on the supposition that it included damages for breach of promise of marriage. The court held that while it might be shown that this matter was discussed in the jury room, the affidavits were incompetent to show what influence such considerations exercised upon the jury. *Brownell v. McEwen*, 5 Denio (N. Y.) 367.

In *Burlingame v. Central R. Co.*, 23 Fed. 706, the day after the jury had delivered their verdict for \$3,500 they were recalled and allowed to swear that the verdict as agreed upon was for \$3,500 with interest, on the ground that such testimony was in support of their verdict.

63. *Bentley v. Fleming*, 1 Man. G. & S. 479, 50 Eng. C. L. 479; *Rex v. Woodfall*, 5 Burr, 2,661; *Roberts v. Hughes*, 7 M. & W. 399. See *Johnson v. Davenport*, 3 Marsh. (Ky.) 391.

In *Dalrymple v. Williams*, 63 N. Y. 361, 20 Am. Rep. 544, the affidavits of all the jurors were held competent to show that the verdict against both defendants as announced by the foreman and entered by the clerk was made through mistake and inadvertence; that the verdict agreed upon was in favor of one defendant and against the other. The court held that this was not "an attempt to reverse their action in the jury room, but to establish it."

In *Cogan v. Ebdon*, 1 Burr. 383, in an action where two different issues were joined, the foreman gave in a general verdict for the defendant. On an application to set aside the verdict, the affidavits of eight of the jury were received to show that the jury intended to find for the plaintiff on one issue and for the defendant on the other, and that the foreman had made a mistake. The verdict was amended in accordance with the affidavit.

64. In *Little v. Larrabee*, 2 Me. 37, 11 Am. Dec. 43, it was held proper to receive jurors' affidavits to show that they had, by misunderstanding the terms "demandant" and "tenant," given a verdict for the wrong party.

In *Capen v. Stoughton*, 16 Gray (Mass.) 364, testimony of jurors was received to show that the jury, after having agreed to a verdict for one party, and filling up a blank form accordingly, by mistake signed a verdict for the other party.

In *Schwamb Lumb. Co. v. Schaar*, 94 Ill. App. 544, the jury, by mistake, signed the form of verdict which had been prepared for them giving judgment to the defendant instead of the plaintiff as they intended. The verdict was sealed and not read until the following day; it was held that the affidavits of all the jurors were admissible to show their mis-

allowed in other cases.<sup>65</sup> No general rule can be formulated embracing all these exceptions.<sup>66</sup>

(8.) **Non-Assent.** — It is well-settled that a juror will not be heard to say that he never assented to the verdict after an opportunity has been given him to express his dissent when the verdict was rendered;<sup>67</sup> nor that he was coerced into an agreement because of

take. The court reviews and discusses the cases in which a similar ruling has been made.

In *Peters v. Fogarty*, 55 N. J. L. 386, 26 Atl. 855, the testimony of jurors was allowed to show that the foreman had wrongly announced a verdict for the defendant instead of for the plaintiff as actually agreed upon by the jury.

**Inconsistency Apparent on Face of Verdict.** — In *Kennedy v. Ball*, 71 N. Y. St. 126, 36 N. Y. Supp. 325, an affidavit by all the jurors was offered to show that by mistake their answer to a special interrogatory was "yes" instead of "no" as they intended. The court held that since this answer was clearly inconsistent with the general verdict such affidavit was competent.

65. In *Cire v. Rightor*, 11 La. 140, it was held that jurors' affidavits were incompetent to prove that they thought they were giving a verdict for the other party.

Where the jury by mistake returned the answer "yes" to a special interrogatory, it was held improper to allow a juror to testify that the answer intended was "no." The court says: "The changing of an answer to an interrogatory from 'yes' to 'no' would be equivalent to changing a general verdict by inserting the word 'plaintiff' in lieu of the word 'defendant,' and affidavits of jurors showing that they had agreed upon a verdict in favor of the 'plaintiff,' and that by inadvertence and mistake they had written the word 'defendant,' would be a direct contradiction of their verdict." *McKinley v. First Natl. Bank*, 118 Ind. 375, 21 N. E. 36.

In *Smalley v. Morris*, 157 Pa. St. 349, 27 Atl. 734, the jury returned a verdict for defendant in the sum of \$1,500. Affidavits of eleven jurors were filed, stating that they intended to find for plaintiff with a credit al-

lowance to defendant of \$1,500 on the note in question, but the court held that such affidavits were wholly incompetent.

66. See note 14, *supra*.

67. *England.* — *Rex v. Wooller*, 2 Stark. 111, 3 Eng. C. L. 270; *Raphael v. The Governor*, 17 C. B. 161, 84 Eng. C. L. 160.

*Arizona.* — *Torque v. Carrillo*, 1 Ariz. 336, 25 Pac. 526.

*California.* — *People v. Kloss*, 115 Cal. 567, 47 Pac. 459.

*Connecticut.* — *Meade v. Smith*, 16 Conn. 346.

*Delaware.* — *McCombs v. Chandler*, 5 Harr. 423.

*Florida.* — *Coker v. Hayes*, 16 Fla. 368.

*Georgia.* — *Sims v. Sims*, 113 Ga. 1,083, 39 S. E. 435; *Hill v. State*, 64 Ga. 453; *Rutland v. Hathorn*, 36 Ga. 380; *Coleman v. State*, 28 Ga. 78; *Mercer v. State*, 17 Ga. 146.

*Idaho.* — *Jacobs v. Dooley*, 1 Idaho 41.

*Illinois.* — *Sanitary Dist. of Chicago v. Cullerton*, 147 Ill. 385, 35 N. E. 723.

*Iowa.* — *Hallenbeck v. Garst*, 96 Iowa 509, 65 N. W. 417; *Turney v. Barr*, 75 Iowa 758, 38 N. W. 550; *Fox v. Wunderlich*, 64 Iowa 187, 20 N. W. 7.

*Kentucky.* — *Johnson v. Davenport*, 3 Marsh. 391.

*Louisiana.* — *State v. Caldwell*, 3 La. Ann. 435.

*Massachusetts.* — *Inhabitants of Bridgewater v. Inhabitants of Plymouth*, 97 Mass. 382.

*New Hampshire.* — *Breck v. Blanchard*, 27 N. H. 100.

*New Jersey.* — *Clark v. Read*, 5 N. J. L. 486.

*North Carolina.* — *Jones v. Parker*, 97 N. C. 33, 2 S. E. 370; *Suttrel v. Bry*, 5 N. C. 94.

*South Carolina.* — *Reaves v. Moody*, 15 Rich. L. 312.

*Texas.* — *Letcher v. Morrison*, 79

his ignorance,<sup>68</sup> timidity<sup>69</sup> or sickness.<sup>70</sup>

(9.) As to Incompetency of Juror. — The juror will not be allowed to swear to his own or his fellows' incompetency, where it involves misconduct,<sup>71</sup> as that he swore falsely on his *voir dire*;<sup>72</sup> that previous to the trial he was prejudiced;<sup>73</sup> or that, owing to indisposition, he paid no attention to the evidence.<sup>74</sup> But he has been held a competent witness to show that he was not a freeholder,<sup>75</sup> or too ignorant of

Tex. 240, 14 S. W. 1,010; Boetge v. Landa, 22 Tex. 105.

Vermont. — Cheney v. Holgate, Brayt. 171.

**Incompetent as to Non-assent.** Where the court directed a verdict of guilty, and the foreman of the jury signed the verdict without giving the jury an opportunity to express themselves upon the question, it is held that these proceedings, though grossly irregular, could not be shown by jurors' affidavits because they inhere in the verdict. Turney v. Barr, 75 Iowa 758, 38 N. W. 550.

**Dictum. — Contra.** — In Smith v. Evans, 4 Ill. 76, 36 Am. Dec. 515, is a *dictum* that if part of the jury have never consented to a verdict they may impeach it by their affidavits to that effect. Cited with approval in West Chicago R. Co. v. Huhnke, 82 Ill. App. 404.

**68. Ignorance of Juror.** — A juror's affidavit is not competent to show that certain of the jurors signed the verdict because they were told by the others that they must do so; that such was the law. Artz v. Robertson, 50 Ill. App. 27.

**Contra.** — In Cockran v. Street, 1 Wash. (Va.) 79, affidavits of jurors were received to show that a minority of the jury agreed to the verdict only because they were persuaded by the others that they must acquiesce in the determination of the majority. But see Bulls Case, 14 Gratt. (Va.) 613, where this case is explained.

**69. Timidity of Juror.** — In People v. Kloss, 115 Cal. 567, 47 Pac. 459, it was held that the affidavit of a juror is not competent to show that he had been misled by statements of the foreman, that he did not understand the verdict, that he was too timid and confused to express his dissent at the time when he ought to have dissented. See also State v. Senn, 32 S. C. 392, 11 S. E. 292.

70. Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803; State v. Stokely, 16 Minn. 282.

71. Moughon v. State, 59 Ga. 308; Gran v. Houston, 45 Neb. 813, 64 N. W. 245.

72. State v. Whitesides, 49 La. Ann. 352, 21 So. 540; State v. Nash, 45 La. Ann. 1,137, 13 So. 732; Brennan v. State, 33 Tex. 266.

73. People v. Baker, 1 Cal. 403; Kelley v. State, 39 Fla. 122, 22 So. 303; Hall v. State, 19 Ga. 19, 16 S. E. 105; Vance v. Haslett, 4 Bibb. 191; State v. Robertson, 54 S. C. 147, 31 S. E. 868.

In West Chicago R. Co. v. Huhnke, 82 Ill. App. 404, a juror's affidavit was admitted to show the prejudice of a fellow juror, and the fact that he swore untruthfully on his *voir dire*, even though such prejudice was first revealed in the jury room. The court, while conceding the general rule that a juror should not be permitted to impeach his verdict, held that it would be unfair to leave litigants at the mercy of a prejudiced juror, merely because his bias is disclosed in the jury room during the deliberations of that body. But *contra* see Cook v. Castner, 9 Cush. (Mass.) 266; Gran v. Houston, 45 Neb. 813, 64 N. W. 245.

In Hyman v. Eames, 41 Fed. 676, where there was evidence to show that previous to the trial a juror had declared himself in favor of one of the parties, the affidavits of other jurors were held competent to show that he made similar declarations in the jury room.

74. Greeley v. Mansur, 64 Me. 211.

75. Lafayette Road Co. v. New Albany & S. R. Co., 13 Ind. 90, 74 Am. Dec. 246.

the English language to understand the evidence.<sup>76</sup>

(10.) **Misconduct of Others.** — (A.) **GENERALLY.** — The courts are divided on the question as to whether the misconduct of third parties may be shown by jurors to impeach their verdict.

(B.) **BAILIFF'S MISCONDUCT.** — The misconduct of the officer having the jury in charge cannot, by weight of authority, be thus established.<sup>77</sup> In some cases a distinction is drawn between misconduct of the bailiff which does and that which does not involve misconduct of the jurors themselves.<sup>78</sup> But in a prosecution of the officer for such misconduct there seems to be no objection to such evidence.<sup>79</sup>

(C.) **COURT'S MISCONDUCT.** — Nor can the misconduct of the court in improperly influencing or interfering with the jury during their deliberations be shown by such affidavits,<sup>80</sup> especially where it involves misconduct by the jury.<sup>81</sup> But the contrary has also been held.<sup>82</sup>

(D.) **PARTY'S MISCONDUCT.** — On the other hand, by the great weight of authority, a juror may testify that he has been improperly approached or tampered with by a party to the suit.<sup>83</sup>

76. *Shaw v. Fisk*, 21 Wis. 373.

77. *Georgia*. — *O'Barr v. Alexander*, 37 Ga. 195.

*Illinois*. — *Sanitary Dist. of Chicago v. Cullerton*, 147 Ill. 385, 35 N. E. 723; *Reins v. People*, 30 Ill. 250.

*Indiana*. — See *Taylor v. Garnett*, 110 Ind. 287, 11 N. E. 309.

*Kentucky*. — *Doran v. Shaw*, 3 Mon. 411.

*Minnesota*. — *Knowlton v. McMahon*, 13 Minn. 386, 97 Am. Dec. 236; *Gardner v. Minea*, 47 Minn. 295, 50 N. W. 199.

*New York*. — *Williams v. Montgomery*, 60 N. Y. 648.

*Ohio*. — See *Hulet v. Barnett*, 10 Ohio 459.

*Contra*. — *Alabama*. — *Clay v. City Council*, 102 Ala. 297, 14 So. 646.

*Colorado*. — *Heller v. People*, 22 Colo. 11, 43 Pac. 124.

*Iowa*. — *State v. LaGrange*, 99 Iowa 10, 68 N. W. 557.

*Mississippi*. — *Nelms v. State*, 13 Smed. & M. 500, 53 Am. Dec. 94; *Shaw v. State*, 79 Miss. 577, 31 So. 209; *Barnett v. Eaton*, 62 Miss. 768.

*Montana*. — *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 271, 52 Am. St. Rep. 665, 30 L. R. A. 803.

*New York*. — *Thomas v. Chapman*, 45 Barb. 98; *Wiggins v. Downer*, 67 How. Pr. 65.

*Vermont*. — *Ferguson v. Merrill*, Brat. 41 note.

78. *People v. Carnal*, 1 Park. Crim. Rep. 256; *Wilson v. People*, 4 Park. Crim. Rep. 619.

79. *Doran v. Shaw*, 3 Mon. (Ky.) 411.

80. *Griffith v. Mosley*, 70 Ark. 244, 67 S. W. 309. See *Everett v. Youells*, 4 Barn. & Ad. 681, 24 Eng. C. L. 141; *State v. Kiefer*, (S. D.), 91 N. W. 1,117.

81. *State v. Alexander*, 66 Mo. 148.

82. In *McBean v. State*, 83 Wis. 206, 53 N. W. 497, a juror's affidavit was held competent to show that the jury during their deliberations asked the court whether he would extend judicial clemency if a verdict of guilty were rendered, and that he replied affirmatively.

83. *Alabama*. — *Clay v. City Council*, 102 Ala. 297, 14 So. 646.

*Colorado*. — *Heller v. People*, 22 Colo. 11, 43 Pac. 124.

*Illinois*. — *Spurck v. Crook*, 19 Ill. 415.

*Iowa*. — *Wright v. Illinois & M. Tel. Co.*, 20 Iowa 195.

*Maine*. — *Heffron v. Gallup*, 55 Me. 563.

*Minnesota*. — In *Knowlton v. McMahon*, 13 Minn. 386, 97 Am. Dec. 236, it is suggested that a juror's affidavit may be admissible to show that a party to the action has tampered with the jury.

(11.) **Dissenting Jurors.** — Where, by statute, the concurrence of but nine jurymen is required for a verdict, the affidavits of the dissenting jurors are nevertheless incompetent to show their misconduct.<sup>84</sup>

(12.) **Modifications of Rule.** — (A.) AT COMMON LAW. — (a.) *Matters Inhering in Verdict.* — In several states the general rule has been so modified that a juror's affidavit or testimony is incompetent to impeach his verdict only as to those matters which essentially inhere in the verdict,<sup>85</sup> or rest solely in the consciousness of the individual

*Mississippi.* — *Nelms v. State*, 13 Smed. & M. 500, 53 Am. Dec. 94.

*New Jersey.* — *Den v. Driver*, 1 N. J. L. 166.

*New York.* — *Reynolds v. Champlain Trans. Co.*, 9 How. Pr. 7; *Thomas v. Chapman*, 45 Barb. 98, but *contra* see *Williams v. Montgomery*, 60 N. Y. 648.

*Pennsylvania.* — *Ritchie v. Holbrooke*, 7 Serg. & R. 458.

*South Carolina.* — See *Smith v. Culbertson*, 9 Rich. L. 106.

*Contra.* — *Sanitary Dist. of Chicago v. Cullerton*, 147 Ill. 385, 35 N. E. 723; *Williams v. Montgomery*, 60 N. Y. 648.

**Misconduct of a Party.** — In *Ritchie v. Holbrooke*, 7 Serg. & R. (Pa.) 458, the affidavit of a juror was held competent to show that during the jury's deliberations the foreman related a conversation which he had held during the trial with one of the parties relative to a disputed question, which had settled the matter in his mind (*distinguishing* this case from *Cluggage v. Swan*, 4 Binn. [Pa.] 150, 5 Am. Dec. 400.)

84. *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131.

85. **Rule Explained.** — "That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affi-

davit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast. That the verdict was obtained by lot, for instance, is a fact independent of the verdict itself, and which is not necessarily involved in it. While every verdict necessarily involves the pleadings, the evidence, the instructions, the deliberation, conversations, debates and judgments of the jurors themselves; and the effect or influence of any of these upon the juror's mind must rest in his own breast, and he is and ought to be concluded thereon by his solemn assent to and rendition of the verdict. To allow a juror to make affidavit against the conclusiveness of the verdict by reason of and as to the effect and influence of any of these matters upon his mind, which in their very nature are, though untrue, incapable of disproof, would be practically to open the jury room to the importunities and appliances of parties and their attorneys, and, of course, thereby to unsettle verdicts and destroy their sanctity and conclusiveness. But to receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance, or the like, is to receive his testimony as to a fact, which, if not true, can be readily and certainly disproved by his fellow jurors; and to hear such proof would have a tendency to diminish such

juror,<sup>86</sup> while as to any *fact* occurring either in or out of the jury room, which might be testified to by any person, a juror stands upon the same ground as any other witness.<sup>87</sup>

(b.) *Rule in Tennessee.* — In Tennessee affidavits of jurors impeaching their own verdict are more freely allowed than elsewhere,<sup>88</sup> especially so in criminal cases.<sup>89</sup> But even here they are seldom per-

practices and to purify the jury room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them." *Wright v. The Illinois & M. Tel. Co.*, 20 Iowa 195.

86. "A juror cannot be permitted to testify to anything which rests solely and exclusively within his own personal consciousness, or which necessarily constitutes or forms a portion of his verdict. But the juror may testify to *facts* which transpired within his own personal observation, and which transpired in such a manner that others, as well as himself, could be cognizant of them, and could testify to them. All that is necessary is that the facts should be such that two or more persons might personally take cognizance of them, and might testify to them, and that the facts themselves to which the jurors may testify do not inhere in the verdict as essential parts or portions thereof." *Gottlieb Bros. v. Jasper*, 27 Kan. 770.

87. *United States.* — *Mattox v. U. S.*, 146 U. S. 140; *Morse v. Montana Ore Co.*, 105 Fed. 337. See *U. S. v. Reid*, 12 How. 361.

*Iowa.* — *Wright v. Illinois & M. Tel. Co.*, 20 Iowa 195; *Purcell v. Tibbles*, 101 Iowa 24, 69 N. W. 1, 120; *Hall v. Robison*, 25 Iowa 91.

*Kansas.* — *Gottlieb Bros. v. Jasper*, 27 Kan. 770; *State v. Furbeck*, 29 Kan. 532; *Perry v. Bailey*, 12 Kan. 539. See also *State v. Rhea*, 25 Kan. 576.

*Nebraska.* — *Johnson v. Parrotte*, 34 Neb. 26, 51 N. W. 290; *Harris v. State*, 24 Neb. 803, 40 N. W. 317; *Savary v. State*, 62 Neb. 166, 87 N. W. 34.

*New Mexico.* — *U. S. v. Biena*, 8 N. M. 99, 42 Pac. 70.

*New York.* — *Brownell v. McEwen*, 5 Denio 367.

*Washington.* — *Marvin v. Yates*,

26 Wash. 50, 66 Pac. 131; *State v. Parker*, 25 Wash. 405, 65 Pac. 776.

"A Mere Mistake in Weighing Evidence is a matter which inheres in the verdict. . . . The procurement of additional evidence on the jury's own motion, after they have retired, is not a matter inhering in the verdict. It is something entirely different from the misunderstanding or misrecollection of the evidence properly before the jury, or the formation of a wrong judgment." *Kruidenier Bros. v. Shields*, 70 Iowa 428, 30 N. W. 681.

*The Arguments Used by Jurors* with their fellows and the deductions to be drawn by the jury from the testimony or the want of it on some particular point are matters clearly inhering in the verdict. *State v. Beste*, 91 Iowa 565, 60 N. W. 112.

*Matters Inhering in Verdict.* As to what matters have been held to inhere in the verdict and what not, see cases from states adopting this rule cited in previous notes, also *Clerist v. City*, 105 Iowa 119, 74 N. W. 743; *State v. Whalen*, 98 Iowa 662, 68 N. W. 554; *Bryson v. Chicago, B. & Q. R. Co.*, 89 Iowa 677, 57 N. W. 430; *State v. McConkey*, 49 Iowa 499; *Hallenbeck v. Garst*, 96 Iowa 509, 65 N. W. 417; *Fox v. Wunderlich*, 64 Iowa 187, 20 N. W. 7; *Wilkins v. Bent*, 66 Iowa 531, 24 N. W. 29; *Griffin v. Harriman*, 74 Iowa 436, 38 N. W. 139; *Ward v. Thompson*, 48 Iowa 588; *Ortman v. Union P. R. Co.*, 32 Kan. 419, 4 Pac. 858.

*Early Iowa Cases.* — *Statute.* — In *Wright v. Illinois & M. Tel. Co.*, 20 Iowa 195, the court cites and comments on the early Iowa cases and explains them as due to the existence of a statute making jurors' affidavits competent on motions for new trial.

88. *Whitmore v. Bale*, 9 Lea (Tenn.) 35; *Wade v. Ordway*, 1 Baxt. (Tenn.) 229.

89. *Cochran v. State*, 7 Humph.



mitted to show the motives<sup>90</sup> of the jurors, or their misconceptions<sup>91</sup> of the law and the evidence.

(B.) BY STATUTE. — (a.) *Chance Verdict*. — By statute, in some states, jurors' affidavits may be received to show that the verdict was reached by a resort to chance.<sup>92</sup> This is held to exclude their use to impeach their verdict in any other case.<sup>93</sup>

(b.) *Criminal Cases*. — In Texas, by statute, the voluntary affidavit of a juror in a criminal case may be received to show misconduct

(Tenn.) 544; *Nelson v. State*, 10 Humph. (Tenn.) 518; *Galvin v. State*, 6 Coldw. (Tenn.) 283; *Hudson v. State*, 9 Yerg. (Tenn.) 408; *Booby v. State*, 4 Yerg. (Tenn.) 111.

90. *Fish v. Cantrell*, 7 Heisk. (Tenn.) 578; *Scott v. State*, 7 Lea (75 Tenn.) 232.

91. *Roller v. Bachman*, 5 Lea (Tenn.) 163; *Dunnaway v. Sharon*, 3 Baxt. (Tenn.) 206; *Wade v. Ordway*, 1 Baxt. (Tenn.) 229; *Lewis v. Moses*, 6 Coldw. (Tenn.) 193.

92. *Arkansas*. — *Hampton v. State*, 67 Ark. 266, 54 S. W. 746; *Smith v. State*, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20; *Fain v. Goodwin*, 35 Ark. 109.

*California*. — *Dixon v. Pluns*, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698; *Hoare v. Hindley*, 49 Cal. 274; *Turner v. Tuolumne W. Co.*, 25 Cal. 398; *Boyce v. California Stage Co.*, 25 Cal. 460.

*Colorado*. — *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78.

*Idaho*. — *Giffen v. City of Lewiston*, (Idaho), 55 Pac. 545; *Flood v. McClure*, (Idaho), 32 Pac. 254.

*Kentucky*. — *Mitchell v. Com.*, 23 Ky. L. Rep. 1,084, 64 S. W. 751.

*Montana*. — *Gordan v. Trevarthan*, 13 Mont. 387, 34 Pac. 185, 40 Am. St. Rep. 452.

*South Dakota*. — *Long v. Collins*, 12 S. D. 621, 82 N. W. 95; *Ulrick v. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. 1,054.

*Utah*. — *People v. Ritchie*, 12 Utah 180, 42 Pac. 209.

*Washington*. — *Goodman v. Cody*, 1 Wash. Ter. 329.

**Retroactive Effect.** — A statute allowing the affidavits of jurors to be received to impeach their verdict, relates merely to the remedy, and governs in all applications for a new trial made after its passage, although the verdict and judgment were ren-

dered previously. *Donner v. Palmer*, 23 Cal. 40.

**Idaho Statute.** — In *Griffiths v. Montandon*, (Idaho), 39 Pac. 548, it was contended that under the Idaho statute the affidavits of jurors are admissible generally to impeach their verdict; but the court held that this statute had been copied from the California statute, and that in the original manuscript the punctuation differed from the printed copies of the statute, in which a mistake had been made by the printer, and that the affidavits of jurors could be received only for the purpose of showing a chance verdict.

93. *People v. Wyman*, 15 Cal. 70; *People v. Azoff*, 105 Cal. 632, 39 Pac. 59; *People v. Soap*, 127 Cal. 408, 59 Pac. 771; *People v. Findley*, 132 Cal. 301, 64 Pac. 472. See also cases in preceding notes.

In *Murphy v. Murphy*, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820, the jury being in doubt as to how to formulate their verdict so as to properly express their intention, instructed the foreman to ask the court's advice on the matter before delivering the verdict as they had formulated it. The foreman did as instructed, but through some misunderstanding failed to get the proper information, and the verdict remained as written, each jurymen answering "yes" when questioned as to whether it was his verdict. The court held that while they were inclined in this case to allow affidavits of jurors showing the mistake, they were bound to reject them, because of previous adjudications of the California supreme court, from which state the statute in South Dakota relating to jurymen's affidavits had been adopted, together with the adjudications thereon.

of the jury which deprives the defendant of a fair and impartial trial.<sup>94</sup> But it is the policy of the court to discourage such affidavits,<sup>95</sup> and they will be confined to misconduct of the jury alone.<sup>96</sup> This exception, moreover, seems to be confined to acts of misconduct which are made grounds for new trial, and is not extended to explaining the intentions, motives, mistakes and misunderstandings of jurors, or the grounds of their verdict.<sup>97</sup>

(13.) **Declarations of Jurors.**—(A.) **GENERALLY.**—The declarations of jurors are of course equally incompetent to prove what cannot be shown by them directly, both on grounds of public policy and because they are hearsay.<sup>98</sup>

(B.) **PRIOR TO TRIAL.**—But this rule has no application to declarations made before the trial showing the prejudice or incompetency of the juror.<sup>99</sup>

c. *To Sustain Verdict.*—(1.) **Generally.**—A jurymen's affidavit in support of his verdict will always be received in denial or explanation of alleged misconduct or irregularity of any kind;<sup>1</sup> but in

94. *Anschicks v. State*, 6 Tex. App. 524; *Hunter v. State*, 8 Tex. App. 75; *Parker v. State*, (Tex. Crim.) 30 S. W. 553; *Mason v. State*, (Tex. App.), 16 S. W. 766; *Ray v. State*, 35 Tex. Crim. 354, 33 S. W. 869; *Keith v. State*, (Tex. Crim.), 56 S. W. 628.

95. *Mitchell v. State*, 36 Tex. Crim. 278, 33 S. W. 367; *Farmer v. State*, 35 Tex. Crim. 270, 33 S. W. 232.

96. *Mitchell v. State*, 36 Tex. Crim. 278, 33 S. W. 367.

97. *Mitchell v. State*, 36 Tex. Crim. 278, 33 S. W. 367; *Farmer v. State*, 35 Tex. Crim. App. 270, 33 S. W. 232; *Hodges v. State*, 6 Tex. App. 615; *Dancy v. State*, 41 Tex. Crim. 293, 53 S. W. 635; *Scott v. State*, 43 Tex. Crim. 591, 68 S. W. 177.

98. *Florida*.—*Goodwin v. Bryan*, 16 Fla. 396.

*Illinois*.—*Allison v. People*, 45 Ill. 37; *Smith v. Smith*, 169 Ill. 623, 48 N. E. 306.

*Indiana*.—*McCray v. Stewart*, 16 Ind. 377.

*Massachusetts*.—*Com. v. Meserve*, 156 Mass. 61, 30 N. E. 166; *Com. v. White*, 147 Mass. 76, 16 N. E. 707.

*New Hampshire*.—*Griffin v. Auburn*, 59 N. H. 286.

**Declarations as Res Gestae.** While the declarations of a juror as to his own misconduct are generally

inadmissible, they may be competent as part of the *res gestae* where they are made during the occurrence of the alleged misconduct. *Deacon v. Shreve*, 22 N. J. L. 176.

99. *McCorkle v. Binns*, 5 Binn. (Pa.) 340, 6 Am. Dec. 420; *Ramadge v. Ryan*, 9 Bing. 333, 23 Eng. C. L. 296; *State v. Cooper*, 85 Mo. 256; *Cain v. Cain*, 1 B. Mon. (Ky.) 213.

1. *United States*.—*Ewer v. National Imp. Co.*, 63 Fed. 562; *Fuller v. Fletcher*, 44 Fed. 34.

*Alabama*.—*Clay v. City Council*, 102 Ala. 297, 14 So. 646.

*Arkansas*.—*Stanton v. State*, 13 Ark. 317.

*California*.—*People v. Hunt*, 59 Cal. 430; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

*Colorado*.—*Heller v. People*, 22 Colo. 11, 43 Pac. 124.

*Georgia*.—*Carr v. State*, 96 Ga. 284, 22 S. E. 570; *Fulton Co. v. Phillips*, 91 Ga. 65, 16 S. E. 260.

*Illinois*.—*Phillips v. Scales Mound*, 195 Ill. 353, 63 N. E. 180; *Palmer v. People*, 138 Ill. 356, 28 N. E. 130, 32 Am. St. Rep. 146; *Reed v. Thompson*, 88 Ill. 245; *Chicago v. Dermody*, 61 Ill. 431; *Peck v. Brewer*, 48 Ill. 54.

*Indiana*.—*Long v. State*, 95 Ind. 481; *Jones v. State*, 89 Ind. 82; *Haun v. Wilson*, 28 Ind. 296; *Bradford v. State*, 15 Ind. 347; *Barlow v. State*, 2 Blackf. 114.

England by the later decisions such affidavits or testimony will not be received either to impeach or support the verdict;<sup>2</sup> and in some American states this general rule is not fully acquiesced in.<sup>3</sup>

*Kansas*.—*Perry v. Bailey*, 12 Kan. 539.

*Louisiana*.—*State v. Favre*, 51 La. Ann. 434, 25 So. 93.

*Maine*.—*Newell v. Ayer*, 32 Me. 334; *Haskell v. Becket*, 3 Me. 92.

*Minnesota*.—*Woodbury v. Ankona*, 52 Minn. 329, 54 N. W. 187; *Martin v. Desnoyer*, 1 Minn. 156.

*Missouri*.—*State v. Rush*, 95 Mo. 199, 8 S. W. 221; *State v. Underwood*, 57 Mo. 40.

*Montana*.—*State v. Gay*, 18 Mont. 51, 44 Pac. 411.

*New Hampshire*.—*Mason v. Knox*, 66 N. H. 545, 27 Atl. 305; *Palmer v. State*, 65 N. H. 221, 19 Atl. 1,003; *State v. Hascall*, 6 N. H. 352; *State v. Pike*, 20 N. H. 344; *Tenny v. Evans*, 13 N. H. 462.

*New Jersey*.—*Kennedy v. Kennedy*, 18 N. J. L. 450.

*New York*.—*Dana v. Tucker*, 4 Johns. 487.

*Pennsylvania*.—*McCorkle v. Binns*, 5 Binn. 340, 6 Am. Dec. 420.

*South Dakota*.—*Thompson Co. v. Gunderson*, 10 S. D. 42, 71 N. W. 764.

*Texas*.—*Wood v. Gulf C. & S. F. R. Co.*, 15 Tex. Civ. App. 322, 40 S. W. 24.

*Vermont*.—*Downer v. Baxter*, 30 Vt. 467; *Thrall v. Lincoln*, 28 Vt. 356; *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104.

*Virginia*.—*Bull's Case*, 14 Gratt. 613; reviewing previous Virginia cases and settling rule in that state.

*Wisconsin*.—*Grottkau v. State*, 70 Wis. 462, 36 N. W. 31.

**Explaining Verdict.**—In *Swails v. Cissna*, 61 Iowa 693, 17 N. W. 39, where it was urged that the jury improperly allowed interest, a juror's affidavit was allowed to prove that the jury did not include in their verdict interest on the sum claimed, on the ground that such affidavit was in support of the verdict.

**Showing Proper Deliberation.** The testimony of jurors is admissible to show that a verdict, found by dividing the sum of the estimates of each of the jurors by twelve, was

adopted only after due deliberation. *Knight v. Epsom*, 62 N. H. 356, containing an extensive review of the cases. See also *Boynton v. Turnbull*, 45 N. H. 408; *State v. Howard*, 17 N. H. 171; *Tenny v. Evans*, 13 N. H. 462.

2. *Coster v. Merest*, 3 Brod. & Bing. 272, 7 Eng. C. L. 433. But he may deny alleged misconduct occurring outside the jury room and statements indicating prejudice. *Ramadge v. Ryan*, 9 Bing. 333, 23 Eng. C. L. 296.

3. *People v. Backus*, 5 Cal. 275; *Organ v. State*, 26 Miss. 78.

**Limitation on Rule.**—In *State v. Cartwright*, 20 W. Va. 32, the rule allowing jurors' affidavits in support of their verdict is limited to those cases in which other evidence shows sufficient misconduct to *prima facie* vitiate the verdict. The court says: "It would seem that the same decisive reasons which would exclude the testimony of jurors to impeach their verdict, would be equally strong, when their evidence is offered, to sustain their verdict. In criminal cases, particularly, the temptation offered to jurors to explain or excuse irregularities in their conduct is very great. If they admit misconduct they are liable to censure and perhaps to be fined; consequently they are more likely to deny than to admit that their verdict was influenced by any misconduct or impropriety. . . . Thus the rule which denies the admissibility of the evidence of jurors to impeach their verdict and allows such evidence to support it necessarily operates to the prejudice of the accused. . . . Both reason and the theory of criminal proceedings in this country would seem to require that the testimony of jurors should not be admitted, either to impeach or to support their verdict." *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; *State v. Cobbs*, 40 W. Va. 718, 22 S. E. 310; *Graham v. Citizens' Natl. Bank*, 45 W. Va. 701, 32 S. E. 245.

**Disregarding Instructions.**—The

(2.) **As to Influence of Misconduct.** — Though a juror is a competent witness in support of his verdict, yet it is held that his testimony or affidavit must be confined to a statement of *facts*, and he will not be heard to say that he was not influenced by the alleged misconduct,<sup>4</sup> or that he reached his conclusion solely by a consideration of the law and the evidence.<sup>5</sup> Affidavits of jurors denying that they were influenced in their judgment by such misconduct have, however, been received in some cases.<sup>6</sup>

affidavits of jurors will not be received to show that the jury disregarded the instructions of the court in respect to the measure of the damages, and adopted the correct rule even though this would tend to sustain their verdict. *Glaspell v. Northern Pac. R. Co.*, 43 Fed. 900.

**Incompetent to Show Impartiality.** — In *Vance v. Haslett*, 4 Bibb 191, it was held that a juror is not a competent witness to prove his own impartiality when it has been attacked.

*Contra.* — See *Moughon v. State*, 59 Ga. 308.

4. *Massachusetts.* — *Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49; *Whitney v. Whitman*, 5 Mass. 405; *Harrington v. Worcester L. & S. R. Co.*, 157 Mass. 579, 32 N. E. 955, explaining *Chemical E. L. & P. Co. v. Howard*, 150 Mass. 495, 23 N. E. 317.

*Montana.* — *State v. Jackson*, 9 Mont. 508, 24 Pac. 213.

*New Hampshire.* — *Page v. Wheeler*, 5 N. H. 91; *State v. Hascall*, 6 N. H. 352; *Tenney v. Evans*, 13 N. H. 462; *Mason v. Knox*, 66 N. H. 545, 27 Atl. 305; *Jordan v. Wallace*, 67 N. H. 175, 32 Atl. 174.

*West Virginia.* — *State v. Cartwright*, 20 W. Va. 32; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

*Wisconsin.* — *State v. Dolling*, 37 Wis. 396.

In *Woodward v. Leavitt*, 107 Mass. 453, 9 Am. Rep. 49, on a motion for a new trial affidavits of a jurymen were offered in explanation of facts and statements relied on to prove his previous prejudicial opinion, and also to show that he took no part in the deliberations of the jurors. The affidavits in explanation of his alleged prejudice were held competent, but that part relating to the

deliberations of the jury room, even though tending to support the verdict, was held incompetent. *Gray, J.*, says: "A jurymen may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind; . . . but the decisive reasons for excluding the testimony of the jurors to the motives and influences which affect their deliberation are equally strong, whether the evidence is offered to impeach or to support the verdict." (In this case is a very full review of the cases on this point.)

5. *McGuffie v. State*, 17 Ga. 497; *State v. Hascall*, 6 N. H. 352.

6. *Georgia.* — *Fulton Co. v. Phillips*, 91 Ga. 65, 16 S. E. 260.

*Illinois.* — *Spurck v. Crook*, 19 Ill. 415; *Reed v. Thompson*, 88 Ill. 245.

*Nebraska.* — *Argabright v. State*, 62 Neb. 402, 87 N. W. 146.

*New Mexico.* — *U. S. v. Biena*, 8 N. M. 99, 42 Pac. 70.

*Texas.* — *Mitchell v. State*, 36 Tex. Crim. 278, 33 S. W. 367. But see *Weatherford v. State*, 31 Tex. Crim. 530, 21 S. W. 251.

**Denying Prejudicial Effect of Misconduct.** — In *Kennedy v. Kennedy*, 18 N. J. L. 450, where the verdict was objected to as having been reached by resort to chance, testimony of jurors was received to the effect that "in their opinion the verdict was the result of reflection and deliberation on the part of the jurors."

So in *People v. Murray*, 94 Cal. 212, 29 Pac. 494, 28 Am. St. Rep. 113, jurors' affidavits, denying alleged misconduct and alleging that "no newspaper articles or anything else save the evidence and the charge influenced them in finding their verdict," were held competent.

d. *Privilege of Jurors.*—Testimony of jurors as to their misconduct, when admissible, cannot be compelled against their will,<sup>7</sup> especially where such misconduct is punishable criminally.<sup>8</sup>

D. ATTORNEYS.—a. *Generally.*—An attorney at law is not incompetent to testify in a case in which he represents one of the parties,<sup>9</sup> unless he has a pecuniary interest in the case, such as a

In *Maxfield v. Pittsfield*, 67 N. H. 104, 36 Atl. 609, the testimony of a juror that he was not influenced in his verdict by information acquired outside the trial is held competent as distinguished from testimony that he was not influenced by evidence improperly admitted at the trial subject to exception. The latter, if material, the juror is bound to consider; the former he ought to disregard. "When the verdict is attacked on the ground that a juror may have been influenced by statements made to him by a stranger without the knowledge or fault of either party, his testimony that he was not so influenced is competent evidence in support of the verdict.

This result is not in conflict with the doctrine of *State v. Hascall*, 6 N. H. 361, that the affidavits of jurors 'are not admissible to show, in general terms, that they agreed to the verdict solely from the law and the evidence given at the trial.'

7. *State v. Grady*, 4 Iowa 461; *Forshee v. Abrams*, 2 Iowa 571.

8. *Howard v. Cobb*, 3 Day 309, 12 Fed. Cas. No. 6,755.

9. *Alabama.*—*Quarles v. Waldron*, 20 Ala. 217; *Morrow v. Parkman*, 14 Ala. 769; *McGehee v. Hansell*, 13 Ala. 17.

*Arkansas.*—*Milan v. State*, 24 Ark. 346.

*Connecticut.*—*Smith v. Huntington*, 1 Root 226; *Carrington v. Holabird*, 17 Conn. 530.

*Georgia.*—*Sharman v. Morton*, 31 Ga. 34.

*Illinois.*—*Ross v. Demoss*, 45 Ill. 447; *Morgan v. Roberts*, 38 Ill. 65.

*Iowa.*—*Walsh v. Murphy*, 2 Greene 227; *Abbott v. Stribley*, 6 Iowa 191.

*Kansas.*—*Central Br. U. P. R. Co. v. Andrews*, 41 Kan. 370, 21 Pac. 276.

*Louisiana.*—*Succession of Grant*, 14 La. Ann. 795; *Boissy v. Lacou*, 10 La. Ann. 29. But see *Madden v.*

*Farmer*, 7 La. Ann. 580; *Blanc v. Forgay*, 5 La. Ann. 695.

*Maine.*—*Foord v. Hains*, 27 Me. 207; *McLaine v. Bachelor*, 8 Me. 324.

*Maryland.*—*Beatty v. Davis*, 9 Gill 211.

*Massachusetts.*—*Potter v. Inhabitants of Ware*, 1 Cush. 519.

*Mississippi.*—*Clark v. Kingsland*, 1 Smed. & M. 248.

*New Jersey.*—*Folly v. Smith*, 12 N. J. L. 139.

*New York.*—*Robinson v. Dauchy*, 3 Barb. 20; *Little v. McKeon*, 1 Sandf. 607. See *Pixley v. Butts*, 2 Cow. 421; *Tullock v. Cunningham*, 1 Cow. 256; *Baker v. Arnold*, 1 Caines Rep. 258.

*North Carolina.*—*State v. Woodside*, 31 N. C. 496.

*Ohio.*—*Cox v. Hill*, 3 Ohio 411.

*Pennsylvania.*—*Follansbee v. Walker*, 72 Pa. St. 228, 13 Am. Rep. 671; *Bell v. Bell*, 12 Pa. St. 235; *Frear v. Drinker*, 8 Pa. St. 520; *Miles v. O'Hara*, 1 Serg. & R. 32; *Newman v. Bradley*, 1 Dall. 240.

*South Carolina.*—*Simonton v. Yongue*, 3 Strob. 538.

*Tennessee.*—*Benton v. Henry*, 2 Coldw. 83.

*Utah.*—*McLaren v. Gillespie*, 19 Utah 137, 56 Pac. 680.

*Vermont.*—*State v. Fitzgerald*, 68 Vt. 125, 34 Atl. 429.

*West Virginia.*—*Moats v. Ryner*, 18 W. Va. 642, 41 Am. Rep. 703.

Under a statute rendering attorneys at law incompetent witnesses in certain cases, the attorney general of the state is not included in the term "client," since the state cannot be considered a client in the sense in which that term is used in the statute. *Hines v. State*, 26 Ga. 614. See also *Churchill v. Corker*, 25 Ga. 479.

**Excluded by Rule of Court.**—A rule of the supreme court of Maine prescribes that an attorney shall not testify for his client in a case which

contingent fee.<sup>10</sup> But the practice of an attorney testifying for his client has been severely criticised and condemned,<sup>11</sup> and when his testimony is necessary the attorney should withdraw from the case.<sup>12</sup>

**b. Prosecuting Attorney**—So also the prosecuting attorney in a criminal case which he is conducting is a competent witness as to any material fact.<sup>13</sup>

**E. INTERPRETER.**—An interpreter is not by virtue of his office disqualified as a witness.<sup>14</sup>

he is conducting except by special leave of court. *Freeman v. Fogg*, 82 Me. 408, 19 Atl. 907.

**Incompetent.**—In Delaware attorneys seem to be incompetent witnesses. In *Pritchard v. Henderson*, 3 Pen. Del. 128, 50 Atl. 217, the son of plaintiff's counsel, who, though not a partner, was connected with him in the office and took part in the trial, was objected to and excluded from testifying on the ground of his being an attorney in the case and therefore interested.

10. *Quarles v. Waldron*, 20 Ala. 217; *Meserve v. Hicks*, 24 N. H. 295.

*Contra.*—*Newman v. Bradley*, 1 Dall. (Pa.) 240.

11. *Ross v. Demoss*, 45 Ill. 447; *Morgan v. Roberts*, 38 Ill. 65; *Succession of Harkins*, 2 La. Ann. 923; *State v. Woodside*, 31 N. C. 496; *McLaren v. Gillespie*, 19 Utah 137, 56 Pac. 680; *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703; *Cobbett v. Hudson*, 1 El. & Bl. 11, 72 Eng. C. L. 11; *Spencer v. Kinnard*, 12 Tex. 180.

In *Frear v. Drinker*, 8 Pa. St. 520, the court says: "It is a highly indecent practice for an attorney to cross-examine witnesses, address the jury and give evidence himself to contradict the witness. It is a practice which, as far as possible, should be discountenanced by courts and counsel. . . . It is sometimes indispensable that an attorney, to prevent injustice, should give evidence for his client. . . . All the courts can do is to discountenance the practice, and where evidence is indispensable to recommend the counsel to withdraw from the cause."

**Sometimes Necessary and Proper.** *Kenney, J.*, says, in *Walsh v. Murphy*, 2 Greene (Iowa) 227: "While it sometimes becomes a matter of necessity for an attorney to testify

in a case in which he is concerned, to prove the execution of papers, or, as in this case, the correctness of an account, an attorney would certainly be negligent of his duty were he to remain silent, and permit his client's interests to suffer, allow a just claim to be defeated, and the ends of justice subverted by reason of his professional position."

12. *Ross v. Demoss*, 45 Ill. 447; *Succession of Harkins*, 2 La. Ann. 923; *State v. Woodside*, 31 N. C. 496; *Bell v. Bell*, 12 Pa. St. 235; *McLaren v. Gillespie*, 19 Utah 137, 56 Pac. 680; *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703.

13. *California.*—*People v. Hamburg*, 84 Cal. 468, 24 Pac. 298 (guilty knowledge).

*Georgia.*—*Hines v. State*, 26 Ga. 614.

*Idaho.*—*State v. Wilmbusse*, (Idaho), 70 Pac. 849.

*Kansas.*—*State v. Tabor*, 63 Kan. 542, 66 Pac. 237.

*Kentucky.*—*Com. v. Moore*, 5 J. J. Marsh. 655.

*Massachusetts.*—*New Hampshire F. Ins. Co. v. Healey*, 151 Mass. 537, 24 N. E. 913.

*Missouri.*—*State v. Grady*, 84 Mo. 220.

*West Virginia.*—*State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

**Other Available Witnesses.**—The fact that there are other witnesses who can testify to the same matters is no ground for excluding the prosecuting attorney's testimony. *State v. Tabor*, 63 Kan. 542, 66 Pac. 237.

14. *People v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Barber Asphalt Pav. Co. v. Odasz*, 85 Fed. 754; *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73; *Chicago & A. R. Co. v. Shenk*, 131 Ill. 283, 23 N. E. 436. See *State v. Michel*, 20 Wash. 162, 54 Pac. 995. But see *State v.*

**F. MISCELLANEOUS RULES.** — a. *Contemnors of Rule of Exclusion* — (1.) **Generally.** — A witness who has violated an order excluding witnesses from the courtroom or separating them from each other does not thereby necessarily become incompetent to testify. But the cases are in conflict, even within a single jurisdiction, as to the effect of such conduct.

(2.) **Exclusion of Witness Discretionary.** — In some states it rests within the sound discretion of the trial court to admit or reject the testimony of such a witness.<sup>15</sup> But it has been said that this discretion will rarely be exercised to exclude the witness in a criminal case where his testimony is essential or important to the defense.<sup>16</sup>

Thompson, 14 Wash. 285, 44 Pac. 533.

15. *Alabama.* — Sanders v. State, 105 Ala. 4, 16 So. 935; Ryan v. Couch, 66 Ala. 244; Wilson v. State, 52 Ala. 299; Bell v. State, 44 Ala. 393; Montgomery v. State, 40 Ala. 684; Sedgreaves v. Myatt, 22 Ala. 617.

*Arkansas.* — Pleasant v. State, 15 Ark. 624.

*Georgia.* — Cunningham v. State, 97 Ga. 214, 22 S. E. 954; Bone v. State, 86 Ga. 108, 12 S. E. 205; Etheridge v. Hobbs, 77 Ga. 531, 3 S. E. 251; Hanvey v. State, 68 Ga. 612; Lassiter v. State, 67 Ga. 739; Grant v. State, 89 Ga. 393, 15 S. E. 488.

*Illinois.* — Bow v. People, 160 Ill. 438, 43 N. E. 593; Bulliner v. People, 95 Ill. 394.

*Kentucky.* — Carlton v. Com., 13 Ky. L. Rep. 946, 18 S. W. 535. See Roberts v. Com., 15 Ky. L. Rep. 341, 22 S. W. 845; Illinois Cent. R. Co. v. Taylor, (Ky.), 70 S. W. 825.

*Louisiana.* — State v. Watson, 36 La. Ann. 148; State v. Ducote, 47 La. Ann. 46, 16 So. 562.

*Massachusetts.* — Com. v. Hall, 4 Allen 305.

*Ohio.* — Laughlin v. State, 18 Ohio 99, 51 Am. Dec. 444.

*South Carolina.* — State v. Vari, 35 S. C. 175, 14 S. E. 392; Anonymous, 1 Hill 251.

*Tennessee.* — Smith v. State, 4 Lea 428. See Adolff v. Irby, (Tenn.), 75 S. W. 710; Record v. Chickasaw Co., (Tenn.), 69 S. W. 334.

*Utah.* — People v. O'Loughlin, 3 Utah 133, 1 Pac. 653.

**Sometimes Discretionary.** — In Holder v. U. S., 150 U. S. 91, in

which the admission of the testimony of a witness who had disobeyed the rule of exclusion was held no error, Fuller, C. J., says: "If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court."

#### **Agreement Not to Use Witness.**

Where an order excluding the witnesses in a criminal case was made, but one of defendant's witnesses was allowed to remain on promise by latter's counsel not to use such witness, the court's refusal to allow such witness to testify later was held error. "Such things are not matters of contract between court and counsel." May v. State, 90 Ga. 793, 17 S. E. 108.

#### **Witness Not Subpoenaed.**

— In State v. Gregory, 33 La. Ann. 737, witnesses who had not been subpoenaed or appeared in court when the order of sequestration was made, were excluded because the defendant had visited and communicated with them. This was held error on the ground that the witness was not within the court's jurisdiction.

16. Smith v. State, 4 Lea (Tenn.) 428; Pleasant v. State, 15 Ark. 624.

In Rooks v. State, 65 Ga. 330, the court says: "Nor do we think that the court itself should go to the extent of depriving a party of the testimony of his witness, because that

Moreover, the cases in which this rule has been announced have generally been cases where the witness was allowed to testify over objection.

(3.) **Witness Competent When Party Not in Fault.** — By the weight of authority the witness cannot be rejected where the party offering him has not been at fault in the matter.<sup>17</sup> If such party, however, has connived at or been the cause of the witness' disobedience, it has been held that the witness should be excluded.<sup>18</sup>

(4.) **Always Competent.** — In a very recent Texas case overruling previous adjudications in that state, the broad rule is laid down that in no case can the testimony of such a witness be rejected.<sup>19</sup>

witness has disobeyed the order given touching his presence in the court room at an improper time. At most it was only an irregularity, and may have amounted to a contempt, . . . but to *exclude* him might deprive the party of the testimony of the only person in the world by whom he could prove his innocence."

17. *England.* — *Cobbett v. Hudson*, 1 El. & Bl. 11, 72 Eng. C. L. 11; citing *Cook v. Nethercote*, 6 Car. & P. 741; *Rex v. Colley*, 1 M. & M. 329, 22 Eng. C. L. 325. See also *Beamon v. Ellice*, 4 Car. & P. 585, 19 Eng. C. L. 537.

*California.* — *People v. Boscovitch*, 20 Cal. 436.

*Colorado.* — *Kelley v. Atkins*, 14 Colo. App. 208, 59 Pac. 841.

*Indiana.* — *Brow v. Levy*, 3 Ind. App. 464, 29 N. E. 417; *State v. David*, (Ind. App.), 58 N. E. 83; *State v. Thomas*, 111 Ind. 575, 13 N. E. 35; *Burk v. Andis*, 98 Ind. 59; *Davis v. Byrd*, 94 Ind. 525, *overruling* *Jackson v. State*, 14 Ind. 327.

*Iowa.* — *Grimes v. Martin*, 10 Iowa 347.

*Kansas.* — *State v. Falk*, 46 Kan. 498, 26 Pac. 1,023; *Davenport v. Ogg*, 15 Kan. 363.

*Maryland.* — *Parker v. State*, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387.

*Mississippi.* — *Timberlake v. Thayer*, 76 Miss. 76, 23 So. 767; *Ferguson v. Brown*, 75 Miss. 214, 21 So. 603. But see *Sartorius v. State*, 24 Miss. 602.

*Missouri.* — *State v. Gesell*, 124 Mo. 531, 27 S. W. 1,101, *overruling* *State v. Fitzsimmons*, 30 Mo. 236; *O'Bryan v. Allen*, 95 Mo. 68, 8 S. W. 225; *Keith v. Wilson*, 6 Mo. 435.

*Nebraska.* — See *Gran v. Huston*, 45 Neb. 813.

*Nevada.* — *State v. Salge*, 2 Nev. 321.

*New Mexico.* — *Trujillo v. Ter.*, 5 N. M. 589, 30 Pac. 870.

*New York.* — *Friedman v. Myers*, 39 N. Y. St. 192, 14 N. Y. Supp. 142.

*North Carolina.* — *State v. Sparrow*, 3 Murph. L. 487. See *State v. Hare*, 74 N. C. 591.

*Oregon.* — *Hubbard v. Hubbard*, 7 Or. 42.

*Virginia.* — *Hey v. Com.*, 32 Gratt. 946, 34 Am. Rep. 799.

*Washington.* — *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1,103.

*West Virginia.* — *Gregg v. State*, 3 W. Va. 705.

**Defendant Must Show Prejudice and Good Faith.** — Where the defendant makes no showing that he did not connive at the witness' disobedience, and that the proposed evidence was material to his defense, the exclusion of such witness is not erroneous. *Trujillo v. Territory*, 5 N. M. 589, 30 Pac. 870.

18. *State v. Gesell*, 124 Mo. 531, 27 S. W. 1,101; *O'Bryan v. Allen*, 95 Mo. 68, 8 S. W. 225; *Dyer v. Morris*, 4 Mo. 214; *Trujillo v. Territory*, 5 N. M. 589, 30 Pac. 870.

19. **Rejection of Witness Always Error.** — In *Johnson v. Cooley*, (Tex Civ. App.), 71 S. W. 34, after the witnesses had been placed under the rule, defendant instructed one of his witnesses as to how plaintiff had testified. The exclusion of this witness' testimony by the trial court was held error. The court says: "The question, in so far as it has been passed upon by the higher courts of this state, has more often arisen in



This also seems to be the rule in the English court of exchequer.<sup>20</sup>

b. *Witnesses Not on List or Indictment.* — (1.) *Generally.* — Statutes varying somewhat in their terms are in force in many states requiring the names of the prosecution's witnesses to be indorsed on the indictment, or a list of the same furnished to defendant before the trial. It is almost universally held that a failure to comply with such a statute does not deprive the prosecution of the right to use witnesses whose names have not been placed on the list,<sup>21</sup>

criminal cases, and the complaint has generally been that the trial court erred in permitting the witness to testify. *Sherwood v. State*, 41 Tex. 498; *Powell v. State*, 13 Tex. App. 244; *Creswell v. State*, 14 Tex. App. 16; *Pierson v. State*, 18 Tex. App. 536; *Cook v. State*, 30 Tex. App. 612, 18 S. W. 412; *Texas Exp. Co. v. J. W. Dupree & Exp. Co.*, 2 Willson, Civ. Cas. Ct. App., § 321; *Phillips v. Edelstein, Id.*, § 452. In these cases it was held that the matter was one resting in the discretion of the court, and the ruling of the trial court would not be revised unless there was a clear abuse of such discretion, resulting in injury to the party complaining. We are of opinion that the administration of justice would be better subserved by denying to the trial court the right in any case to refuse to allow the witness to testify. The primary object of judicial investigation is the ascertainment of the truth of the matter under consideration, and a rule which excludes any means by which the truth may be arrived at should not be adopted by the courts. The rule which requires the court, on the motion of either party, to exclude the witnesses from the court room, so that they might not hear each other testify, and to direct them not to discuss with each other, or permit any person to discuss with them, the evidence in the case, is designed to aid in the ascertainment of the truth, and, when invoked by either party to a suit, should be enforced by the exercise of the power of the court to punish as contempt any violation of such rule; but to authorize the court to exclude the testimony of a witness who had violated the rule would in many cases operate to defeat the object and purpose of the rule." For previous

cases in this state, see *Crawleigh v. Galveston H. & S. A. R. Co.*, 28 Tex. Civ. App. 260, 67 S. W. 140; *King v. State*, 34 Tex. Crim. 228, 29 S. W. 1,086; *Turner v. State*, (Tex. Crim.), 32 S. W. 700.

20. *Parker v. M'William*, 6 Bing. 683, 19 Eng. C. L., citing Attorney General *v. Bulpitt*, 9 Price 4.

21. *California.* — *People v. Lopez*, 26 Cal. 112; *People v. Symonds*, 22 Cal. 349; *People v. Bonney*, 19 Cal. 426; *People v. Freeland*, 6 Cal. 96.

*Colorado.* — *Kelly v. People*, 17 Colo. 130; *Minich v. People*, 8 Colo. 440; *Wilson v. People*, 3 Colo. 325.

*Dakota.* — *Territory v. Godfrey*, 6 Dak. 46, 50 N. W. 481.

*District of Columbia.* — *U. S. v. Schneider*, 21 D. C. 381.

*Florida.* — *Mann v. State*, 22 Fla. 600.

*Georgia.* — *State v. Calvin*, R. M. Charl. 142.

*Illinois.* — *Gifford v. People*, 148 Ill. 173, 35 N. E. 754; *Kota v. People*, 136 Ill. 655, 27 N. E. 53; *Bulliner v. People*, 95 Ill. 394; *Logg v. People*, 92 Ill. 598; *Perteet v. People*, 70 Ill. 171; *Gardner v. People*, 4 Ill. 83.

*Indiana.* — *Short v. State*, 63 Ind. 376.

*Iowa.* — *State v. Beal*, 94 Iowa 39, 62 N. W. 657; *State v. Craig*, 78 Iowa 637, 43 N. W. 462; *State v. Fowler*, 52 Iowa 103, 2 N. W. 983; *State v. McClintock*, 8 Iowa 203, explaining previous cases apparently contrary. See *State v. Abrahams*, 6 Iowa 117, 71 Am. Dec. 399.

*Kansas.* — *State v. Sorter*, 52 Kan. 531, 34 Pac. 1,036; *State v. Adams*, 44 Kan. 135, 24 Pac. 71; *State v. Dowd*, 39 Kan. 412, 18 Pac. 483; *State v. Taylor*, 36 Kan. 329, 13 Pac. 550; *State v. Cook*, 30 Kan. 82, 1

especially when the defendant is not prejudiced by such failure.<sup>22</sup>

(2.) **When Statute Has No Application.** — Such statutes do not apply to witnesses subsequently discovered by the prosecutor,<sup>23</sup> nor to witnesses who testify only in rebuttal of new matter introduced by the defendant,<sup>24</sup> or to purely collateral facts.<sup>25</sup>

(3.) **Misnomer of Witness.** — A misnomer of the witness forms no ground of objection, where the defendant is not thereby surprised or prejudiced.<sup>26</sup>

(4.) **Modifications of Rule.** — (A.) **GENERALLY.** — In some jurisdictions the admission or exclusion of a witness not on the list is a matter resting in the sound discretion of the court;<sup>27</sup> in others the

Pac. 32; *State v. Medlicott*, 9 Kan. 257.

*Missouri.* — *State v. Loehr*, 93 Mo. 103, 5 S. W. 696; *State v. Pagels*, 92 Mo. 300, 4 S. W. 931; *State v. Phelps*, 91 Mo. 478, 4 S. W. 119; *State v. O'Day*, 89 Mo. 559, 1 S. W. 763; *State v. Roy*, 83 Mo. 268.

*Montana.* — *State v. Black*, 15 Mont. 143, 38 Pac. 674; *State v. Calder*, 23 Mont. 504, 59 Pac. 903.

*Utah.* — *State v. Thiede*, 11 Utah 241, 39 Pac. 837.

*Vermont.* — *State v. Smith*, 55 Vt. 57.

*Virginia.* — *Lawrence v. Com.*, 30 Gratt. 845.

**No Application to Territorial Courts.** — § 1,033 U. S. Rev. Stat. entitling defendant in a criminal case to a list of the prosecution's witnesses two days before trial has no application to territorial courts. *Thiede v. Utah*, 159 U. S. 508, 40 L. ed. 237.

**Applies Only to First Trial.** — A statute providing that previous to the arraignment of prisoner he must be furnished with a list of the witnesses against him is held to apply only to the first trial. *Heller v. People*, (Colo.), 31 Pac. 773; *State v. Pancoast*, 5 N. D. 514, 67 N. W. 1,052, 35 L. R. A. 518.

**Applies Only to Witnesses Before Grand Jury.** — Where, by law, the defendant is entitled to a list of the witnesses on whose evidence the charge against him is founded, a witness not on the list and not examined before the grand jury is competent, since such list is limited to those testifying before the grand jury finding the indictment. *Inman v. State*, 72 Ga. 269.

22. *Boykin v. People*, 22 Colo. 496, 45 Pac. 419; *Wilson v. People*, 3 Colo. 325.

23. *Parks v. State*, 20 Neb. 515; *State v. Schnepel*, 23 Mont. 523, 59 Pac. 927; *State v. Sloan*, 22 Mont. 293, 56 Pac. 364; *State v. Steifel*, 106 Mo. 129, 17 S. W. 227.

24. *Illinois.* — *Gore v. People*, 162 Ill. 259, 44 N. E. 500; *Simons v. People*, 150 Ill. 66, 36 N. E. 1,019; *Bulliner v. People*, 95 Ill. 394.

*Iowa.* — *State v. Rivers*, 68 Iowa 611, 27 N. W. 781; *State v. Parish*, 22 Iowa 284; *State v. Ruthven*, 58 Iowa 121, 12 N. W. 235; *State v. Gillick*, 10 Iowa 98. (No application to rebuttal testimony.)

*Nebraska.* — *State v. Huckins*, 23 Neb. 309.

*New Hampshire.* — *State v. Hartigan*, 19 N. H. 248.

*Washington.* — *State v. Phelps*, 22 Wash. 181, 60 Pac. 134.

25. **In Support of Indictment.** This provision applies only to evidence or witnesses in support of the indictment, and not to testimony of a witness that certain persons testified before the grand jury. *State v. Fowler*, 52 Iowa 103. See *State v. Little*, 42 Iowa 51.

26. *People v. Freeland*, 6 Cal. 96; *Logg v. People*, 92 Ill. 598; *State v. Hunter*, 18 Wash. 670, 52 Pac. 247. See *State v. Craig*, 78 Iowa 637, 43 N. W. 462; *State v. Stanley*, 33 Iowa 526; *State v. McComb*, 18 Iowa 43.

27. *Illinois.* — *Gifford v. People*, 148 Ill. 173, 35 N. E. 754; *Kota v. People*, 136 Ill. 655, 27 N. E. 53; *Logg v. People*, 92 Ill. 598; *Gates v. People*, 14 Ill. 433; *Gardner v. People*, 4 Ill. 83; *Cross v. People*, 192 Ill. 291, 61 N. E. 400; *Bolen v.*

prosecution must show some good excuse for its failure to comply with the law;<sup>28</sup> and in one state such witness is, by implication of the statute, incompetent.<sup>29</sup>

(B.) INFORMATION DISTINGUISHED FROM INDICTMENT. — Some courts have drawn a sharp distinction between indictments and informations, holding that a failure to indorse the witness' name on the latter is fatal to his competency, except in rebuttal,<sup>30</sup> because an information is an innovation, and there is no other way of knowing on what testimony the charge is based.

(5.) Notice Required. — In Iowa, by statute, a written notice containing the names and the substance of the testimony of proposed witnesses whose testimony was not taken before the grand jury must be given to defendant by the prosecution. Failure to do so renders such witness incompetent.<sup>31</sup> But where the indictment is founded

People, 184 Ill. 338, 56 N. E. 408; Kirkham v. People, 170 Ill. 9, 48 N. E. 465.

*Kansas.* — State v. Sorter, 52 Kan. 531, 34 Pac. 1,036; State v. Adams, 44 Kan. 135, 24 Pac. 71.

*Oklahoma.* — Hyde v. Territory, 8 Okla. 69, 56 Pac. 851.

*South Dakota.* — State v. Reddington, 7 S. D. 368, 64 N. W. 170; State v. Isaacson, 8 S. D. 69, 65 N. W. 430; State v. Church, 6 S. D. 89, 60 N. W. 143; State v. Boughner, 5 S. D. 461, 59 N. W. 736, following Territory v. Godfrey, 6 S. D. 46, 50 N. W. 481.

*Washington.* — State v. Bokien, 14 Wash. 403, 44 Pac. 889.

28. People v. De France, 104 Mich. 563, 62 N. W. 709, 28 L. R. A. 139. See People v. Dietz, 86 Mich. 419, 49 N. W. 296; Hill v. People, 26 Mich. 496; People v. Price, 74 Mich. 37, 41 N. W. 853; People v. Hall, 48 Mich. 482, 12 N. W. 665.

**Sufficient Excuse.** — In People v. Mills, 94 Mich. 630, 54 N. W. 488, the name of an offered witness had been inadvertently left off the indictment. Since he was a public police officer, took a prominent part in the prosecution and was frequently mentioned in the testimony, and his name had been omitted by mistake, the admission of his testimony was held no error.

29. **Incompetent by Implication.** Under a statute requiring the prosecution to furnish a list of its witnesses to the defendant, but providing that the state may introduce

other witnesses to rebut or explain defendant's new matter, or to discredit his witnesses, those not on the list are incompetent for any other purpose. State v. Hartigan, 19 N. H. 248. And see State v. Johnson, 33 Ark. 174.

30. **Witness Not on Indictment Competent.** — State v. Huckins, 23 Neb. 309; Parks v. State, 20 Neb. 515; Stevens v. State, 19 Neb. 648.

**Witness Not on Information Incompetent.** — Ballard v. State, 19 Neb. 609. The North Dakota statute requires a list of the witnesses known to the prosecutor to be indorsed on the information, but provides that "other witnesses may testify on the trial of such cause in behalf of the prosecution the same as if their names had been indorsed thereon." In State v. Pancoast, 5 N. D. 516, 67 N. W. 1,052, 35 L. R. A. 518, objection to the introduction of witnesses not thus indorsed was overruled. On appeal the court said: "If this ruling rested only upon the evidence adduced we should hesitate to sustain it. . . . But in this case there had been one trial of the case. . . . However, had this objection been seasonably made at the first trial it might have proved fatal. We cannot permit the latter clause of the provision (see clause quoted above) to thus emasculate and destroy the former. . . . Such 'other' witnesses must be witnesses who were not known to the prosecutor when he filed the information."

31. State v. Yetzer, 97 Iowa 423,

wholly on the preliminary examination, witnesses thereat are competent at the trial, although their names are not indorsed on the indictment.<sup>32</sup>

**6. Declarations of Incompetent Witness.**—The declarations of a person made while he was incompetent to testify are generally inadmissible,<sup>33</sup> but they become competent, however, as soon as his disability is removed.<sup>34</sup> But the competency of the declarations of one who subsequently becomes incompetent to testify seems to depend upon the reasons underlying the incapacity of such witness. If the reasons are of such a nature that they would operate as well against

66 N. W. 737; *State v. Beal*, 94 Iowa 39, 62 N. W. 657.

Although the offered witness had sent to the grand jury a written statement of what she would testify to, and her name was indorsed on the indictment, yet she was held to be incompetent under this statute. *State v. Porter*, 74 Iowa 523.

**Meaning of "Witness."**—In *State v. Farrington*, 90 Iowa 623, 38 N. W. 514, it was held that the term "witness" used in this statute cannot be extended to include a written instrument introduced as a standard of comparison of defendant's signature.

**Limits of Such Witness' Testimony.**—The testimony of such additional witnesses is not limited to the matters set out in the notice, but they may be examined as to any other material facts. *State v. Craig*, 78 Iowa 637, 43 N. W. 462.

**32.** *State v. Rodman*, 62 Iowa 456, 17 N. W. 663.

**Defect in Transcript of Testimony.** Under the statute allowing the state to examine witnesses who gave testimony at defendant's preliminary examination and whose testimony was transmitted to the grand jury and considered by them, it is no objection to the competency of such witnesses that the transcript of their testimony was not properly certified by the committing magistrate, since it is presumed that the grand jury, before founding an indictment on such testimony, properly satisfied themselves that such transcript was correct. *State v. Kepper*, 65 Iowa 745, 23 N. W. 304.

**33.** *England.*—*Rex v. Pike*, 3 Car. & P. 598, 14 Eng. C. L. 473; *Reg. v. Perkins*, 2 Moody C. C. 135;

*Rex v. Drummond*, 1 Leach C. C. 337, 1 East P. C. 323.

*United States.*—*Queen v. Neale*, 2 Cranch C. C. 3, 20 Fed. Cas. No. 11,504.

*Alabama.*—*Gayle v. Bishop*, 14 Ala. 552.

*Arkansas.*—*Walker v. State*, 39 Ark. 221.

*New York.*—*People v. Quong Kun*, 68 N. Y. St. 139, 34 N. Y. Supp. 260.

*North Carolina.*—*State v. Williams*, 67 N. C. 12.

*Ohio.*—*Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608.

*South Carolina.*—*Nettles v. Harrison*, 2 McCord 230.

*Texas.*—*Long v. State*, 10 Tex. App. 186; *Smith v. State*, 41 Tex. 352.

**Rule Not Applicable.**—In a prosecution for receiving stolen goods testimony of a third party as to what occurred between him and a thief on the night of the theft was not inadmissible, though involving a statement of the thief, who had been previously convicted of the crime and was therefore infamous. "The rule excluding the statement of a convict . . . does not apply; otherwise the circumstances attending a theft committed by an unpardoned convict could never be shown." *Bargna v. State*, (Tex. Crim.), 68 S. W. 997.

**Privilege of Witness.**—Where the witness cannot be questioned as to certain matters because his answers would criminate him, his declarations as to the same facts cannot be shown. *Nettles v. Harrison*, 2 McCord (S. C.) 230.

**34.** *State v. Baldwin*, 15 Wash. 15, 45 Pac. 950.

the testimony of the witness when the declaration was made as when offered, such declaration is incompetent.<sup>35</sup>

**35. Neely v. Neely**, 17 Pa. St. 227.  
**Witness Subsequently Made Competent.**—The declarations of a person incompetent as a witness at the time the declarations were made, because a slave, are made competent by the removal of that ground of incapacity even after the slave's death. *Whitehurst v. Pettipher*, 87 N. C. 179, 42 Am. Rep. 520.

**Insanity of Declarant.**—The fact that declarant subsequently becomes insane will not render previous dec-

larations incompetent. *Bausman v. Cameron*, (Wash.), 67 Pac. 70.

**Infamy of Declarant.**—Where declarations were made after indictment, but before conviction for an infamous offense, it was held that the subsequent conviction on the charge rendered the declarations as well as the witness incompetent since the declarant was as untrustworthy before the conviction as after it. *Webster v. Mann*, 56 Tex. 119, 42 Am. Rep. 688.

---

COMPOSITIONS WITH CREDITORS.—See Bankruptcy; Compromise and Settlement; Insolvency.

Vol. III

# COMPOUNDING OFFENSES.

## I. THE STATE'S CASE, 246

## II. THE DEFENSE, 247

### I. THE STATE'S CASE.

The state may show the acceptance of a promissory note as consideration for not prosecuting a felony,<sup>1</sup> whether the note was received from the one charged with the felony or not.<sup>2</sup>

The exaction of money on an understanding that the prosecution would be dropped may be shown, although the accused retained no part of the money.<sup>3</sup>

Under an indictment for compounding a criminal prosecution the state need not show that a crime had actually been committed by the person prosecuted.<sup>4</sup>

**Prima Facie Evidence.** — On an indictment for compounding a felony, the record of the conviction is *prima facie* evidence of the felony, but not conclusive as against the compounder.<sup>5</sup>

**Insufficient Evidence.** — Evidence that defendant charged with compounding had accepted money and notes as damages for injuries in an assault and battery and was subsequently absent from the trial of the person charged with said assault and battery, is not

1. "It is argued that it will not, because such a note will be void in law, and in fact nothing may ever be received. But there seems to be no reason for this nice and critical construction of the words. The note, although voidable, is in fact of value to the holder until it is avoided. It may never be disputed. Indeed it would be hazardous ever to dispute it, for the promisee would then be released from his engagement not to prosecute; so that he holds a coercive power over the maker of the note, as strong as the law.

"But, further, what is the gist of the offense? It is the concealing of the crime, and abstaining from prosecution, to the detriment of the public. Now, if a man is induced to this by the promise of money, and actually takes an obligation for the money, everything necessary to constitute him criminal in the eye of the law seems to be done." *Com. v. Pease*, 16 Mass. 91.

2. It is not necessary to constitute the offense of compounding a misdemeanor that an offense was committed by the person from whom the money was received. *State v. Carver*, 69 N. H. 216, 39 Atl. 973.

3. "If the defendant, as the jury found, corruptly exacted a sum of money from the prosecutrix upon his agreeing to conceal her crime and not to prosecute or give evidence against her, he is guilty, under the statute, although he retained no part of the consideration." *State v. Ash*, 33 Or. 86, 54 Pac. 184. "If the defendant corruptly exacted a consideration from George Hanson for an agreement not to prosecute his son, he is guilty under the statute, although he took the consideration for the benefit of another." *State v. Ruthven*, 58 Iowa 121, 12 N. W. 235.

4. *Fribly v. State*, 42 Ohio St. 205.

5. *State v. Duhammel*, 2 Harr. (Del.) 532.

sufficient of itself to show that defendant intended to compound the public offense.<sup>6</sup>

## II. THE DEFENSE.

The defendant cannot show that he acted by direction of another to whom the consideration was paid over,<sup>7</sup> nor the acquittal of the person whose offense he is charged with compounding,<sup>8</sup> nor his own breach of the agreement not to prosecute.<sup>9</sup>

6. *Stancel v. State*, 50 Ga. 152.

7. Evidence that defendant had, prior to the time he received the money from prosecutrix, been directed by the chief of police to make such collection, and that two or three days after he received the money he turned it over to his superior officer, is inadmissible. *State v. Ash*, 33 Or. 86, 54 Pac. 184.

8. *People v. Buckland*, 13 Wend. (N. Y.) 592.

9. *State v. Duhammel*, 2 Harr. (Del.) 532.

"It is no defense to a prosecution for compounding a crime, under the statute, that the defendant subsequently institutes a prosecution against the party whom he promised to protect. The statute makes it a

crime for any person having knowledge of the commission of a crime to receive or accept any gift or gratuity, valuable consideration, or thing whatever, or any promise to do or cause to be done any act beneficial to such person, with the understanding or agreement, express or implied, to compound or conceal such crime, or not to prosecute therefor or give evidence thereof. Hill's Ann. Laws, § 1,839. Under this statute the offense is complete when the consideration or thing of value is received, or promise made, with such understanding or agreement; and a subsequent violation by a guilty party of his agreement is no defense to his prosecution, whatever may have been the rule at common law." *State v. Ash*, 33 Or. 86, 54 Pac. 184.

# COMPROMISE AND SETTLEMENT.

By A. I. McCORMICK.

- I. MODE OF PROVING IN GENERAL, 249**
  - 1. *Presumptions, 249*
    - A. *From Mere Giving of Promissory Note, 249*
    - B. *From Mere Giving of Written Receipt in Full, 250*
    - C. *From Judgment of Court, 250*
  - 2. *Admissibility of Evidence, 251*
    - A. *Need Not Be in Writing, 251*
    - B. *Evidence Surrounding Circumstances, 251*
- II. EXTENT OF SETTLEMENT, MATTERS INCLUDED IN, 252**
  - 1. *Presumption of Complete Settlement, 252*
  - 2. *Evidence of Transaction and Surrounding Circumstances, 253*
  - 3. *From Giving of Promissory Note on Settlement Had, 253*
  - 4. *From Proof of Other Circumstances, 254*
- III. EFFECT OF PRESUMPTIONS, 256**
  - 1. *Not Conclusive, 256*
  - 2. *Character of Evidence to Rebut, 257*
- IV. BURDEN OF PROOF, 258**
  - 1. *Where Settlement Itself Attacked, 258*
  - 2. *Whether Disputed Claim Was Included in Settlement Had, 258*
  - 3. *When Settlement Was With Agent, 258*
- V. SUFFICIENCY OF THE EVIDENCE TO PROVE AND THE EFFECT THEREOF, 258**
  - 1. *In General, 258*
  - 2. *When Evidence Conclusive of Compromise and Settlement, 259*
- VI. SETTING ASIDE OR AVOIDING SETTLEMENT, 260**
  - 1. *Admissibility, 260*
    - A. *In General, 260*
    - B. *What Evidence Not Admissible, 260*
      - a. *When Compromise and Settlement is Conclusive, 260*
      - b. *Where the Settlement is an Absolute Release, Mutual and in Writing, 261*
    - C. *Character of Evidence, 261*
  - 2. *Weight and Sufficiency of the Evidence, 262*
- VII. COMPOSITION WITH CREDITORS, 262**
  - 1. *Meaning or Effect of Agreement, 262*
    - A. *When Evidence Inadmissible to Explain, 262*
    - B. *What Evidence Sufficient to Prove, 263*
      - a. *Character of Evidence, 263*



- b. *Weight of Evidence*, 263
- 2. *Setting Aside or Avoiding Composition Agreement*, 264
  - A. *When Agreement is Executory or Conditional*, 264
    - a. *What Evidence Admissible*, 264
    - b. *Burden of Proof*, 264
  - B. *When Agreement is Absolute Release for a Consideration Paid*, 264
  - C. *Where Fraud is Alleged*, 265
  - D. *By Proof of New Promise*, 266
- 3. *Damages for Breach*, 266

## CROSS-REFERENCES.

Accord and Satisfaction;

Bankruptcy;

Insolvency.

## I. MODE OF PROVING IN GENERAL.

1. **Presumptions.** — A. FROM MERE GIVING OF PROMISSORY NOTE.  
The giving of a promissory note<sup>1</sup> by one party to another, or the giving

1. *Alabama*. — Maynard *v.* Johnson, 4 Ala. 116.

*Arkansas*. — Carlton *v.* Buckner, 28 Ark. 66.

*Indiana*. — Campbell *v.* Hayes, 1 Ind. 547; Thornton *v.* Williams, 14 Ind. 518; Gaskin *v.* Wells, 15 Ind. 253; Kerchner *v.* Lewis, 27 Ind. 22; Bishop *v.* Welch, 35 Ind. 521.

*Missouri*. — Kinman *v.* Cannefax, 34 Mo. 147.

*New York*. — Treadwell *v.* Abrams, 15 How. Pr. 219; Dutcher *v.* Porter, 63 Barb. 15.

*Wisconsin*. — Atchison *v.* Davidson, 2 Pinn. 48.

Giving of promissory note is *prima facie* evidence of an accounting and settlement of all demands existing between parties—and that maker was, on such settlement, indebted to payee in the amount of note. Lake *v.* Tysen, 6 N. Y. 461.

It throws burden of proving contrary on party who claims there was no settlement. Robertson *v.* Branch, 3 Sneed (Tenn.) 506.

Giving of note is *prima facie* evidence of settlement which included all demands held by maker against payee, and that they were satisfied in

arrangement upon which note was executed. Smith *v.* Bissell, 2 Greene (Iowa) 379.

"Until some explanation shall be given (by person opposing) the note is *decisive evidence* against any such claim." De Freest *v.* Bloomingdale, 5 Denio (N. Y.) 304.

*Held*, in a suit on note, after note had been admitted, defendant could not introduce evidence of set-off—the items of which were dated prior to date of note—unless he first prove that such items were not included or satisfied in the arrangement on which note was given. Smith *v.* Bissell, 2 Greene (Iowa) 379.

**Presumption.** — **Extent Of.** — It was held in Tisdale *v.* Maxwell, 58 Ala. 40, that this presumption extended only to *accounts*, but that giving of note was not presumptive evidence of settlement of *notes* or *bills* previously given.

**Exception of Certain Claims.**  
Execution of note is presumptive evidence of a full settlement of accounts up to date of note, *except such as are specially excepted at the time*. Mills *v.* Mercer, Dud. (Ga.) 158.

ing of a due bill<sup>2</sup> by one party to another, nothing else appearing, is *prima facie* evidence of an accounting and settlement in full of all claims and demands existing between the parties thereto, prior and up to its date.

**B. FROM MERE GIVING OF WRITTEN RECEIPT IN FULL. — Presumption of Settlement.**—A written receipt in full is *prima facie* evidence that on date of same parties made a settlement of all their accounts and that balance was paid in full.<sup>3</sup>

**C. FROM JUDGMENT OF COURT.**—Where money judgment is rendered in favor of one party against the other, matters of account existing between them prior to the judgment are presumed to have been settled before its rendition.<sup>4</sup>

**Execution of Lease. — When No Evidence of Settlement.**—A lease from father to son of real estate for a term of years, with a covenant on part of lessee to support lessor during life, and also to pay a yearly rent, is no evidence of a settlement of accounts between father and son, so as to bar a set-off of demand in favor of son and accruing prior to lease, in an action by father on covenants of lease. *Held*, that lease itself showed what matters it embraced, and that the set-off not being included did not affect it. *Hart v. Hart*, 22 Barb. (N. Y.) 606.

**Giving of Bill of Sale or Mortgage** raises same presumption. *Allen v. Bryson*, 67 Iowa 591, 25 N. W. 820, 56 Am. Rep. 358; *Chewning v. Proctor*, 2 McCord Eq. (S. C.) 343.

*Contra.*—The mere giving of a note, unexplained, is not evidence of a settlement of all demands between the parties thereto. But it is evidence admissible for the consideration of the jury and is to be weighed in the light of surrounding circumstances. *Rosencrantz v. Mason*, 85 Ill. 262; *Crabtree v. Rowand*, 33 Ill. 423; *Ankeny v. Pierce*, 1 Ill. 289; *Heffron v. Chapin*, 35 Ill. App. 565.

2. *Boffandick v. Raleigh*, 11 Ind. 136; *Spencer v. Chrisman*, 15 Ind. 215; *Gue v. Kline*, 13 Pa. St. 60.

3. *McDonald v. Piper*, 193 Pa. St. 312, 44 Atl. 455; *Paige v. Perno*, 10 Vt. 491.

**Settlement of Damages for Bastardy. — Receipt in Full.**—*McElhane v. People*, 1 Ill. App. 550.

In an action by employee against

employer for extra services, a receipt, given by employee in full for all demands for work done during regular and irregular hours, is admissible and *prima facie* evidence of payment for all services. Plaintiff was hired as attorney and stock agent. Services in suit were notarial. *Leach v. Hannibal & St. J. R. Co.*, 86 Mo. 27.

**Check Containing Condition. — Receipt and Retention Of.**—Where, on sale of real estate, vendor receives and retains check for certain sum upon which is written "balance in full for property," describing it; held, this was conclusive evidence of settlement in full for the property. *Critchell v. Loftis*, 100 Ill. App. 196.

**Check in Full. — Receipt Of.**—Where a person who has been employed as farm hand for several years at a certain monthly salary, and on final settlement of accounts at termination thereof he accepts from employer a check for a certain sum, which recites that it is in full payment for work to date and was afterwards paid, the presumption of fact is strong that all items properly chargeable at the time are included in the settlement, and this extends to Sunday work claimed as extra by employee. *Robinson v. Webb*, 73 Ill. App. 569.

4. *Dodds v. Dodds*, 57 Ind. 293.

Every reasonable presumption is to be indulged in, in favor of a complete settlement by said judgment, especially when entered by consent. *Williams v. Nolan*, 58 Tex. 708.

**Presumption That Court Had Proof of Compromise Before It When Judg-**

**2. Admissibility of Evidence.** — A. NEED NOT BE IN WRITING. Where there is an honest dispute as to the amount of a debt between debtor and creditor, and the debtor pays a sum less than amount claimed by the creditor, an agreement by the latter at the time to accept the sum paid in full settlement need not be in writing.<sup>5</sup>

B. EVIDENCE OF SURROUNDING CIRCUMSTANCES. — Where the question at issue is as to whether or not a settlement was had between the parties, evidence of all the matters comprised in and of the circumstances leading up to and surrounding the transaction constituting the alleged settlement is admissible.<sup>6</sup>

**ment Was Entered Thereon.** — *Orr v. Hamilton*, 36 La. Ann. 790.

**Settlement of Judgment.** — Where, by contract, B agrees to pay A a certain price for pasturage, said payments to be applied as credits on a judgment existing in favor of B and against A, satisfaction in full of the judgment raises a presumption of settlement of contract for pasturage. Burden on A to prove otherwise. *Boswell v. Williams*, 86 Ind. 375.

5. *Miles v. Arp*, 9 S. D. 625, 70 N. W. 1,050.

**Settlement of Suit Pending.** — **Rules of Court.** — Although rules of court require all agreements in respect to the proceedings in a cause to be in writing, this does not apply to agreements of settlement of the controversy. *Smith v. Bach*, 81 N. Y. Supp. 1,057.

**Exception.** — Where statute requires compromise to be in writing, parol proof thereof is inadmissible. But, even then, a judgment of court of record predicated on such compromise is admissible to prove same. *Orr v. Hamilton*, 36 La. Ann. 790.

6. *Frank v. Heaton*, 56 Ill. App. 227.

It is competent for a party who claims settlement to prove the several items which preceded it and which are claimed to have been considered and included in it. *Mead v. White*, (Pa.), 8 Atl. 913.

**Papers Used by Parties** on alleged settlement are admissible. *Jefferson v. Burhans*, 85 Fed. 924.

**Judgment Entered on Alleged Settlement** is admissible to prove it. *Orr v. Hamilton*, 36 La. Ann. 790.

**Copy of Account Books.** — Testimony of plaintiff that statement on which settlement was based was a correct copy of plaintiff's books is admissible. *McLendon v. Wilson*, 57 Ga. 438.

**Surrounding Circumstances.** Where facts show that plaintiff had been employed by defendant to erect two houses, as contractor under written contract, and plaintiff had commenced work and abandoned it, when new arrangement was had by which defendant hired plaintiff as mere superintendent to finish said houses, and agreed to pay him therefor, and also to pay bills then outstanding against plaintiff incurred by him on work already done, it was held, in a suit by plaintiff for services as superintendent, in which suit he claimed that new agreement was a complete rescission and final settlement of original contract, that an offer by defendant to prove that at the time of new arrangement "he had paid to plaintiff for materials furnished toward completion of contract a sum in excess of that required by contract itself" should have been admitted because "it was one of the circumstances surrounding" the alleged settlement. The question was then for the jury. *McAllister v. Sexton*, 4 E. D. Smith (N. Y.) 41.

Evidence showing that parties in good faith disagreed over their rights in the premises and as a result finally came to said settlement is admissible. *City Elec. R. Co. v. Floyd Co.*, 115 Ga. 665, 42 S. E. 45; *McLendon v. Wilson*, 57 Ga. 438.

**Deed of Land Given on Settlement When Admissible.** — Where, in action

## II. EXTENT OF SETTLEMENT. — WHAT MATTERS INCLUDED IN.

**1. Presumption of Complete Settlement.** — Where it is ascertained upon proof, or is admitted that there was a settlement of accounts between parties, a strong presumption arises that it was a full settlement of all matters existing between them at the time when made.<sup>7</sup> But if it plainly appears, either from the instrument of settlement itself, or from other evidence, that the settlement was not

on a note, defendant pleads no consideration, in that it was given for an alleged balance of old transactions which included two old notes theretofore actually paid in a settlement in which a farm was deeded to the plaintiff in full liquidation of all debts, it is competent for defendant to introduce deed in evidence, not as conclusive proof of the consideration for farm, but as an element of the settlement relied upon in determining whether the old notes were included in a settlement when deed was given. *Dufo v. Juif*, 63 Mich. 513, 30 N. W. 105.

**Written Settlement in Name of Individual.** — Evidence Admissible to Show It Was Settlement With Firm. Where plaintiff in an action introduces written memorandum of settlement between himself, individually, and defendant, and signed by defendant, evidence is admissible to show that items mentioned in settlement are partnership claims owing plaintiff and another person. *Barger v. Collins*, 7 Har. & J. (Md.) 213, 11 Md. App. 166.

**Note Given to Individual Member of Firm,** evidence is admissible to prove it was given for balance on settlement with firm. *Boffandick v. Raleigh*, 11 Ind. 136.

**Evidence Admissible to Disprove Settlement of Damages Against Sheriff.** — **Indemnity Bond.** — In an action against the sheriff for damages caused by wrongful attachment, where sheriff claims he settled with the plaintiff, an indemnity bond taken by sheriff from judgment creditor at the time sheriff paid to said creditor the money received by him on release of attached property, which bond indemnified sheriff from the attachment, is admissible and *prima*

*facie* evidence that there was no settlement between sheriff and plaintiff. *Luce v. Hoisington*, 56 Vt. 436.

**7. Kennedy v. Williamson**, 50 N. C. 284; *Farmer v. Barnes*, 56 N. C. 109; *Nichols v. Scott*, 12 Vt. 47; *Bull v. Harris*, 31 Ill. 487; *Barkley v. Tarrant Co.*, 53 Tex. 251; *Van Buren v. Wells*, 19 Wend. (N. Y.) 202; *Lothrop v. Evans*, 8 Colo. App. 171, 45 Pac. 235; *Tank v. Rohweder*, 98 Iowa 154, 67 N. W. 106.

**Itemized Settlements.** — **Presumption That Omission of Item Intentional.** — Where several itemized accounts have been settled between the parties, and item in dispute was not specified in any of them, it is presumed that its omission was intentional. *Straubher v. Mohler*, 80 Ill. 21.

**Presumption That Claim of One Party as Surety for Other Paid.** Where settlements were had after one of the parties had paid off a note as surety for other, it is presumed that the note was included in same. *Ward v. Grayson*, 9 Dana (Ky.) 281.

Written statement that "on final settlement I stand indebted" to A in a certain stated amount is *prima facie* evidence of a final settlement of all accounts between parties thereto up to date of instrument. *Jack v. McKee*, 9 Pa. St. 235.

**Litigation.** — **Settlement Of.** — **What Included In.** — Whenever parties are in litigation, each having antagonistic claims and demands against the other, and a settlement is proposed and accepted, it will be presumed that all matters in controversy, including claims of both parties, were included within settlement, unless the contrary clearly appears. *Coburn v. Cedar Valley L. & C. Co.*, 29 Fed. 584.

a complete and final one, such presumption does not arise.<sup>8</sup>

**2. Evidence of Transaction and Surrounding Circumstances.** Where the issue is as to whether a certain claim or demand was included in a settlement had between the parties, evidence of all the matters comprised in, and of the circumstances leading up to, and surrounding, the settlement is admissible.<sup>9</sup>

**3. From Giving of Promissory Note on Settlement Had.**—Where parties between whom mutual accounts have existed have a settle-

**Settlement of Current Account.** Due bill presumed included in. *Hedrick v. Bannister*, 12 La. Ann. 373.

**8. Partial Settlement.—Erroneous Instruction.**—Where evidence shows that a settlement was had between A and B, which settlement mentioned only two or three individual items due from B to A, which A was to pay, and did not purport to be a complete settlement of all accounts, and made no mention of a claim of B against A then existing, an instruction that the fact that such accounting and settlement were had and such promises of payment made was *prima facie* evidence that all the claims which B had against A were settled, adjusted and paid off, is erroneous. *Smith v. Smith*, 45 Ill. App. 215.

**Settlement Between Principal and Agent.—Presumption as to What Included In.**—Where plaintiff was employed by defendant to sell defendant's horse and had exchanged it for one-half interest in another horse, with which transaction defendant was dissatisfied and therefore brought suit against plaintiff, and thereafter the parties made a compromise and settlement by which plaintiff paid defendant \$400 and took receipt from defendant's attorney in full for all demands, and plaintiff thereafter brought this suit for commission for sale of the horse; held, there was no legal presumption that the claims of plaintiff in the suit at bar were included in the settlement previously had. The settlement was admissible and competent, and the question was for the jury. *Walton v. Eldridge*, 1 Allen (Mass.) 203.

**9.** It is always competent to show, by any testimony relevant, what items

entered into a settlement when an item sued for is claimed to be barred by the settlement. *Hicks v. Leaton*, 67 Mich. 371, 34 N. W. 880, citing 1 Phill. Ev. 108; *Cowan & Hill's Notes to Phill. Ev.*, 213-316.

Where an instrument of compromise recited that "whereas great difficulties had arisen" about what did not clearly appear, on a controversy afterwards, it was held that parol evidence was admissible to prove that the claim in suit was among the "difficulties" and so settled. *Wood v. Lee*, 5 T. B. Mon. (Ky.) 50. This was a settlement between executor of an estate and the heirs.

**Cause of Action.—Evidence of Settlement of Other Action.**—An offer to prove that cause of action in suit was compromised and settled in a settlement of a prior cause of action is admissible. *Skubkagel v. Dierstein*, 131 Pa. St. 46, 18 Atl. 1,059, 6 L. R. A. 481.

**Book of Account.**—Plaintiff (merchant) may introduce his book of original entries to prove that a note, claimed by defendant as a set-off, had been credited to the latter in an account which had been previously settled between the parties—said book containing the account settled. *Powers v. Hamilton*, 6 Blackf. (Ind.) 293.

Where the issue is whether or not a certain due bill of a prior date was included in a settlement had between the parties, evidence that at the time of settlement the party claiming under the due bill did not exhibit or claim to have any receipt or voucher for the amount of the bill is proper and relevant as an admission that he claimed nothing on the due bill. *Thomas v. White*, 11 Ind. 132.

ment, and as a result thereof a note is given by one to the other, these facts raise the presumption that all matters of difference between parties were considered on settlement, and that the note represents the final balance owing the payee thereof on such settlement.<sup>10</sup>

**4. From Proof of Other Circumstances.** — Proof of the surrounding facts and circumstances in connection with the transaction comprising the alleged settlement may be such as to raise the presump-

10. *Lindsey v. Moore*, 101 Iowa 592, 70 N. W. 695; *Wagner v. Ladd*, 38 Neb. 161, 56 N. W. 891; *Colwell v. Caperton*, 27 W. Va. 397; *Manke v. Neal*, 23 W. Va. 57.

No other proof than mere settlement and giving of note is necessary to invoke presumption. *Thomas v. Thomas*, 15 B. Mon. (Ky.) 178.

Force of presumption is stronger when alleged error is only as to quantity of some item, which item is mentioned in settlement. *Smathers v. Shook*, 90 N. C. 484.

If item in dispute was merely discussed in settlement it will be held embraced therein unless it clearly appears that that item was waived or parties agreed to leave it open. *Perry v. Roberts*, 17 Mo. 36; *Deuser v. Walkup*, 43 Mo. App. 625.

A note executed on a settlement, in the absence of fraud and mistake, is the highest evidence of the respective rights of the parties at its date. *Rogers v. McMachan*, 4 J. J. Marsh. (Ky.) 37.

Presumption is that amount of note was final balance found owing by maker to payee on the settlement. *Daniel on Neg. Inst.* § 91; *Campbell Ptg. P. Mfg. Co. v. Yorkston*, 10 Misc. 780, 32 N. Y. Supp. 263; *Wright v. Wright*, 56 N. Y. St. 305, 26 N. Y. Supp. 238.

**Promissory Note. — Presumption of Settlement of Accounts.** — On Sept. 19, 1865, defendant executed his note to D for \$150.00 payable 2 years after date. On Nov. 15, 1865, defendant executed another instrument, by which "for and in consideration of a certain sum of money, together with all claims and demands that D holds against me, bearing date Nov. 15, 1865," defendant agreed to support D during his natural life. *Held*,

that language of agreement of Nov. 15 showed that parties had accounting that day, and presumption was that all liabilities were included. *Held*, also, that law implies that in said accounting all demands were brought down to Nov. 15, 1865, and therefore all demands, including note, bore date Nov. 15, 1865. *Dutcher v. Porter*, 63 Barb. (N. Y.) 15.

**When Precedent Obligation Included In.** — On settlement of accounts between debtor and creditor, a note or certificate being given for the ascertained balance, an order, previously given by creditor to third person, if then accepted or paid, is presumed to have entered into settlement. If paid or accepted afterward rule is different. *Alabama & Miss. R. R. Co. v. Sanford*, 36 Ala. 703.

**Presumption. — Aided by Surrounding Circumstances.** — Where defendants (cotton dealers) have had open account with plaintiff bank during "cotton season," it is not error to assume that notes given by defendants to bank, at close of said season, were in settlement of said account. *Loan & Ex. Bank v. Miller*, 39 S. C. 175, 17 S. E. 592.

**Settlement of Old Note. — Presumption of from Giving a New Note.** — Where A holds note of B upon which A has credited B with a payment in a certain amount, which B claims should be larger, and this note is afterward taken up by B and a new note given by B to A for balance after deducting amount credited, it is presumed a settlement was had between parties as to the old note, and that upon such settlement the parties settled the dispute as to the amount of the credit on old note. *Greenwade v. Greenwade*, 3 Dana (Ky.) 495.

tion that it constituted a full and complete compromise and settlement.<sup>11</sup>

**11. Presumption of Settlement from Sale of One Partner to Another.**

Where it appeared that A & B had been carrying on partnership business, and A, after disposing of his interest to third party, then purchased B's interest and promised to pay certain sum therefor. *Held*, that in absence of contrary proof, it would be presumed that all former accounts between A and B were settled at time of purchase. *Norman v. Hudleston*, 64 Ill. 11.

**Presumption from Subsequent Agreement Covering Same Transactions.**—Where brother and sister who are only heirs of real estate enter into a mutual agreement to share the profits and use the real estate in equal proportions, and act under this for eight years, and no mention is therein made of the previous use of the estate by brother alone, it will be presumed that agreement settled all liabilities and charges against brother for said previous occupation. *Enyard v. Nevins*, (N. J.), 18 Atl. 192.

**Settlement With Deceased Before Death.**—**Presumption from Facts Occurring Before and After Death.** Where A and B purchased mill, in payment for one-half of which A turned over certain personal property, and while the mill was being taken to B's place to be used by A and B—A died at B's house where he was sick. During the probate proceedings B turned over to appraisers certain like personal property as A's property (two mules, a wagon and harness) and asked that it be appraised, and said that if it was appraised higher than the property A had turned in to purchase one-half the mill, the estate should pay him the difference, if the difference in value was in favor of the estate he would pay it the difference. *Held*, that the fact of A's sickness and death in B's house, and the acts and statements of B after A's death, might be ground for inference by jury that a settlement of all accounts

had been had between A and B before A's death. *Gregory v. Martin*, 78 Ill. 38.

**Title to Land.**—**Suit in Partition.** **Settlement Of.**—Where, in a partition suit, plaintiff claims undivided three-fourths interest in 19 lots, legal title being in defendant, he having paid part purchase price, and defendant claiming he was entitled to an undivided one-half interest instead of one-fourth, and before suit parties had discussed the dispute; partition suit then commenced by plaintiff and defendant answered, denying plaintiff owned more than one-half; thereupon G (a third party) suggested to defendant a compromise by which plaintiff would get 11 lots and defendant 8, which defendant accepted; pursuant thereto defendant deeded to plaintiff 11 lots by deed prepared by plaintiff and plaintiff dismissed suit. Plaintiff claimed it was only a settlement of the suit and not final. G stated that he told plaintiff it was not final, but only meant dismissal of suit, and plaintiff did not know G was trying to settle in full. *Held*, that facts justified the inference that settlement was in full and final. *Burnham v. Rosenberg*, 110 Mo. 468, 19 S. W. 732.

**Settlement of Estate by Agreement.**—**Lapse of Time.**—**Presumption.**—Twenty years after settlement of estate in probate court pursuant to agreement among the heirs, it will be presumed that all parties to agreement appeared before court, that agreement was signed by each heir or by some one authorized to sign for him, and that all parties interested were parties to agreement. *Lasley v. Preston*, (Mich.) 93 N. W. 253.

Lapse of time in suing on due bill together with admissions made by owner of same, held, to raise presumption of settlement of due bill. *Burns v. Ross*, 17 Ky. L. Rep. 187, 30 S. W. 641.

**Settlement.**—**Proved by Circum-**

## III. EFFECT OF PRESUMPTIONS.

**1. Not Conclusive.** — The presumption arising from the proof of a settlement, viz., that the same was a complete and final settlement of all matters of difference existing between the parties, is not conclusive.<sup>12</sup> It may be rebutted by parol proof showing that the claim in question was not included in the settlement had;<sup>13</sup> or by proof of fraud, accident or mistake therein.<sup>14</sup>

Likewise, the presumption of full settlement of accounts arising from the mere giving of a promissory note, or due bill, or receipt in full, is not conclusive; it may be rebutted by other evidence, such as proof of the consideration for the instrument, and the circumstances surrounding its execution.<sup>15</sup>

**stances.** — Where an employee, when charged in good faith with negligence resulting in financial loss to his employers, in order to hold position refrains from disputing liability and accedes to their proposition to deduct amount from his future wages in successive installments, and thereafter installments are deducted from his wages and deduction is stated to him to be on this account and he is given balance and signs receipt in full, a settlement in full as to original liability for loss and its admission by him is implied from the facts, and he cannot subsequently maintain action to recover amount. *Martin v. Guindon*, 22 Misc. 141, 48 N. Y. Supp. 694.

**What Facts Do Not Raise Presumption. — Question for Jury.** — A lessee of farm, on the day after \$65.00 rent had become due and payable, entered into a written contract with lessor by which lessor, in consideration for surrender of unexpired term by lessee, and other stipulations (not including rent) agreed to pay within one month to lessee, and did pay, \$550.00. *Held*, on the issue of payment, that no presumption arose that rent had been paid by the mere production of contract and receipt for the \$550.00, but that this evidence with surrounding circumstances should go to jury, and they decide the question of payment. *Sperry v. Miller*, 16 N. Y. 407.

**12.** *Nichols v. Scott*, 12 Vt. 47.

**13.** And this although settlement was in writing. *Wheeler v. Alexander*, 1 Strob. L. (S. C.) 61; *Gue*

*v. Kline*, 13 Pa. St. 60. Question is then for jury. *Jack v. McKee*, 9 Pa. St. 235.

**14.** *Lothrop v. Evans*, 8 Colo. App. 171, 45 Pac. 235; *Smathers v. Shook*, 90 N. C. 484.

Where the basis of a suit on a note is an alleged compromise which plaintiff claims came from an admission of theft by defendant of certain hogs of plaintiff, who had charged defendant with said theft, and that the note was given in settlement of the claim for damages for the taking, and the defendant claiming that the note was given only under threats of imprisonment made by defendant and without an admission of guilt. The defense may introduce any evidence to show the falsity of the charge of theft as bearing on the question of whether plaintiff had any claim adequate to support the alleged compromise. *Overstreet v. Dunlap*, 56 Ill. App. 486.

**15.** *Maynard v. Johnson*, 4 Ala. 116; (Receipt in Full) *McDonald v. Piper*, 193 Pa. St. 312, 44 Atl. 455.

Where payee of notes secured by mortgage gives maker and mortgagor a due bill for small amount, the presumption of settlement of mortgage notes is rebutted by proof that they were outstanding and not surrendered or canceled, after giving of due bill. *Spencer v. Chrisman*, 15 Ind. 215.

**Giving of Note. — Presumption of Full Settlement. — Rebuttal Of.** Where in suit on a note for the purchase price of goods defendant sets up a counter claim that he had agreed



**2. Character of Evidence to Rebut.**—To overcome the presumption the party must prove the contrary clearly and by a preponderance of the evidence.<sup>18</sup>

to purchase goods on the understanding that if goods proved unsalable plaintiff would take them back at purchase price, and that goods had proved unsalable and he had tendered them back to plaintiff. The goods were purchased in the fall and could not be offered for sale until spring. Note in suit was given in February and payable on demand. Defendant claimed his rights under agreement were reserved when note was given. *Held*, the refusal of the court to allow defendant to prove the above facts to rebut the presumption of settlement arising from the giving of the note, on the ground that by so doing he would be contradicting written note by parol evidence, was error. In this case it was held that the evidence was admissible under the counter-claim, but not as a mere defense to the note. *Clement, Bane & Co. v. Houck*, 113 Iowa 504, 85 N. W. 765.

It may be shown by other evidence that such note was not given on settlement or that unsettled accounts existed when note was given. *Kirchner v. Lewis*, 27 Ind. 22; *Bofandick v. Raleigh*, 11 Ind. 136. "It is a question of intention." *Carlton v. Buckner*, 28 Ark. 66.

**Presumption. — What Sufficient to Rebut.**—Presumption may be repelled by proof of the consideration of such note, and of the occasion for and circumstances surrounding the giving of the same. *Held*, that proof that note was mere accommodation note given by defendant to plaintiff for benefit of another to whom plaintiff would not loan amount of note without security, but did so when defendant signed, was sufficient to overcome presumption. *Sherman v. McIntyre*, 7 Hun (N. Y.) 592.

**Promissory Note. — Receipt in Full Embodied in Same.**—Where a receipt in full is embodied in a promissory note, it is open to explanation the same as if it were a separate instrument. *Smith v. Holland*, 61 N. Y. 635.

**Promissory Note. — Evidence of Additional Facts.**—When presumption becomes conclusive, where in action on note defendant pleads prior note and account as set-off, the mere giving of the note in suit is *prima facie* evidence of settlement of all demands covered by set-off, and when to this is added evidence that since execution of note in suit it was shown to defendant, and he then promised to pay it, the presumption becomes conclusive. *Gould v. Chase*, 16 Johns. (N. Y.) 226.

**16.** *Blake v. Krom*, 36 N. Y. St. 83, 13 N. Y. Supp. 335; *Campbell Prtg. P. & Mfg. Co. v. Yorkston*, 10 Misc. 780, 32 N. Y. Supp. 263.

"Not merely by an appearance of probabilities, but clearly by the preponderance of the evidence." *Bailey v. Wood*, 24 Ky. L. Rep. 801, 69 S. W. 1,103; *McElhany v. People*, 1 Ill. App. 550.

Mere fact that person who gave receipt in full had claim larger than amount of balance paid, and that he says that settlement did not include item because of his carelessness or want of recollection is not sufficient to overthrow presumption. *McDonald v. Piper*, 193 Pa. St. 312, 44 Atl. 455.

**Promissory Note. — Presumption of Settlement. — What Not Sufficient to Rebut.**—Fact that evidence shows note was given for a loan of money does not rebut presumption of settlement of accounts. *Proctor v. Thompson*, 13 Abb. N. C. (N. Y.) 340.

**Presumption from Note. — What Does Not Rebut.**—Evidence that four months before the "rent" note in suit was given, a contract was made by which payee (landlord) agreed that maker (tenant) should have certain repairs done on premises, the cost thereof to come out of rent, and that defendant did make such repairs, does not rebut the presumption that the giving or execution of the note was a settlement in full of all accounts to its date. *Broughton v. Thornton*, 50 Ga. 568.

## IV. BURDEN OF PROOF.

1. **Where Settlement Itself Attacked.** — Where the alleged compromise and settlement is attacked for fraud, accident or mistake, the burden is on party assailing settlement to prove such fraud or other grounds of avoidance, by preponderance of evidence.<sup>17</sup>

2. **Whether Disputed Claim Was Included in Settlement Had.** The party asserting that a certain claim of anterior date was not included in a settlement of accounts had between the parties has the burden of proving the fact.<sup>18</sup>

3. **When Settlement Was With Agent.** — Where party claims a settlement in full which was had with agent of adverse party, burden is upon party claiming settlement to show agent's authority to make the settlement.<sup>19</sup>

## V. SUFFICIENCY OF THE EVIDENCE TO PROVE AND THE EFFECT THEREOF.

1. **In General.** — The question of the sufficiency of the evidence to prove an alleged compromise and settlement, or as to whether a

17. **Fraud or Mistake.** — *Home Fire Ins. Co. v. Bredehoft*, 49 Neb. 152, 68 N. W. 400; *Bailey v. Wood*, 24 Ky. L. Rep. 801, 69 S. W. 1,103; *Williams v. Dean*, (Tex. Civ. App.), 38 S. W. 1,024; *Rodgers v. Davenport*, 47 N. C. 138; *Hurd v. Blockman*, 19 Conn. 177; *Fuller v. Crittenden*, 9 Conn. 401; *Chubbuck v. Ver-nam*, 42 N. Y. 432.

**Duress.** — *Comer v. Illinois Car & Equipment Co.*, 107 La. 179, 32 So. 380.

Party claiming fraud or mistake in settlement has burden of proving by clear evidence the particular facts wherein such fraud, accident, or mistake consists. *Colwell v. Caperton*, 27 W. Va. 397.

18. *Perry v. Roberts*, 17 Mo. 36; *Wagner v. Ladd*, 38 Neb. 161, 56 N. W. 891; *Campbell Prtg. P. & Mfg. Co. v. Yorkston*, 10 Misc. 780, 32 N. Y. Supp. 263; *Van Buren v. Wells*, 19 Wend. (N. Y.) 203; *Sewell v. Mead*, 85 Iowa 343, 52 N. W. 227; *Tank v. Rohweder*, 98 Iowa 154, 67 N. W. 106; *Hedrick v. Bannister*, 12 La. Ann. 373.

Presumption that settlement includes all matters of difference is so strong that it devolves upon party asserting contrary to prove that disputed item was not due or that it

was omitted by consent or accident or unintentionally. *Straubher v. Mohler*, 80 Ill. 23.

General rule as to burden of proof to overcome settlement held not to entitle defendant to an instruction to that effect on account of the wide range proofs had taken. *Hicks v. Leaton*, 67 Mich. 371, 34 N. W. 880.

**When Burden Shifts to Party Claiming Compromise and Settlement.** — Where in a suit on a note an itemized account is pleaded as a set-off, in which account one item is dated later than the note, the defendant may prove all the items of his set-off, and the burden is then on the plaintiff to show that they were settled in the note. This may be done by showing each of the items to have accrued before the date of the note. Date of items in account is not conclusive. *Thornton v. Williams*, 14 Ind. 518.

When burden is on party claiming settlement to show that it includes claim in dispute. See *Watson v. Eldridge*, 83 Mass. 203.

19. *Barker v. Ring*, 97 Wis. 53, 72 N. W. 222.

Possession of note by agent of payee no evidence of authority to compromise note. *Corbet v. Waller*, 27 Wash. 242, 67 Pac. 567.

certain item was included therein, depends on the circumstances of each individual case.<sup>20</sup>

**2. When Evidence Conclusive of Compromise and Settlement.** The agreement itself,<sup>21</sup> or the facts in connection with the transaction and the surrounding circumstances, as shown by the evidence, may be such as to prove a full and final compromise and settlement conclusive on all the parties thereto.<sup>22</sup>

20. Evidence examined and held to prove that a certain alleged settlement of differences did in fact occur. *Canfield v. Robertson*, 8 N. D. 603, 80 N. W. 764; *Roberts v. Dahat*, 27 Misc. 795, 58 N. Y. Supp. 304; *Stout v. Harlem*, 20 Ind. App. 200, 50 N. E. 492.

Evidence examined and held to prove that alleged settlement did not occur. *Western Loan & Savings Co. v. Desky*, 24 Utah 347, 68 Pac. 141.

**Settlement of Damages.—Purchase of Particular Estate in Land by Reversioner** is no evidence that claim for damages which reversioner had against vendor was settled in the purchase. *Dupree v. Dupree*, 49 N. C. 387, 69 Am. Dec. 757.

When evidence merely shows receipt in full given when only a partial payment is made and without new consideration, there is no question of compromise or settlement to submit to jury. *Eve v. Mosely*, 2 Strob. L. (S. C.) 203.

**21. Written Instrument of Settlement.—Effect Thereof.**—An agreement between parties having mutual accounts and cross demands to "relinquish and cancel all book accounts, contracts and demands existing between said parties" must be construed as a settlement in full of all mutual accounts. *Kentucky River Lumber Co. v. Moore-Whipple Lumber Co.*, 24 Ky. L. Rep. 587, 69 S. W. 704.

**Construction of Written Instrument.—Settlement of Single Transaction.—Effect of Clause Therein Covering All Matters Between Parties.**—Plaintiff contracted to purchase stock from defendant and to pay for same in installments. Thereafter, the installments having been paid so far as matured, defendant asked plaintiff to advance \$1000 on contract, which plaintiff declined, but

which sum he loaned defendant and took defendant's note therefor. Plaintiff continued to pay installments, though there were negotiations about applying amount of note on contract, but it was not so applied. Contract was thereafter terminated and settled by agreement which related solely to the purchase of the stock, but it ended thus: "It is further agreed that from and after this date no indebtedness exists in favor of either of said parties against the other." *Held*, that such general words were controlled in effect by the general tenor of the instrument and that the note was not included in the settlement. *Basset v. Lawrence*, 193 Ill. 494, 61 N. E. 1,098.

**Construction of Written Instrument.**—An instrument worded "Received of M. H. the amount in full of all claims and demands I have against him, and he is now entitled to all property I have . . . in consideration of his giving up to me all notes and accounts which he holds against me at this time. . . ." was held to be not merely a receipt but a contract of settlement. Parol evidence cannot be permitted to contradict. *Bird v. Hueston*, 10 Ohio St. 418.

Receipt in full given on settlement is conclusive against any further claim by party giving it in absence of fraud or mistake. *Hurd v. Blockman*, 19 Conn. 177; *Fuller v. Crittenden*, 9 Conn. 401; *Comer v. Illinois Car & Equipment Co.*, 107 La. 179, 32 So. 380, 90 Am. St. Rep. 285.

22. Evidence examined and held to show that a settlement reached was a complete compromise and settlement precluding assertion of further claims. *Daily v. Saginaw Bldg. & Loan Ass'n*, (Mich.), 95 N. W. 326; *The Mascotte*, 72 Fed. 684.

## VI. SETTING ASIDE OR AVOIDING SETTLEMENT.

**1. Admissibility.** — A. IN GENERAL. — Where an alleged compromise and settlement is attacked on the ground of fraud or mistake, all the facts and circumstances attending the alleged settlement are proper subjects of inquiry.<sup>23</sup>

B. WHAT EVIDENCE NOT ADMISSIBLE. — a. *When Compromise and Settlement is Conclusive.* — Where a valid settlement of a pend-

Where, after a dispute over accounts, A objects to bill presented by B and makes out new one for reduced amount, which amount is received and new bill receipted by B, this is sufficient to show settlement of dispute binding on parties. *Union Pac. R. Co. v. Anderson*, 2 Colo. 293, 18 Pac. 24.

Facts held to constitute *contract of compromise and settlement conclusive* on parties. *Pruden v. Asheboro & M. R. Co.*, 121 N. C. 509, 28 S. E. 349.

**Settlement of Prior Action Between Other Parties. — When Conclusive.** — Where in action by corporation, defendant sets off the debt of a third person, claiming that it was incurred by said third person as agent for corporation, and cause was subsequently by written stipulation "settled in full and dismissed," said debt is extinguished as against said third person by said settlement, and defendant cannot sue said third person on it. *Case v. Phillips*, 182 Ill. 187, 55 N. E. 66.

Rule is different if evidence simply shows that prior action was simply *discontinued*, under an executory agreement which has not been performed. *Jacob v. Marks*, 183 Ill. 533, 56 N. E. 154; *affirmed*, *Jacob v. Marks*, 182 U. S. 583.

**Offer of Compromise. — Acceptance Of. — Sufficiency.** — Where amount of attorney's fee is disputed and attorney, by letter, offers compromise by which defendant is to pay \$500 in cash and balance in notes, and defendant is satisfied and writes: "I will endeavor to send \$500 this month and my notes for the balance," and defendant at various times thereafter, in response to letters, writes that he would settle matter as soon as he could. *Held*, facts show acceptance of offer of com-

promise and defendant was bound thereby. *Cunningham v. Patrick*, 136 Mo. 621, 37 S. W. 817.

**Suit in Ejectment. — Compromise Of. — When Conclusive.** — If, after ejectment brought, parties compromise same by defendant purchasing plaintiff's title and securing purchase price by mortgage, upon which judgment is afterwards obtained and property sold thereunder. *Held*, in a subsequent suit in ejectment brought against defendant, he will not be permitted to defend himself by some evidence which he might have produced in original suit. Compromise is inclusive. *Bennet v. Paine*, 5 Watts (Pa.) 259.

**23. McAllister v. Engle**, 52 Mich. 56, 17 N. W. 694.

**Settlement of Action. — Credit on Note. — What Evidence Admissible to Avoid.** — Where, in settlement of a *groundless* suit for slander, the defendant B allows a credit of \$900 on a note held by him against the plaintiff, in an action afterwards brought on the note by B against A it is proper for B to prove that he had been drunk the greater part of the time for a period of several weeks while he was stopping at A's house, during which period said settlement was had, and also that the alleged slanderous words were the truth. This evidence tended to prove fraud in the alleged settlement. *Foss v. Hildreth*, 10 Allen (Mass.) 76.

**Setting Aside Settlement.** — Where a settlement with plaintiff, personally, of a suit in which an attorney has appeared for plaintiff, is pleaded by defendant as a defense, and plaintiff claims fraud in such settlement, an agreement between said plaintiff's attorney in said former suit and himself whereby it was agreed that no assignment, sale or transfer of any interest in the claims of plaintiff

ing law suit is had between debtor and creditor, after long deliberation, and a note is given for the balance found due thereon, the creditor cannot show that his claim was larger, nor can debtor show his indebtedness was smaller, than that mentioned in the settlement.<sup>24</sup>

b. *Where the Settlement is an Absolute Release, Mutual and in Writing.* — Where the settlement is mutual, and in writing, and is an absolute release of all claims by each of the parties, parol evidence is not admissible to limit its effect, or to show what was or was not included, in the absence of fraud or mistake.<sup>25</sup>

C. CHARACTER OF EVIDENCE. — In order to justify the court in setting aside or reforming a compromise and settlement on the ground of fraud or mistake, the fraud or mistake must be made out

in said suit should be made by plaintiff, and that the proceeds when collected should be distributed to the assignors, by whom they were assigned to plaintiff for collection, under the supervision and control of said attorney, and also a written notice of said attorney's lien which had been filed in said former suit, are admissible to show that defendant during the negotiations for said alleged settlement had full notice of the limited capacity in which plaintiff was acting, it appearing that defendant had knowledge of the execution of these instruments before the alleged settlement. *Falconio v. Larsen*, 31 Or. 137, 48 Pac. 703.

**Compromise of Litigation.** — Evidence of representations and transactions leading up to, is admissible to prove, fraud in same. *Alderson v. Aiken*, (Tenn.), 52 S. W. 741.

**Duress by Attorney.** — **Evidence of Attorney's Interest in Settlement.** Where plaintiff claims that he was forced into settlement by duress and threats made by defendant and his attorney employed in the transaction, it was held proper for plaintiff to show amount defendant paid said attorney for fees in the transaction, as bearing on attorney's interest in forcing settlement. *Landa v. Obert*, 5 Tex. Civ. App. 620, 25 S. W. 342.

**Settlement With Deceased.** — **Admissions of Before Death.** — Where the issue is whether a final settlement was had between plaintiff and defendant's testator prior to his death, evidence showing indebtedness of testator to plaintiff and of testator's admissions thereof a short time prior

to his death is admissible. *Kendall v. Collier*, 97 Ky. 446, 30 S. W. 1,002.

**Compromise of Judgment.** — **Fraud Practiced on Attorney for Judgment Creditor Is Sufficient.** — It need not be shown that party would not have compromised had he known truth himself. *Ross v. Seaver*, (Tenn.), 52 S. W. 903.

**Settlement.** — **Defense of Duress.** **What Evidence Inadmissible to Prove.** — **Hearsay.** — Evidence that third persons told plaintiff that defendant threatened to have her arrested unless she made settlement is inadmissible to prove duress without proof that defendant authorized or ratified statements. *Boydan v. Habersumpf*, 129 Mich. 137, 88 N. W. 386.

Evidence of situation of parties and to such matters of fact as will put court in position of the parties at the time is admissible. *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666.

24. *Power v. Hambrick*, (Ky.), 74 S. W. 660.

Evidence of the difference in value of former demand and claims of defendant, and his rights and claims under the compromise agreement, is immaterial and inadmissible on question of fraud in compromise. *Long v. Robinson*, 5 La. Ann. 627.

25. *Freeman v. Freeman*, 68 Mich. 28, 35 N. W. 897; *Lanzon v. Bellemmer*, 108 Mich. 444, 66 N. W. 345.

Same rule applies where settlement consists of mutual receipts in full for all debts, dues and demands to this date. Parol evidence of contemporaneous agreement that certain items were not included is inad-

in the most clear and unequivocal manner, by strong and satisfactory evidence.<sup>26</sup>

**2. Weight and Sufficiency of the Evidence.** — Whether the evidence is or is not sufficient to show that compromise and settlement was obtained by fraud or mistake, and should be set aside, depends on facts of each individual case.<sup>27</sup> Question is for jury when evidence is conflicting.<sup>28</sup>

## VII. COMPOSITION WITH CREDITORS.

**1. Meaning or Effect of Agreement.** — A. WHEN EVIDENCE INADMISSIBLE TO EXPLAIN. — When composition agreement is clear and unambiguous, parol testimony is not admissible to explain it or to show what effect it was intended to have.<sup>29</sup> But where the agree-

missible. *Pratt v. Castle*, 91 Mich. 484, 52 N. W. 52; *Paige v. Akins*, 112 Cal. 401, 44 Pac. 666.

<sup>26</sup> *Hall v. Clagett*, 2 Md. Ch. 151.

Where settlement has been acquiesced in for five years it will not be disturbed except upon strong proof of fraud. *Nevian v. New Albany Ice Co.*, 24 Ky. L. Rep. 400, 68 S. W. 64.

He must show wherein mistake consisted, point it out distinctly and furnish data by which it could be corrected. *Chubbuck v. Vernam*, 42 N. Y. 432.

**What Not Sufficient.** — Testimony that party, when he signed the release in full, was hard up, hungry; that paper was not read to him; that he thought he was signing a simple receipt, is insufficient to prove fraud. *Williams v. Wilson*, 75 N. Y. St. 451, 40 N. Y. Supp. 1,132.

Evidence of fraud must be clear and persuasive. *Chicago & A. R. Co. v. Greene*, 114 Fed. 676.

Unsupported statement of party that important clause was omitted, without which his agent had no authority to sign compromise agreement, is insufficient. *Wright v. Durrett*, (Tenn.), 52 S. W. 710.

**Exception.** — **Where Confidential Relations** exist between the parties, slight evidence of fraud is sufficient to authorize submission of issue of fraud in the settlement to the jury. *Williams v. North Pac. Lumber Co.*, (Or.), 70 Pac. 387.

<sup>27</sup> For cases where evidence was examined and held sufficient to justify a finding that settlement was

obtained by fraud, see *Bussian v. Milwaukee L. S. & W. R. Co.*, 56 Wis. 325, 14 N. W. 452. (Settlement of damages for injuries.) *Ross v. Seaver*, (Tenn.), 52 S. W. 903 (compromise of judgment induced by fraudulent representations as to judgment debtor's financial condition.)

For cases holding evidence insufficient to justify setting aside of compromise and settlement on ground of fraud or mistake, see *Bennett v. Walker*, 100 Ill. 525 (Attorney and Client); *Wright v. Durrett*, (Tenn.), 52 S. W. 710 (Compromise of Action, Mistake); *Gladish v. Pennsylvania Co.*, 107 Fed. 61 (Settlement of Damages for Injuries — Defense Misrepresentations); *Boatright v. Enewold*, 49 Neb. 254, 68 N. W. 472 (Settlement of suit gone to judgment (held, evidence did not prove duress); *Johnson v. Chicago, R. I. & P. R. Co.*, 107 Iowa 1, 77 N. W. 476 (held, no fraud proven in settlement of damages for injuries).

<sup>28</sup> *Abrams v. Los Angeles Trac-tion Co.*, 124 Cal. 411, 57 Pac. 216.

<sup>29</sup> Where agreement recited "Whereas, H. & Son are indebted to the undersigned, their several creditors, in divers amounts . . . Now therefore we" etc., it was held that parol testimony was inadmissible to prove that instrument was not to be binding until signed by all creditors, some of whom did not sign. *Strickland v. Harger*, 16 Hun (N. Y.) 465.

Where, by written composition, creditors agree to take and accept a

ment itself or the circumstances surrounding its execution and performance are complex and uncertain, such evidence has been held admissible.<sup>30</sup>

**B. WHAT EVIDENCE SUFFICIENT TO PROVE.** — *a. Character of Evidence.* — **Writing not Necessary.** — An oral agreement between a debtor and his creditors to compound and discharge their claims and demands against him is valid.<sup>31</sup>

*b. Weight of Evidence.* — The weight or sufficiency of the evidence to prove that the composition agreement released all the debts, or as to whether any certain debt was released by it, depends on the circumstances of each individual case.<sup>32</sup>

certain per cent. on each and every dollar owing by defendants whether due or not, in an action afterwards brought on note in existence at settlement it is not competent to prove a parol agreement that the note was not to be included in composition, for that would contradict writing and would be a fraud on other creditors. *Perry v. Armstrong*, 39 N. H. 583.

**30.** Where holders of debtor's note signed composition agreement with debtor by which they agreed to accept 50 per cent. of their claim in full, and they subsequently surrendered note to third person for debtor's notes for 50 per cent. of claim indorsed by third person, under an agreement with debtor by which he agreed to pay firm's liabilities under composition agreement, and indemnify himself out of firm property, it was held that testimony of creditors as to their understanding of agreement between debtor and third person was admissible to rebut any presumption which might be drawn from their unexplained signatures to composition agreement, that agreement with third person was not a part of composition agreement. *Cobb v. Fogg*, 166 Mass. 466, 44 N. E. 534.

Debt of individual on note may be shown to be released by composition agreement with partnership debtor. *Baxter v. Bell*, 86 N. Y. 195.

**31.** *Chem. Nat. Bank v. Kohner*, 85 N. Y. 189, 39 Am. Rep. 649; *Fellows v. Stevens*, 24 Wend. (N. Y.) 294; *Halstead v. Ives*, 57 N. Y. St. 125, 25 N. Y. Supp. 1,058.

**32.** For cases where facts examined and held sufficient to consti-

tute and prove valid and binding composition with creditors, see *Continental Bank v. McGeoch*, 92 Wis. 286, 66 N. W. 606; *Murchie v. McIntire*, 40 Minn. 331, 42 N. W. 348.

Where one partner, A, withdraws from firm of four, A, B, C and D, and executes quit-claim deed of his interest in firm real estate (which stands on record in name of B and C, individually,) to B and C, who took such conveyance for benefit of firm, and A receives as consideration certain cash and individual note of B and C secured by mortgage on said real estate for balance, and firm continues, and pays considerable on note, and finally, becoming insolvent, they make composition agreement with creditors, which A signs as a creditor in a certain sum which he considered would be the amount of his deficiency under the mortgage; held, in action to foreclose mortgage against B and C individually that composition agreement was admissible and that it was a bar to and final discharge of any deficiency judgment against B or C; the debt of B and C on the note and mortgage being practically a firm debt. *Baxter v. Bell*, 86 N. Y. 195.

Where, to prove release of claim sued on, defendant introduces a written agreement signed by plaintiff and five other creditors stating, "We, the undersigned, agree to take 50 per cent. of the amount due us, in full, for account against" defendant, there being no proof of any agreement or offer by defendant, it was held that agreement was void for want of mutuality and consideration. The additional fact that before suit defendant offered plain-

**2. Setting Aside or Avoiding Composition Agreement.** — A WHEN AGREEMENT IS EXECUTORY OR CONDITIONAL. — a. *What Evidence Admissible.* — Where, in consideration of the performance by debtor of certain acts in the future, or on some other conditions, his creditors agree in writing to release him from their claims, parol evidence that the conditions have not been fulfilled, or that debtor has failed to perform agreement, is admissible in suit against debtor, in which he pleads the release, and non-performance being proven, the release is not good as a bar.<sup>33</sup>

b. *Burden of Proof.* — Where defense to a suit on a note or other obligation is a composition agreement with creditors, including plaintiff, burden of proof is on defendant to prove a strict performance of the terms and conditions of the agreement, in order to give it any effect.<sup>34</sup> But if agreement on its face appears to be a complete and absolute release from plaintiff to defendant, burden is on plaintiff to show that it was given on conditions which have not been complied with by defendant.<sup>35</sup>

**B. WHEN AGREEMENT IS ABSOLUTE RELEASE FOR A CONSIDERATION PAID.** — If the written composition agreement with creditors contains an absolute release of each and all of the claims and de-

tiff a draft for 50 per cent. of his claim, which defendant did not accept, does not constitute a settlement under Maine Rev. Stat. C. 82, § 38, which makes the settlement "by a creditor of a demand by the receipt of money or other valuable consideration, however small," a defense suit on demand, evidence showing draft was not accepted or received by plaintiff. *Webb v. Stuart*, 59 Me. 356.

**Evidence of Acts Subsequent to Alleged Composition.** — On an issue as to whether creditor had entered into composition and thereby released debt of defendant on note in suit, evidence that long after date of alleged composition, debtor had authorized creditor to sell bonds belonging to creditor, to secure the note, and had directed proceeds of such sale to be applied as part payment on said note, is admissible in support of creditor's claim that he had never entered into any such composition agreement. *Halstead v. Ives*, 57 N. Y. St. 125, 25 N. Y. Supp. 1,058.

<sup>33.</sup> *Meyer v. McKee*, 19 Ill. App. 109.

Where written release of debts, although in terms an absolute release

from plaintiff to defendant, is preceded by the printed words "Conditional Release" as a heading, it is competent for plaintiff to prove by parol that said release was given on express condition that it was to be binding only in the event that all the creditors consented to the agreement under which said release was given. *Tutt v. Price*, 7 Mo. App. 194.

Evidence that composition agreement was not signed by all creditors who were by its terms to sign it before it became binding is sufficient to render it void. *Lower v. Clement*, 25 Pa. St. 63.

Where defense to composition is that defendant has not complied with its provisions it is error to refuse plaintiff's offer to prove facts showing such non-compliance. So held in case where agreement provided for securing plaintiff 50 per cent. of his claim by preference, after securing *confidential debts to the amount of \$50,000*. Plaintiff offered to show that the \$50,000 of debts actually secured as *confidential* were not in fact confidential debts. *Smythe v. Graydon*, 29 How. Pr. (N. Y.) 11.

<sup>34.</sup> *Lower v. Clement*, 25 Pa. St. 63.

<sup>35.</sup> *Tutt v. Price*, 7 Mo. App. 194.



mands for a consideration then paid by debtor, parol evidence is inadmissible to show that a particular debt was not intended to be, or was not actually included in agreement,<sup>36</sup> or that release was not to be binding until signed by all creditors, some not having signed,<sup>37</sup> or that a secret preference was given to a certain creditor.<sup>38</sup>

C. WHERE FRAUD IS ALLEGED. — Where the composition agreement is attacked by a creditor on the ground of fraud, evidence tending to show fraud in the execution of such agreement or in the negotiations leading up to it, is admissible.<sup>39</sup>

36. *Meyer v. McKee*, 19 Ill. App. 109.

37. Where written release executed by certain creditors for valuable consideration then paid purported to be absolute and unconditional, evidence to the effect that it was to be binding only in case all of debtor's creditors signed and that all did not sign is inadmissible. *Van Bokkelen v. Taylor*, 62 N. Y. 105; *Ramsdell v. Edgerton*, 8 Metc. (Mass.) 227, 41 Am. Dec. 503.

38. Testimony that defendant represented to witness (creditor) that all creditors had agreed to sign and that witness had executed release with that understanding, or that one creditor had been paid a greater percentage, without knowledge of others, held inadmissible, because agreement was absolute release by each creditor for certain definite amount of his claim which witness had received. *Smith v. Stone*, 4 Gill & J. (Md.) 310.

39. **Fraudulent Representations. Pecuniary Condition of Debtor.** Parol evidence that a written composition by which creditor relinquished part of his claim was made in consequence of debtor's fraudulent representations as to his pecuniary condition, he representing himself to be worth much less than he really was, is admissible. *Jamison v. Ludlow*, 3 La. Ann. 492.

Evidence showing that shortly after (17 months) composition with creditors defendant purchased property of considerable value is admissible as tending to prove that defendant had property at date of composition which he did not apply to payment of his debts. *Blodgett v. Webster*, 24 N. H. 91.

Where the debtors were partners,

statements of one of them made while negotiations for composition were pending, and tending to show fraud in same are admissible. *Pierce v. Wood*, 23 N. H. 519.

**Composition Agreement**, itself, although affecting other creditors not parties to action, is admissible on the question of fraud. *Pierce v. Wood*, 23 N. H. 519.

Where plaintiff seeks to avoid written composition agreement of defendant with his creditors on ground of fraud, parol evidence that before plaintiff signed another creditor signed said agreement only as to a part of his debt, the balance being paid in full by defendant, said creditor thereby receiving a larger percentage of his debt than any other creditor and in violation of the agreement, is admissible to prove fraud. *Cobleigh v. Pierce*, 32 Vt. 788.

**Fraudulent Representation by Written Statement of Financial Condition.** — Where plaintiff claims composition with defendant (debtor) was obtained by fraudulent representations and a written statement of defendant's financial condition given by defendant to plaintiff was shown to have been lost, it was held that a witness who had read the written statement might testify that it agreed with verbal statements which he knows defendant made at the time, and which he noted on a memorandum made by him at the time. He may testify what those verbal statements were by reference to such memorandum, although he is unable to testify from recollection. *Blodgett v. Webster*, 24 N. H. 91.

**Fraud. — Knowledge of by Creditor. — Acquiescence.** — Evidence that party seeking to avoid had full knowledge of acts constituting al-

**D. BY PROOF OF NEW PROMISE.** — In a suit by a creditor to recover one-half of the amount of his claim from the debtor, the other half having been accepted by him in full satisfaction of his claim, under a written composition agreement which plaintiff now claims was void, parol evidence is admissible to prove a new and subsequent promise to pay the amount sued for.<sup>40</sup>

**3. Damages for Breach.** — In an action to set aside, on the ground of fraud, a composition agreement whereby defendant settled with his creditors, including plaintiff, and to recover damages sustained by such fraudulent settlement, evidence as to the value of the property and assets owned by defendant at time of composition is admissible on the question of the amount of damages sustained by plaintiff.<sup>41</sup>

leged fraud before he accepted his share under composition agreement is admissible, and, the knowledge being proven, the settlement is binding on party seeking to avoid it. *Continental Bank v. McGeoch*, 92 Wis. 286, 66 N. W. 606.

**Action by Creditor v. Creditor for Breach of Composition Agreement. What Evidence Inadmissible.**

Where a composition agreement executed by a number of creditors extends time of debtor to pay his debts, and each agreed not to purchase debtor's stock or allow same to be sold with their aid or assistance, and provided a penalty to each of the other creditors for any breach by a creditor; and one of the signers subsequently brought attachment against debtor claiming fraud in composition, and sold his stock on execution.

*Held*, in suit to recover penalty by one creditor against attaching creditor, that records in attachment suit were not admissible to show fraud on part of debtor by which attaching creditor was justified in treating composition as void. *Held* also that said records were admissible to show breach by defendant. *Hill v. Wertheimer-Swartz Shoe Co.*, 150 Mo. 483, 51 S. W. 702.

<sup>40.</sup> *Jamison v. Ludlow*. 3 La. Ann. 492.

<sup>41.</sup> In such case it is competent for defendant to ask a witness whether defendant had property or assets sufficient to pay over 50 cents on the dollar, as this goes right to the question of the amount of damages sustained by plaintiff, the fraud being established. *Whiteside v. Hyman*, 10 Hun (N. Y.) 218.

---

**CONCLUSIONS.** — See Belief; Capacity; Cause; Damages; Expert and Opinion Evidence; Handwriting; Insanity; Intent; Mental and Physical States; Motive; Negligence; Ownership.

# CONCLUSIVE EVIDENCE.

BY CHARLES E. HOGG.\*

## I. DEFINITION, 268

## II. CHARACTER OF CONCLUSIVE EVIDENCE, 268

## III. EVIDENCE CONCLUSIVE FROM ITS INHERENT NATURE, 269

1. *Judgments and Decrees*, 269
2. *Scope and Conclusiveness of Judgment or Decree*, 272
  - A. *Validity and Regularity of Procedure*, 272
3. *Subjects to Which it Extends*, 274
4. *Conclusiveness Not Affected by the Form of the Judgment*, 274
5. *The Rule Includes All Bodies Acting Judicially*, 274
6. *Essentials of Judgment or Decree to Render it Conclusive Evidence*, 274
7. *Persons Not Parties to the Record, When Concluded*, 276
  - A. *Action for Reimbursement by City or Town*, 277
  - B. *Right of Action Over Against a Third Party*, 277
  - C. *In Cases of Indemnity*, 277
  - D. *In Cases of Warranty*, 278
  - E. *Probate of Will*, 279
8. *Conclusiveness of Judgment Against Surety of Defendant*, 280
  - A. *In General*, 280
  - B. *Judgments of Courts of Admiralty*, 281
9. *Foreign Judgments*, 282
10. *Judgments and Decrees in Proceedings for Divorce*, 283
11. *Conclusive Evidence Dependent Upon Contract*, 284

## IV. EVIDENCE CONCLUSIVE UPON THE PRINCIPLE OF PUBLIC POLICY, 285

1. *Acts of Legislation*, 285
2. *Journals of Legislative Bodies*, 287
3. *Conclusiveness of Officer's Return Upon Process*, 288
  - A. *In General*, 288
  - B. *Identity of Party Served*, 288

---

\* Author of "Pleading and Forms," "Equity Principles," and "Equity Procedure."

C. *Conclusiveness of the Return is the Rule Generally Obtaining*, 288

D. *Controverting Return by Plea*, 289

E. *Notice to Take Depositions*, 290

## V. WHEN PARTY CONCLUDED BY HIS OWN EVIDENCE, 290

1. *Impeachment of One's Own Witness*, 290

2. *Admissions Made by a Party to the Suit in His Evidence*, 290

3. *Contradiction of Documentary Evidence*, 291

## VI. RIGHT OF LEGISLATURE TO DECLARE CERTAIN EVIDENCE CONCLUSIVE, 291

1. *General Rule*, 291

2. *Exception to This Rule*, 292

### I. DEFINITION.

Conclusive evidence is that character of evidence which either forbids or dispenses with any ulterior inquiry as to the matter sought to be established by proof.<sup>1</sup>

### II. CHARACTER OF CONCLUSIVE EVIDENCE.

This kind of evidence may consist of presumptions arising from facts already established by the ordinary methods of proof;<sup>2</sup> from the inherent nature of the evidence itself dependent upon positive law or well-established legal principles;<sup>3</sup> or upon the doctrine of public policy and social convenience and safety.<sup>4</sup>

1. 1 Greenl. Ev. (16th ed.) § 15; 1 Rice Ev. 11.

2. *McCagg v. Heacock*, 34 Ill. 476, 85 Am. Dec. 327; *Jones v. Brim*, 165 U. S. 178, 41 L. ed. 677; *Tanner v. Hughes*, 53 Pa. St. 289; *Frost v. Brown*, 2 Bay (S. C.) 133; *Austin v. Bingham*, 31 Vt. 577. See article "PRESUMPTIONS."

3. *Dependent Upon Positive Law.* Wherever the law declares that certain *indicia* are conclusive evidence of fraud, no finding or decree against such conclusive evidence can be sustained. *Billings v. Billings*, 2 Cal. 107, 56 Am. Dec. 319; *Clow v. Woods*, 5 Serg. & R. (Pa.) 275, 9

Am. Dec. 346; *Shattuck v. Knight*, 25 W. Va. 590; *Claflin v. Foley*, 22 W. Va. 434; *Landeman v. Wilson*, 29 W. Va. 702, 2 S. E. 203; *Sheppards v. Turpin*, 3 Gratt. (Va.) 373.

*Dependent Upon the Principles of the Law.*—*Infra* III, and the cases there cited.

4. *U. S. v. Searcey*, 26 Fed. 435; *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512.

Illustration of this part of the foundation of conclusive evidence is found in the principle that every one is presumed to know the law for the purposes of his contracts, and his amenability to the criminal code.

## III. EVIDENCE CONCLUSIVE FROM ITS INHERENT NATURE.

1. **Judgments and Decrees.**—A judgment or decree, as evidence in any other action, suit or proceeding, is conclusive between the parties or their privies of the fact of its rendition;<sup>5</sup> of the obligation of the party to pay the sum of money adjudged against him, or of the amount adjudged or decreed in his favor;<sup>6</sup> a divesting of the right of or title to property when the right or claim thereto has been adjudicated thereby;<sup>7</sup> and of every other matter which it actually adjudicates,<sup>8</sup> as well as all other matters which the parties

See *infra* IV, and the cases cited, as well as the instances there given of that branch of conclusive evidence, and which rest, in the main, upon the doctrine of public policy for the principle or reason of their enforcement.

5. *Buford v. Buford*, 4 Munf. (Va.) 241, 6 Am. Dec. 511; *Faulcon v. Johnston*, 102 N. C. 264, 9 S. E. 394, 11 Am. St. Rep. 737.

**Judgment or Decree Against Personal Representative** is conclusive evidence against the personal estate of his decedent. *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745; *Butterfield v. Smith*, 101 U. S. 570, 25 L. ed. 868; *Tate v. Norton*, 94 U. S. 746, 24 L. ed. 222. But said judgment is not conclusive against the heir at law to whom the real estate has descended, who was not a party to the judgment. *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745. And in some states a judgment against the executors is no evidence whatever against the heirs.

*United States.*—*Deneale v. Archer*, 8 Pet. 528, 8 L. ed. 1,033; *Ingle v. Jones*, 9 Wall. 486, 19 L. ed. 621.

*Alabama.*—*Boykin v. Cook*, 61 Ala. 472.

*Louisiana.*—*Sargent v. Davis*, 3 La. Ann. 353.

*Maryland.*—*Harwood v. Rawling*, 4 Har. & J. 126; *Davis v. Green*, 4 Har. & J. 270; *Birely v. Staley*, 5 Gill & J. 432.

*Mississippi.*—*McCoy v. Nichols*, 4 How. 31.

*New York.*—*Osgood v. Manhattan Co.*, 3 Cow. 612.

*Virginia.*—*Robertson v. Wright*, 17 Gratt. 540; *Brewis v. Lawson*, 76 Va. 36.

*West Virginia.*—*McKay v. McKay*, 33 W. Va. 724, 11 S. E. 213; *Sadler v. Kennedy*, 26 W. Va. 636.

6. *Buford v. Buford*, 4 Munf. (Va.) 241, 6 Am. Dec. 511; *First Nat. Bank v. Huntington Distilling Co.*, 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878; *Ketchum v. Breed*, 54 Wis. 131, 11 N. W. 238; *Dillingham v. Hawk*, 60 Fed. 494, 23 L. R. A. 417; *Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133.

7. *Marsh v. Pier*, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; *Minneapolis Trust Co. v. Eastman*, 47 Minn. 301, 50 N. W. 930; *Steel v. Spencer*, 1 Pet. (U. S.) 559, 7 L. ed. 259; *Smith v. Walker*, 77 Ga. 289, 3 S. E. 256; *Bernard v. Childs*, 7 Dana (Ky.) 19; *Garth v. Everett*, 16 Mo. 490.

8. *Alabama.*—*Wood v. Wood*, 134 Ala. 557, 33 So. 347.

*Arkansas.*—*Ellis v. Clarke*, 19 Ark. 420, 70 Am. Dec. 603; *Peay v. Duncan*, 20 Ark. 85.

*Indiana.*—*Gutheil v. Goodrich*, (Ind.), 66 N. E. 446.

*Iowa.*—*Coffin v. Knott*, 2 Greene 582, 52 Am. Dec. 537.

*Kentucky.*—*Hayden v. Boothe*, 2 A. K. Marsh. 353.

*Maryland.*—*Fridge v. State*, 3 Gill & J. 103, 20 Am. Dec. 463; *Barrick v. Horner*, 78 Md. 253, 27 Atl. 1,111, 44 Am. St. Rep. 283.

*Missouri.*—*Parker v. Straat*, 39 Mo. App. 616.

*Nebraska.*—*Hamilton Nat. Bank v. American L. & T. Co.*, (Neb.), 92 N. W. 189; *Miles v. Ballantine*, (Neb.), 93 N. W. 708.

*New Hampshire.*—*Wingate v. Haywood*, 40 N. H. 437.

*New York.*—*Gardner v. Buckbee*, 3 Cow. 120, 15 Am. Dec. 256; *Bent v. Sternburgh*, 4 Cow. 559, 15 Am. Dec. 402.

*North Carolina.*—*Winslow v.*

to the suit might have litigated as incident thereto and coming within the legitimate purview of the subject matter of the action.<sup>9</sup> As documentary evidence it is conclusive, and cannot be assailed col-

Stokes, 3 Jones L. 285, 67 Am. Dec. 242.

*Pennsylvania*.—Lentz v. Wallace, 17 Pa. St. 412, 55 Am. Dec. 569.

*South Carolina*.—Jones v. Weatherbee, 4 Strob. L. 50, 51 Am. Dec. 653.

*Texas*.—Watson v. Hopkins, 27 Tex. 637; Tadlock v. Eccles, 20 Tex. 782, 73 Am. Dec. 213; Grassmeyer v. Beeson, 18 Tex. 753, 70 Am. Dec. 309.

*Utah*.—Hodson v. Union Pac. R. Co., 14 Utah 402, 47 Pac. 859, 60 Am. St. Rep. 902.

**Pleadable in Bar or Given in Evidence Under the General Issue.** The judgment is conclusive as a plea in bar of the action, or as evidence under the general issue.

*United States*.—Smith v. Kernochen, 7 How. 198, 12 L. ed. 666; The Johnson Co. v. Wharton, 152 U. S. 252, 38 L. ed. 429.

*California*.—Caperton v. Schmidt, 26 Cal. 479.

*Connecticut*.—Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94; Bell v. Raymond, 18 Conn. 91.

*Maryland*.—Whitehurst v. Rogers, 38 Md. 503.

*Michigan*.—Wales v. Lyon, 2 Mich. 276.

*New Hampshire*.—Divoll v. Atwood, 41 N. H. 443; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675.

*New York*.—Wright v. Butler, 6 Wend. 284, 10 L. ed. 1,097.

*Pennsylvania*.—Kilheffer v. Herr, 17 Serg. & R. 319, 17 Am. Dec. 658.

*Tennessee*.—Estill v. Taul, 2 Yerg. 466, 24 Am. Dec. 498; Warwick v. Underwood, 3 Head 238, 75 Am. Dec. 767.

There are some cases which hold that a judgment offered in evidence, and not relied on by special plea in bar of the action, is only *prima facie* evidence of the matters determined by it. Wann v. McNulty, 7 Ill. 355, 43 Am. Dec. 58; Dutton v. Woodman, 9 Cush. (Mass.) 255; Cleaton v. Chambliss, 6 Rand. (Va.) 86; Meiss v. Gill, 44 Ohio St. 253, 6 N. E. 656.

**Failure to Urge Conclusiveness of Judgment as Evidence.**—The omission of the plaintiff to insist upon the conclusiveness of a judgment as evidence until near the close of the trial, and his introduction of other testimony, besides the judgment, to the same point, did not preclude the right to an instruction to the jury that the judgment was conclusive. Carpenter v. Pier, 30 Vt. 81, 73 Am. Dec. 288.

**Judgment of a Justice of the Peace** stands upon the same footing as to its conclusiveness as that of a court of general jurisdiction. Mitchell v. Hawley, 4 Denio (N. Y.) 414, 47 Am. Dec. 260.

9. *United States*.—Beloit (Town) v. Morgan, 7 Wall. 619, 19 L. ed. 205; Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302; Harshman v. Knox Co., 122 U. S. 306, 30 L. ed. 1,152; Werlein v. New Orleans, 177 U. S. 390, 44 L. ed. 817.

*Alabama*.—Bloodgood v. Grasey, 31 Ala. 575; Wittick v. Traun, 25 Ala. 317; Chamberlain v. Gaillard, 26 Ala. 504; Mervine v. Parker, 18 Ala. 241.

*Arkansas*.—Jones v. Terry, 43 Ark. 230; Morris v. Curry, 41 Ark. 75; Ellis v. Clarke, 19 Ark. 420, 70 Am. Dec. 603.

*California*.—People v. San Francisco, 27 Cal. 655; Boston v. Haynes, 23 Cal. 31.

*Connecticut*.—Betts v. Starr, 5 Conn. 550; Appeal of Freeman, 74 Conn. 247, 50 Atl. 748; Huntley v. Holt, 59 Conn. 102, 22 Atl. 34, 21 Am. St. Rep. 71.

*Georgia*.—Hobby v. Bunch, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301.

*Illinois*.—Gross v. People, 193 Ill. 260, 61 N. E. 1,012; Nilson v. Home Bldg. & Loan Ass'n, 96 Ill. App. 235; Baxter v. Thede, 103 Ill. App. 57; Anderson v. West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717; Harmon v. Auditor, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502.

*Indiana*.—Kilander v. Hoover, 111

laterally by parol or other testimony *aliunde* on any ground not affecting the jurisdiction of the court which rendered it,<sup>10</sup> although it may be erroneous, and be such a judgment as ought not to have been rendered by the court.<sup>11</sup> The principle under consideration ap-

Ind. 10, 11 N. E. 796; *Hord v. Bradbury*, 156 Ind. 20, 59 N. E. 27.

*Iowa*.—*Keokuk Gas Light & Coke Co. v. City of Keokuk*, 80 Iowa 137, 45 N. W. 555.

*Kansas*.—*Hentig v. Redden*, 46 Kan. 231, 26 Pac. 701, 26 Am. St. Rep. 91.

*Louisiana*.—*Bonvillain v. Bourg*, 16 La. Ann. 363; *West v. Creditors*, 3 La. Ann. 529.

*Michigan*.—*Finn v. Peck*, 47 Mich. 208, 10 N. W. 202.

*New York*.—*Embury v. Connor*, 3 N. Y. 511, 53 Am. Dec. 325; *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, 1 Am. Dec. 121; *Harris v. Harris*, 36 Barb. 88; *Masten v. Olcott*, 60 How. Pr. 105; *Malloney v. Horan*, 49 N. Y. 111; *Jordan v. Van Epps*, 85 N. Y. 427; *Fairchild v. Lynch*, 99 N. Y. 359, 2 N. E. 20; *Griffin v. Long Island R. Co.*, 102 N. Y. 449, 7 N. E. 735; *In re Stilwell's Estate*, 139 N. Y. 337, 34 N. E. 777; *Pray v. Hegeman*, 98 N. Y. 351; *Smith v. Smith*, 79 N. Y. 634; *Clemens v. Clemens*, 37 N. Y. 74.

*South Carolina*.—*Perkins v. Perkins*, 49 S. C. 563, 27 S. E. 551; *Newell v. Neal*, 50 S. C. 68, 27 S. E. 560; *McDowall v. McDowall*, 1 Bail. 324.

*South Dakota*.—*Howard v. Huron*, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493.

*Texas*.—*Tadlock v. Eccles*, 20 Tex. 782, 73 Am. Dec. 213.

*Vermont*.—*Parkhurst v. Sumner*, 23 Vt. 538.

*Virginia*.—*Wohlford v. Compton*, 79 Va. 333; *Wilcher v. Robertson*, 78 Va. 602; *Hoover v. Mitchell*, 25 Gratt. 387; *Siron v. Ruleman*, 32 Gratt. 215; *McCullough v. Dashiell*, 85 Va. 37, 6 S. E. 610; *Diehl v. Marchant*, 87 Va. 447, 12 S. E. 803.

*West Virginia*.—*Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633; *Pettell v. McCullough*, 49 W. Va. 520, 39 S. E. 199.

*Wisconsin*.—*Pierce v. Kneeland*, 9 Wis. 23; *Danaher v. Prentiss*, 22 Wis. 311; *Hart v. Moulton*, 104 Wis.

349, 80 N. W. 599, 76 Am. St. Rep. 881.

*Wyoming*.—*Graham v. Culver*, 3 Wyo. 639, 29 Pac. 270, 30 Pac. 957, 31 Am. St. Rep. 105.

10. *United States*.—*Union Trust Co. v. Southern I. N. & I. Co.*, 130 U. S. 565, 32 L. ed. 1,043.

*California*.—*Crim v. Kessing*, 89 Cal. 478, 26 Pac. 1,074, 23 Am. St. Rep. 491.

*Georgia*.—*Richardson v. Conn*, 100 Ga. 39, 27 S. E. 978.

*Illinois*.—*Kelly v. People*, 115 Ill. 583, 4 N. E. 644; *Millard v. Marmon*, 116 Ill. 649, 7 N. E. 468.

*Indiana*.—*Lowrey v. Howard*, 103 Ind. 440, 3 N. E. 124.

*Kentucky*.—*Paul v. Smith*, 82 Ky. 451.

*Missouri*.—*Holliday v. Jackson*, 21 Mo. App. 660; *Lewis v. Morrow*, 89 Mo. 174, 1 S. W. 93.

*Nebraska*.—*Roberts v. Flanagan*, 21 Neb. 503, 32 N. W. 563.

*New Jersey*.—*Mount v. Manhattan Co.*, 41 N. J. Eq. 211, 3 Atl. 726.

*Ohio*.—*Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. 132.

*South Carolina*.—*Turner v. Malone*, 24 S. C. 398.

*Texas*.—*Wilkerson v. Schoonmaker*, 77 Tex. 615, 14 S. W. 223, 19 Am. St. Rep. 803.

*West Virginia*.—*Miller v. White*, 46 W. Va. 67, 33 S. E. 332.

11. *California*.—*Wiese v. San Francisco M. F. Soc.*, 82 Cal. 645, 23 Pac. 212, 7 L. R. A. 577; *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172.

*Delaware*.—*Roach v. Martin*, 1 Harr. 548, 27 Am. Dec. 746.

*Georgia*.—*Milner v. Neel*, 114 Ga. 118, 39 S. E. 890.

*Indiana*.—*Doe v. Rue*, 4 Blackf. 263, 29 Am. Dec. 368.

*Minnesota*.—*Ellis's Appeal*, 55 Minn. 401, 56 N. W. 1,056, 23 L. R. A. 287.

*Mississippi*.—*Ex parte Adams*, 25 Miss. 883, 59 Am. Dec. 234; *Cannon v. Cooper*, 39 Miss. 784, 80 Am. Dec. 101.

plies to a judgment of another state duly authenticated, as well as to a domestic judgment.<sup>12</sup> So where the courts of another state have jurisdiction of the subject matter and the parties, no defense is available in an action on such judgment which could have been interposed in such courts.<sup>13</sup> This is due to its conclusiveness as evidence of the highest character of the debt, claim or liability upon which the judgment or decree is founded, and forbids any further inquiry into its merits or justice.<sup>14</sup>

**2. Scope and Conclusiveness of Judgment or Decree.** — A. VALIDITY AND REGULARITY OF PROCEDURE. — The judgment of the court is not only conclusive upon the matters involved in the controversy, but it concludes all inquiry into the validity or regularity of the procedure by which the court reaches its determination, and to all

*Nebraska.* — Doty v. Sumner, 12 Neb. 378, 11 N. W. 464.

*Pennsylvania.* — Hall v. Benner, 1 Pen. & W. 402, 21 Am. Dec. 394; Kase v. Best, 15 Pa. St. 101, 53 Am. Dec. 573.

*South Carolina.* — Hunter v. Ruff, 47 S. C. 525, 25 S. E. 65.

*Virginia.* — Lemmon v. Herbert, 92 Va. 653, 24 S. E. 249.

*West Virginia.* — First Nat. Bank v. Hyer, 46 W. Va. 13, 32 S. E. 1,000.

12. *Alabama.* — Memphis & C. R. Co. v. Grayson, 88 Ala. 572, 7 So. 122, 16 Am. St. Rep. 69; Semple v. Glenn, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894.

*Illinois.* — Welch v. Sykes, 8 Ill. 197, 44 Am. Dec. 689.

*Kentucky.* — Scott v. Coleman, 5 Litt. 349, 15 Am. Dec. 71.

*Louisiana.* — West Feliciana R. Co. v. Thornton, 12 La. Ann. 736, 68 Am. Dec. 778.

*Massachusetts.* — Harrington v. Harrington, 154 Mass. 517, 28 N. E. 903.

*Nebraska.* — Keeler v. Elston, 23 Neb. 310, 34 N. W. 891.

*New Jersey.* — Barnes v. Gibbs, 31 N. J. L. 317, 86 Am. Dec. 210.

*New York.* — Teel v. Yost, 128 N. Y. 387, 28 N. E. 353.

*North Carolina.* — McClure v. Ben-  
ceni, 2 Ired. Eq. 513, 40 Am. Dec. 437.

*Ohio.* — Spencer v. Brockway, 1 Ohio 259, 13 Am. Dec. 615.

*Pennsylvania.* — Merchants' Ins. Co. v. De Wolf, 33 Pa. St. 45, 75 Am. Dec. 577; Baxley v. Linah, 16 Pa. St. 241, 55 Am. Dec. 494.

*Virginia.* — Buford v. Buford, 4 Munf. 241, 6 Am. Dec. 511.

**Effect of Decree of Divorce Rendered by Court of Sister State on Constructive Service of Process.** Hood v. State, 56 Ind. 263, 26 Am. Rep. 21, and note pp. 27-33.

13. Packer v. Thompson, 25 Neb. 688, 41 N. W. 650; Sayre v. Harpold, 33 W. Va. 553, 11 N. E. 16; Buford v. Buford, 4 Munf. 241, 6 Am. Dec. 511; Scott v. Coleman, 5 Litt. (Ky.) 349, 15 Am. Dec. 71.

As to the extent to which inquiry may go as to the jurisdiction of the foreign court, see Bartlet v. Knight, 1 Mass. 401, 2 Am. Dec. 36, and note pp. 42-47; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21, and note pp. 27-33. See also Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742, and note pp. 762-770.

14. *United States.* — McElmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177.

*Florida.* — Drake v. Granger, 22 Fla. 353.

*Illinois.* — Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202.

*Indiana.* — Davis v. Lane, 2 Ind. 548, 54 Am. Dec. 458.

*Maryland.* — Duvall v. Fearson, 18 Md. 502.

*New York.* — Reich v. Cochran, 151 N. Y. 122, 45 N. E. 367, 56 Am. St. Rep. 607.

*Virginia.* — Martin v. S. S. L. Co., 94 Va. 28, 26 S. E. 591.

*West Virginia.* — First Nat. Bank v. Huntington Distilling Co., 41 W. Va. 530, 23 S. E. 792, 56 Am. St. Rep. 878; Bensimer v. Fell, 35 W.



facts essentially relating thereto or connected therewith.<sup>15</sup>

**Illustrations.** — Thus, evidence *aliunde* is not admissible to impeach the record of naturalization by showing that the preliminary steps necessary to the adjudication were not taken.<sup>16</sup> So in an action upon a domestic judgment for costs, in the state where it was rendered, and between citizens of that state, proof that the action in which it was rendered was prosecuted by an attorney without authority, and without the knowledge of the party for whom he assumed to act, is inadmissible to impeach the judgment.<sup>17</sup> So in many states the validity of a domestic decree or judgment cannot be collaterally attacked, for the purpose of destroying the jurisdiction of the court, by proof of want of service of process.<sup>18</sup>

Va. 15, 12 S. E. 1,078, 29 Am. St. Rep. 774.

15. *United States*. — *Cornett v. Williams*, 20 Wall. 250, 22 L. ed. 254; *In re Lennon*, 166 U. S. 553, 41 L. ed. 1,110; *Maxwell v. Stewart*, 21 Wall. 73, 22 L. ed. 564; *Gunn v. Plant*, 94 U. S. 669, 24 L. ed. 304; *Stoitt v. Lye*, 103 U. S. 66, 26 L. ed. 428; *Harshman v. Knox Co.*, 122 U. S. 306, 30 L. ed. 1,152.

*Alabama*. — *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.

*California*. — *In re Warfield*, 22 Cal. 51, 83 Am. Dec. 49.

*Georgia*. — *McDade v. Burch*, 7 Ga. 559, 50 Am. Dec. 407.

*Illinois*. — *People v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254; *Bimeler v. Dawson*, 5 Ill. 536, 39 Am. Dec. 430.

*Louisiana*. — *Brewing Ass'n v. McGowan*, 49 La. Ann. 630, 21 So. 766.

*Michigan*. — *Waldron v. Palmer*, 104 Mich. 556, 62 N. W. 731.

*Nebraska*. — *State v. Hopewell*, 35 Neb. 822, 53 N. W. 990; *Chicago, B. & Q. R. Co. v. Anderson*, 38 Neb. 112, 56 N. W. 794.

*Pennsylvania*. — *Tarbox v. Hays*, 6 Watts 398, 31 Am. Dec. 478.

*West Virginia*. — *Blake v. Ohio River R. Co.*, 47 W. Va. 520, 35 S. E. 953.

*Wisconsin*. — *State v. McDonald*, 108 Wis. 8, 84 N. W. 171, 81 Am. St. Rep. 878.

16. *People v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254; *Stark v. Chesapeake Ins. Co.*, 7 Cranch (U. S.) 420, 3 L. ed. 391; *Ritchie v. Putnam*, 13 Wend. (N. Y.) 524; *McCarthy v. Marsh*, 5 N. Y. 284; *Com. v. Towles*, 5 Leigh (Va.) 743; *Mc-*

*Lane v. Moore*, 6 Jones L. (N. C.) 520.

17. *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 Am. Dec. 665.

18. *Alabama*. — *Lightsey v. Harris*, 20 Ala. 409.

*California*. — *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

*Connecticut*. — *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 556, 73 Am. Dec. 688; *Coit v. Haven*, 30 Conn. 190.

*Louisiana*. — *Dufour v. Camfranc*, 11 Mart. 607, 13 Am. Dec. 360.

*Maine*. — *Granger v. Clark*, 22 Me. 128.

*Maryland*. — *McDowell v. Goldsmith*, 6 Md. 319, 61 Am. Dec. 305.

*Massachusetts*. — *Cook v. Darling*, 18 Pick. 393; *Finneran v. Leonard*, 7 Allen 54, 83 Am. Dec. 665.

*Michigan*. — *Wilcox v. Kassick*, 2 Mich. 165.

*Missouri*. — *McDonald v. Lee-wright*, 31 Mo. 29.

*Nebraska*. — *Johnson v. Jones*, 2 Neb. 126.

*Ohio*. — *Callen v. Ellison*, 13 Ohio St. 446.

*Pennsylvania*. — *Tarbox v. Hays*, 6 Watts 398, 31 Am. Dec. 478.

**A Contrary Doctrine to That Stated in the Text Is Laid Down in the Following Cases:** *Adams v. Saratoga & Wash. R. R. Co.*, 10 N. Y. 328; *Bolton v. Jacks*, 6 Rob. (N. Y.) 166; *Porter v. Bronson*, 29 How. Pr. 292; *Tebbetts v. Tilton*, 31 N. H. 273; *Sanborn v. Fellows*, 22 N. H. 473; *Dutton v. Smith*, 10 App. Div. 566, 42 N. Y. Supp. 80; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589.

**3. Subjects to Which it Extends.** — A judgment or decree as one of the forms of conclusive evidence extends to everything which may become the subject of legal controversy or adjudication, and may be invoked as the highest and most solemn mode of proof touching the matter to which it relates.<sup>19</sup>

**4. Conclusiveness Not Affected by the Form of the Judgment.** The rule is not affected by the form of the judgment or decree, whether upon demurrer,<sup>20</sup> by default,<sup>21</sup> or upon full trial or hearing.<sup>22</sup> Its conclusiveness is practically the same in every instance.<sup>23</sup>

**5. The Rule Includes All Bodies Acting Judicially.** — The rule making an adjudication of a matter in controversy conclusive evidence of the fact or subject to which such adjudication relates, extends to all courts and other bodies acting in a judicial capacity.<sup>24</sup>

**6. Essentials of Judgment or Decree to Render It Conclusive Evidence.** — It is a general rule that a judgment or decree can only be made conclusive against the parties to it and their privies,<sup>25</sup> and when

19. *California*. — Kellogg v. Cochran, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104.

*Iowa*. — Bowen v. Port Huron E. & T. Co., 109 Iowa 255, 80 N. W. 345, 47 L. R. A. 131.

*Kansas*. — Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258.

*Massachusetts*. — Sly v. Hunt, 159 Mass. 151, 34 N. E. 187, 21 L. R. A. 680.

*Minnesota*. — Minnesota L. & T. Co. v. Beebe, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418.

*New York*. — Trustees of Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305.

*North Carolina*. — Spencer v. Creddie, 102 N. C. 68, 8 S. E. 901.

*South Dakota*. — Howard v. Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493.

20. *United States*. — Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. ed. 416.

*Arkansas*. — Luttrell v. Reynolds, 63 Ark. 254, 37 S. W. 1,051.

*Colorado*. — Schroers v. Fisk, 10 Colo. 599, 16 Pac. 285.

*Connecticut*. — Brennan v. Berlin Co., 71 Conn. 479, 42 Atl. 625.

*Indiana*. — Nickless v. Pearson, 126 Ind. 477, 26 N. E. 478.

*Kansas*. — McLaughlin v. Doane, 40 Kan. 392, 19 Pac. 853, 10 Am. St. Rep. 212.

*Minnesota*. — Carlin v. Bracket, 38 Minn. 307, 37 N. W. 342.

*Texas*. — Bomar v. Parker, 68 Tex. 435, 4 S. W. 599.

*Washington*. — Plant v. Carpenter, 19 Wash. 621, 53 Pac. 1,107.

*West Virginia*. — McCoy v. McCoy, 29 W. Va. 794, 2 S. E. 809; Poole v. Dilworth, 26 W. Va. 583.

21. *North R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; *Goebel v. Iffla*, 111 N. Y. 170, 18 N. E. 649; *Harshman v. Knox Co.*, 122 U. S. 306, 30 L. ed. 1,152; *Howard v. Huron*, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493; *Philbrick v. O'Connor*, 15 Or. 15, 13 Pac. 612, 3 Am. St. Rep. 139.

22. *Howard v. Huron*, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493.

23. See cases cited in last three notes.

24. *Com. v. Union League*, 135 Pa. St. 301, 19 Atl. 1,030, 8 L. R. A. 195; *Baxter v. McDonnell*, 155 N. Y. 83, 49 N. E. 667, 40 L. R. A. 670; *First Presbyterian Church v. Meyers*, 5 Okla. 809, 50 Pac. 70, 38 L. R. A. 687; *In re Madera Irrig. Dist. Bonds*, 92 Cal. 296, 28 Pac. 272, 14 L. R. A. 755; *Hefferman v. Porter*, 6 Coldw. (Tenn.) 391, 98 Am. Dec. 459; *Sherwood v. Baker*, 105 Mo. 472, 16 S. W. 938, 24 Am. St. Rep. 399; *Griffin v. Cunningham*, 20 Gratt. (Va.) 31; *Brown v. New York*, 66 N. Y. 385.

25. *United States*. — Barr v. Gratz,

4 Wheat. 213, 4 L. ed. 553; Tappan v. Beardsley, 10 Wall. 427, 19 L. ed. 974; Litchfield v. Crane, 123 U. S. 549, 31 L. ed. 199.

*Colorado.*—Schuster v. Rader, 13 Colo. 329, 22 Pac. 505.

*Indiana.*—Wilson v. Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792; Lowe v. Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

*Missouri.*—Fountaine v. Hudson, 93 Mo. 62, 5 S. W. 692.

*North Carolina.*—Hornthal v. Burwell, 109 N. C. 10, 13 S. E. 721, 13 L. R. A. 740.

*Virginia.*—Ogden v. Davidson, 81 Va. 757; Pracht v. Lange, 81 Va. 711; Tate v. Bank, 96 Va. 765, 32 S. E. 476; Stinchcomb v. Marsh, 15 Gratt. 202.

*West Virginia.*—Cady v. Gale, 5 W. Va. 505; Adams v. Alkire, 20 W. Va. 480.

"It is a well settled rule of evidence that a verdict and judgment in an action at law cannot be received in evidence upon the trial of an action between others not parties to the first, nor standing in privity with those who were, for the purpose of proving any fact upon which such verdict and judgment were founded, and which, being essential to their rendition, is to be regarded as established by them. The party in the second action had no opportunity of cross-examining the witnesses in the first, nor of confronting them with others by whom the facts deposed to by them might have been effectually disproved." Stinchcomb v. Marsh, 15 Gratt. (Va.) 202.

#### **Apparent Exceptions to the Rule.**

A decree for an injunction abating a nuisance, obtained by one citizen of a county, although not enforced, bars the right of suit for the same purpose against the same defendant by another citizen of the same county. Dickinson v. Eichorn, 78 Iowa 710, 43 N. W. 620, 6 L. R. A. 721.

Judgment in favor of the makers of a note, in an action thereon against them by the endorsee, is conclusive evidence in their favor in a subsequent suit brought in another state by the payee against the latter's right of recovery. Leslie v. Bonte, 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62.

Where one is not named as a party to a suit, but is represented in the suit by one who is a party, and under whom he claims, and he employs counsel, and puts in an answer in the name of such party, setting up title, and pays his proportion of the expenses of litigation, and controls the defense, a decree therein is conclusive against him. Plumb v. Grane, 123 U. S. 560, 31 L. ed. 268.

**Remaindermen Are Concluded** by a judgment or decree against the first taker. Baylor v. Dejarnette, 13 Gratt. (Va.) 152; Faulkner v. Davis, 18 Gratt. (Va.) 684; Hawthorne v. Beckwith, 89 Va. 786, 17 S. E. 241.

**Who Are Privies.**—Privies are those who claim under or in right of parties, or who stand in mutual or successive relationship to the same rights of property. Hill v. Bain, 15 R. I. 75, 23 Atl. 44, 2 Am. St. Rep. 873, and note at p. 878; Harmon v. Auditor of Public Accounts, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502; Bridges v. McAllister, 106 Ky. 791, 51 S. W. 189, 45 L. R. A. 800; Dewey v. St. Albans Trust Co., 60 Vt. 1, 12 Atl. 224, 6 Am. St. Rep. 84.

**Privity Can Not Exist** where there is no identity of interest. Winston v. Westfield, 22 Ala. 760, 58 Am. Dec. 278.

See note to Howard v. Kennedy, 39 Am. Dec. 311.

**Judgment Against Corporation Concludes Stockholder.**—A stockholder being in privity with the corporation is concluded by a judgment rendered against the corporation. Thomp. Liab. Stockh., § 329.

*Iowa.*—Hampson v. Weare, 4 Iowa 13; Donworth v. Coolbaugh, 5 Iowa 300.

*Kansas.*—Grund v. Tucker, 5 Kan. 70.

*Maine.*—Merrill v. Suffolk Bank, 31 Me. 57; Came v. Brigham, 39 Me. 35; Milliken v. Whitehouse, 49 Me. 527.

*New York.*—Slee v. Bloom, 20 Johns. 669; Moss v. Oakley, 2 Hill 265; Belmont v. Coleman, 1 Bosw. 188. See *contra* Moss v. McCullough, 5 Hill 131; Strong v. Wheaton, 38 Barb. 616; Miller v. White, 50 N. Y. 137; McMahon v. Macy, 51 N. Y. 155; Moss v. Averell, 10 N. Y.

the court rendering it had jurisdiction of the parties,<sup>26</sup> and the subject matter to which the adjudication relates.<sup>27</sup> It must be final,<sup>28</sup> and as a general rule the decision must be upon the merits of the cause.<sup>29</sup>

**7. Persons Not Parties to the Record, When Concluded.**—The general rule, as we have seen,<sup>30</sup> is that to render a judgment or decree conclusive evidence of the matters it determines, the person must be a party or privy to it; but to this rule there are some well-marked exceptions.<sup>31</sup>

449; *Belmont v. Coleman*, 21 N. Y. 96.

*Pennsylvania*.—*Wilson v. Pittsburgh & Y. Coal Co.*, 43 Pa. St. 424.

**Parties**, in the larger and broader sense, includes all those persons having a right to control the proceedings, to make defense to the suit, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal will lie. *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626; *Lipscomb v. Postell*, 38 Miss. 476, 77 Am. Dec. 651.

The cases cited showing apparent exceptions to the rule might not improperly be classed as coming under the principle of privies, but they are not so classed here, for the purpose of avoiding confusion.

**26.** *United States*.—*Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Hall v. Lanning*, 91 U. S. 165, 23 L. ed. 273; *Andrews v. National F. & P. Works*, 46 U. S. App. 281, 619, 36 L. R. A. 139.

*Arkansas*.—*Bates v. State Bank*, 7 Ark. 394, 46 Am. Dec. 293.

*California*.—*People v. Greene*, 74 Cal. 400, 16 Pac. 197, 5 Am. St. Rep. 448.

*Georgia*.—*Hobby v. Bunch*, 83 Ga. 1, 10 S. E. 113, 20 Am. St. Rep. 301.

*Illinois*.—*Isett v. Stuart*, 80 Ill. 404, 22 Am. Rep. 194.

*Michigan*.—*Howard v. Coon*, 93 Mich. 442, 53 N. W. 513; *Noyes v. Hillier*, 65 Mich. 636, 32 N. W. 872.

*Oregon*.—*Ferguson v. Jones*, 17 Or. 204, 20 Pac. 842, 11 Am. St. Rep. 808; *Foshier v. Narver*, 24 Or. 441, 34 Pac. 21, 41 Am. St. Rep. 874.

*Virginia*.—*Ogden v. Davidson*, 81 Va. 757; *Cronise v. Carper*, 80 Va. 678; *Mosely v. Cocke*, 7 Leigh 224.

*West Virginia*.—*Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E.

456, 45 Am. St. Rep. 872, 23 L. R. A. 120.

*Wisconsin*.—*St. Sure v. Lindsfeldt*, 82 Wis. 346, 52 N. W. 308, 33 Am. St. Rep. 50.

**27.** *Hughes v. Jones*, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637; *Brickhouse v. Sutton*, 99 N. C. 103, 5 S. E. 380, 6 Am. St. Rep. 497; *Hope v. Blair*, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366; *Seamster v. Blackstock*, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 262; *Mudge v. Steinhart*, 78 Cal. 34, 20 Pac. 147, 12 Am. St. Rep. 17; *McClure v. Mauperture*, 29 W. Va. 633, 2 S. E. 761; *Russell v. Shurtleff*, 28 Colo. 414, 65 Pac. 27, 89 Am. St. Rep. 216; *Williamson v. Berry*, 8 How. (U. S.) 495, 12 L. ed. 1, 170.

**28.** *Garrett v. Greenwell*, 92 Mo. 120, 4 S. W. 441; *Payne v. Grant*, 81 Va. 164; *Hendrick v. Clouts*, 91 Ga. 196, 17 S. E. 119; *Agnew v. Omaha Nat. Bank*, (Neb.), 96 N. W. 189; *U. S. v. Parker*, 120 U. S. 89, 30 L. ed. 601; *Lyon v. Perin & Gaff Co.*, 125 U. S. 698, 31 L. ed. 839.

**29.** *Garrett v. Greenwell*, 92 Mo. 120, 4 S. W. 441; *Payne v. Grant*, 81 Va. 164; *Hendrick v. Clouts*, 91 Ga. 196, 17 S. E. 119.

**30.** *Ante*, Div. III, Sub-div. (6).

**31.** *United States*.—*Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712.

*Alabama*.—*McBroom v. Governor*, 4 Port. 90.

*Georgia*.—*Linton v. Harris*, 78 Ga. 265, 3 S. E. 278; *Jinks v. Lewis*, 94 Ga. 677, 20 S. E. 6.

*Maine*.—*Dane v. Gilmore*, 51 Me. 544.

*Massachusetts*.—*Loring v. Hildreth*, 170 Mass. 328, 49 N. E. 652, 64 Am. St. Rep. 301.

*Minnesota*.—*Cross v. White*, 89 Minn. 413, 83 N. W. 393, 81 Am. St. Rep. 267.

**A. ACTION FOR REIMBURSEMENT BY CITY OR TOWN.** — Where a city or town has been held liable in damages resultant upon injury occasioned by a defect or obstruction in a street or highway caused by the act of a third party, in a suit properly brought against such city or town, and due notice that such suit is brought has been given to such third party, the judgment rendered against such city or town is conclusive evidence against the party, in an action for reimbursement against him by the city or town, that the defect or obstruction existed, that the injury resulted therefrom while the injured party was using due care, and that the amount of damages fixed by the judgment was actually sustained.<sup>32</sup>

**B. RIGHT OF ACTION OVER AGAINST A THIRD PARTY.** — It may be laid down, as a general rule, that a judgment against a party who has a right of action to recover over against a third party is conclusive upon the latter, provided he has notice and full opportunity to defend against the original suit.<sup>33</sup>

**C. IN CASES OF INDEMNITY.** — Where a defendant has been indemnified against loss or damage in an action or suit, judgment against him is conclusive evidence against the party indemnifying as to the liability, to whom notice and opportunity to defend the action in which the judgment was rendered have been given.<sup>34</sup>

*Montana.* — *Botkin v. Klein-schmidt*, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641.

*Nebraska.* — *Pasewalk v. Bollman*, 29 Neb. 519, 45 N. W. 780, 26 Am. St. Rep. 399.

*Nevada.* — *Deegan v. Deegan*, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

*New York.* — *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 N. E. 704, 18 Am. St. Rep. 331.

*North Carolina.* — *Vann v. Hargett*, 2 Dev. & B. Eq. 31, 32 Am. Dec. 689; *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868; *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901.

*Pennsylvania.* — *Masser v. Strickland*, 17 Serg. & R. 354, 17 Am. Dec. 668; *Evans v. Com.*, 8 Watts 398, 34 Am. Dec. 477; *Eagles v. Kern*, 5 Whart. 144; *Snapp v. Com.*, 2 Pa. St. 49; *Musselman v. Com.*, 7 Pa. St. 240; *McMicken v. Com.*, 58 Pa. St. 213.

*Rhode Island.* — *Pawtucket v. Bray*, 20 R. I. 17, 37 Atl. 1, 78 Am. St. Rep. 837.

*Virginia.* — *Harrison v. Wallton*, 95 Va. 721, 30 S. E. 372, 64 Am. St. Rep. 830.

32. *United States.* — *Chicago v.*

*Robbins*, 67 U. S. 418, 17 L. ed. 298; *Robbins v. City of Chicago*, 4 Wall. 657, 18 L. ed. 427; *Washington Gas Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712.

*Maryland.* — *Cleveland & O. Canal County Com'rs*, 57 Md. 201, 40 Am. Rep. 430.

*Massachusetts.* — *Boston v. Worthington*, 10 Gray 496, 71 Am. Dec. 678; *Elliott v. Hayden*, 104 Mass. 180; *Chamberlain v. Preble*, 11 Allen 370. *New Hampshire.* — *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759.

*New York.* — *City of Troy v. T. & L. R. R. Co.*, 49 N. Y. 657.

*Rhode Island.* — *Pawtucket v. Bray*, 20 R. I. 17, 37 Atl. 1, 78 Am. St. Rep. 837.

33. *American Bell Tel. Co. v. National Imp. Tel. Co.*, 27 Fed. 663; *Stearns v. Lawrence*, 54 U. S. App. 541, 83 Fed. 738; *Drennan v. Bunn*, 124 Ill. 175, 16 S. E. 100, 7 Am. St. Rep. 362; *Midland R. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506; *Davis v. Smith*, 79 Me. 357, 10 Atl. 55; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289, 21 Am. Rep. 417.

34. *Beers v. Pinney*, 12 Wend. (N. Y.) 309; *Kip v. Brigham*,

**D. IN CASES OF WARRANTY.**—A judgment against a warrantee of title to real estate, in an action of which the warrantor had due notice, is, by the weight of authority, conclusive evidence against the latter as to the eviction and consequent breach of warranty by title paramount, or whatever was in issue and determined in the suit and within the scope of the warranty.<sup>35</sup>

6 Johns. (N. Y.) 157; Clark v. Carrington, 7 Cranch. (U. S.) 308, 3 L. ed. 354; Brown v. Chaney, 1 Ga. 410; Holbrook v. Holbrook, 15 Me. 9; New York Co. v. Protection Ins. Co., 1 Story (U. S.) 458, 18 Fed. Cas. No. 10,216.

**Conclusive Though No Notice of Suit Given.**—"If a person enters into a contract of indemnity whereby he agrees to become responsible for the result of a litigation, or if, by operation of law, such a responsibility is cast upon him without any agreement, he will, in the absence of fraud or collusion, be conclusively bound by the judgment rendered, whether he had notice of the action in which it was rendered or not." Freeman on Judgments, 4th ed. § 176; Wells on Res Adjudicata, § 196.

*California.*—Riddle v. Baker, 13 Cal. 296; Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647.

*Florida.*—Collins v. Mitchell, 5 Fla. 364.

*Maine.*—Davis v. Smith, 79 Me. 351, 10 Atl. 55.

*Nebraska.*—Pasewalk v. Bollman, 29 Neb. 519, 45 N. W. 780, 26 Am. St. Rep. 399.

*New York.*—Chace v. Hinman, 8 Wend. 452, 24 Am. Dec. 39; Douglass v. Howland, 24 Wend. 36; Rapelye v. Prince, 4 Hill 119, 40 Am. Dec. 267; Fay v. Ames, 44 Barb. 327; Gilbert v. Wiman, 1 N. Y. 550, 49 Am. Dec. 359; Methodist Churches v. Barker, 18 N. Y. 463; Bridgeport F. & M. Ins. Co. v. Wilson, 34 N. Y. 275; Conner v. Reeves, 103 N. Y. 257, 9 N. E. 439; *affirming* 35 Hun 507.

*Ohio.*—Jaynes v. Platt, 47 Ohio St. 262, 24 N. E. 262.

*Pennsylvania.*—Patton v. Caldwell, 1 Dall. 419.

*Vermont.*—Lincoln v. Blanchard, 17 Vt. 464.

See note by Mr. Freeman to Robinson v. Baskins, 22 Am. St. Rep. 204.

**Conclusive When Indemnitor Notified of Suit.**—"In the case of a general indemnity against claims and suits, a judgment against the covenantor will be held conclusive against the indemnitor, where notice has been given the latter to come in and defend the suit in which it was rendered, and an opportunity was given him to do so."

*United States.*—City of Chicago v. Robbins, 67 U. S. 418, 17 L. ed. 298.

*Arkansas.*—Smith v. Corege, 53 Ark. 295, 14 S. W. 93.

*California.*—Dutil v. Pacheco, 21 Cal. 438, 82 Am. Dec. 749.

*Maine.*—Inhabitants of Veazie v. Penobscot R. Co., 49 Me. 119; Davis v. Smith, 79 Me. 351, 10 Atl. 55.

*Massachusetts.*—Boston v. Worthington, 10 Gray 496, 71 Am. Dec. 678; Train v. Gold, 5 Pick. 379.

*Minnesota.*—Mackey v. Fisher, 36 Minn. 347, 31 N. W. 363.

*New Hampshire.*—Littleton v. Richardson, 34 N. H. 179, 66 Am. Dec. 759.

*New York.*—Kip v. Brigham, 6 Johns. 157; Aberdeen v. Blackmar, 6 Hill 324.

See note to Robinson v. Baskins, 22 Am. St. Rep. 204.

35. *Alabama.*—Salle v. Light, 4 Ala. 700, 39 Am. Dec. 317.

*Connecticut.*—Hinds v. Allen, 34 Conn. 195.

*Maryland.*—McKenzie v. B. & O. R. R. Co., 28 Md. 161.

*Massachusetts.*—Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Chamberlain v. Preble, 11 Allen 370.

*Nebraska.*—Walton v. Campbell, 51 Neb. 788, 71 N. W. 737.

*New Hampshire.*—Andrews v. Denison, 16 N. H. 469, 43 Am. Dec. 565.

*New York.*—Barney v. Dewey, 13 Johns. 224, 7 Am. Dec. 372; Miner v. Clark, 15 Wend. 425; Heiser v. Hatch, 86 N. Y. 614.

E. PROBATE OF WILL. — A sentence or decree of a court of competent jurisdiction admitting a will to probate,<sup>36</sup> or rejecting the probate thereof,<sup>37</sup> being a proceeding *in rem*,<sup>38</sup> is binding and conclusive upon every person whether a party to the proceeding or not;<sup>39</sup> and until set aside or reversed is conclusive evidence as to the due execution and validity of the instrument probated.<sup>40</sup> It is conclusive evidence as to the question of the testamentary capacity of the maker of the will,<sup>41</sup> the testamentary character of the instrument,<sup>42</sup> and also of its genuineness.<sup>43</sup> The sentence is conclusive evidence even in a

*Pennsylvania*. — *Ives v. Niles*, 5 Watts 323.

*South Carolina*. — *Sims v. Lyles*, 1 Hill 39, 26 Am. Dec. 155.

The only cases holding a contrary doctrine to that stated in the text, which we have been able to find, are the following: *Martin v. Cowles*, 2 Dev. & B. L. (N. C.) 101; *Shober v. Robinson*, 2 Murph. L. (N. C.) 33; *Wilder v. Ireland*, 8 Jones L. (N. C.) 885.

36. *California*. — *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *In re Warfield*, 22 Cal. 51, 83 Am. Dec. 49.

*Nebraska*. — *Loosemore v. Smith*, 12 Neb. 343, 11 N. W. 493.

*New York*. — *Bogardus v. Clark*, 4 Paige Ch. 623.

*Pennsylvania*. — *Holliday v. Ward*, 19 Pa. St. 485, 57 Am. Dec. 671; *McCoy v. Clayton*, 119 Pa. St. 133, 12 Atl. 860.

*Tennessee*. — *Townsend v. Townsend*, 4 Coldw. 70, 94 Am. Dec. 184.

*Virginia*. — *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 102; *Robinsons v. Allen*, 11 Gratt. 785; *Connolly v. Connolly*, 32 Gratt. 657; *Norvell v. Lessueur*, 33 Gratt. 222.

*West Virginia*. — *Coffman v. Hedrick*, 32 W. Va. 119, 9 S. E. 65.

37. *Schultz v. Schultz*, 10 Gratt. (Va.) 358, 60 Am. Dec. 335; *Connolly v. Connolly*, 32 Gratt. (Va.) 657; *Ballou v. Hudson*, 13 Gratt. (Va.) 672; *Thornton v. Baker*, 15 R. I. 553, 10 Atl. 617, 2 Am. St. Rep. 925.

38. *Bogardus v. Clark*, 4 Paige Ch. (N. Y.) 623; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Schultz v. Schultz*, 10 Gratt. (Va.) 358, 60 Am. Dec. 335; *Redmond v. Collins*, 4 Dev. (N. C.) 430, 27

Am. Dec. 208; *Wolcott v. Wolcott*, 140 Mass. 194, 3 N. E. 214; *Brock v. Frank*, 51 Ala. 85.

39. *California*. — *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118.

*Kentucky*. — *Davies v. Leete*, 23 Ky. L. Rep. 441, 64 S. W. 441.

*Massachusetts*. — *Wolcott v. Wolcott*, 140 Mass. 194, 3 N. E. 214.

*Mississippi*. — *Schlottman v. Hoffman*, 73 Miss. 188, 18 So. 893, 55 Am. St. Rep. 527.

*Missouri*. — *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642.

*North Carolina*. — *Redmond v. Collins*, 4 Dev. L. 430, 27 Am. Dec. 208.

*Texas*. — *Steele v. Renn*, 50 Tex. 467, 32 Am. Rep. 605.

*Virginia*. — *Schultz v. Schultz*, 10 Gratt. 358, 60 Am. Dec. 335; *Wills v. Spraggins*, 3 Gratt. 554; *Connolly v. Connolly*, 32 Gratt. 657; *Ballou v. Hudson*, 13 Gratt. 672.

40. *Holliday v. Ward*, 19 Pa. St. 485, 57 Am. Dec. 671; *Connolly v. Connolly*, 32 Gratt. (Va.) 672; *Parker v. Brown*, 6 Gratt. (Va.) 554; *Michael v. Baker*, 12 Md. 158, 7 Am. Dec. 593; *Pritchard v. Hicks*, 1 Paige Ch. (N. Y.) 270; *Van Rensselaer v. Morris*, 1 Paige Ch. (N. Y.) 13; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Fallon v. Chidester*, 46 Iowa 588, 26 Am. Rep. 164.

41. *Ballou v. Hudson*, 13 Gratt. (Va.) 672; *Smith v. Henning*, 10 W. Va. 596; *Cutter v. Butler*, 25 N. H. 343, 57 Am. Dec. 330.

42. *Lorieux v. Keller*, 5 Iowa 196, 68 Am. Dec. 696; *Robinsons v. Allen*, 11 Gratt. (Va.) 785; *Strong v. Perkins*, 3 N. H. 517.

43. *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Lorieux v. Keller*, 5 Iowa 196, 68 Am. Dec. 696.

court of equity on the charge of fraud in obtaining its execution;<sup>44</sup> or in preventing its revocation.<sup>45</sup> Of course, the sentence of probate is not conclusive evidence of the death of the testator,<sup>46</sup> because the death of the testator is an essential prerequisite of jurisdiction to the probate of his will.<sup>47</sup> And if the probate tribunal is without jurisdiction upon any other ground the sentence of probate is without effect.<sup>48</sup>

**8. Conclusiveness of Judgment against Surety of Defendant.** — A. IN GENERAL. — There is much diversity of opinion among the courts as to the effect against a surety on a bond with collateral conditions of a judgment rendered against the principal in a suit to which his surety was not a party. In many States the judgment or decree is conclusive, in the absence of fraud or collusion,<sup>49</sup> while in a number of others it is only *prima facie* evidence, and is inconclusive

44. *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Wolcott v. Wolcott*, 140 Mass. 194, 3 N. E. 214; *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122.

45. *Malone v. Hobbs*, 1 Rob. (Va.) 366, 380.

46. *Melia v. Simmons*, 45 Wis. 334, 30 Am. Rep. 746; *McPherson v. Cunliff*, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642.

47. *Melia v. Simmons*, 45 Wis. 334, 30 Am. Rep. 746; *McPherson v. Cunliff*, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642.

48. *Wall v. Wall*, 123 Pa. St. 545, 16 Atl. 598, 10 Am. St. Rep. 549.

49. *United States*. — *Stovall v. Banks*, 10 Wall. 583, 19 L. ed. 1,036; *Washington Ice Co. v. Webster*, 125 U. S. 426, 31 L. ed. 799.

*Arkansas*. — *Wycough v. State*, 50 Ark. 102, 6 S. W. 598.

*Florida*. — *Robinson v. Epping*, 24 Fla. 237, 4 So. 812.

*Illinois*. — *City of Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Nevitt v. Woodburn*, 160 Ill. 203, 43 N. E. 385, 52 Am. St. Rep. 315.

*Nebraska*. — *Pasewalk v. Bollman*, 29 Neb. 519, 45 N. W. 780, 26 Am. St. Rep. 399.

*Texas*. — *Bopp v. Hansford*, (Tex. Civ. App.), 45 S. W. 744.

*West Virginia*. — *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

*Wisconsin*. — *Meyer v. Barth*, 97 Wis. 352, 72 N. W. 748, 65 Am. St. Rep. 124.

**Sureties on Bond of Guardian.** The judgment of a court of probate

fixing the amount due from a guardian to his ward, after due notice to the guardian, is conclusive against the sureties on the guardian's bond in an action thereon. *Cross v. White*, 80 Minn. 413, 83 N. W. 393, 81 Am. St. Rep. 267; *Botkin v. Kleinschmidt*, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641; *Deegan v. Deegan*, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742; *Gillett v. Wiley*, 126 Ill. 310, 19 N. E. 287, 9 Am. St. Rep. 587; *Shepard v. Pebbles*, 38 Wis. 373.

**Sureties on Bond of Personal Representative.** — It is a general rule that a judgment against an administrator or executor is conclusively binding upon the sureties on his bond.

*United States*. — *Stovall v. Banks*, 10 Wall. 583, 19 L. ed. 1,036.

*Arkansas*. — *Wycough v. State*, 50 Ark. 102, 6 S. W. 598.

*California*. — *Chaquette v. Ortet*, 60 Cal. 594; *Irwin v. Backus*, 25 Cal. 214, 85 Am. Dec. 125.

*Connecticut*. — *Willey v. Paulk*, 6 Conn. 76.

*Illinois*. — *Nevitt v. Woodburn*, 160 Ill. 203, 43 N. E. 385, 52 Am. St. Rep. 315; *Ralston v. Wood*, 15 Ill. 159, 58 Am. Dec. 604.

*Indiana*. — *Sayler v. State*, 5 Ind. 202.

*Massachusetts*. — *Heard v. Lodge*, 20 Pick. 53, 32 Am. Dec. 197.

*Missouri*. — *State v. Holt*, 27 Mo. 340, 72 Am. Dec. 273.

*New Hampshire*. — *Judge of Probate v. Claggett*, 36 N. H. 381, 72 Am. Dec. 314.



upon the matters involved.<sup>50</sup>

B. JUDGMENTS OF COURTS OF ADMIRALTY. — It is an accepted maxim of the law that proceedings *in rem* bind the world.<sup>51</sup> So, inasmuch as a proceeding of a court of admiralty in a condemnation case is one *in rem*,<sup>52</sup> the final sentence or decree pronounced therein is conclusive evidence as to the matter or thing decided as to all persons, whether parties or not,<sup>53</sup> as well also as to the facts upon which it is founded.<sup>54</sup>

*New York*. — *Deobold v. Opperman*, 111 N. Y. 531, 19 N. E. 94, 7 Am. St. Rep. 760.

*Oregon*. — *Bellinger v. Thompson*, 26 Or. 320, 37 Pac. 714, 40 Pac. 229. *Pennsylvania*. — *Com. v. Stubb*, 11 Pa. St. 150, 51 Am. Dec. 515.

*Texas*. — *Stewart v. Morrison*, 81 Tex. 396, 17 S. W. 15, 26 Am. St. Rep. 821.

*West Virginia*. — *Crim v. England*, 46 W. Va. 480, 33 S. E. 310.

*Wisconsin*. — *Meyer v. Barth*, 97 Wis. 352, 72 N. W. 748, 65 Am. St. Rep. 124.

**Sureties on Official Bonds.** — Generally, the sureties on the bond of a sheriff or other officer are not concluded by a judgment against their principal in a suit to which they were not parties.

*California*. — *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647.

*Georgia*. — *Taylor v. Johnson*, 17 Ga. 521.

*Iowa*. — *Charles v. Hoskins*, 14 Iowa 471, 83 Am. Dec. 378.

*Kansas*. — *Graves v. Bulkley*, 25 Kan. 249, 37 Am. Rep. 249.

*Louisiana*. — *Mullen v. Scott*, 9 La. Ann. 173.

*Massachusetts*. — *City of Lowell v. Parker*, 10 Metc. 309, 43 Am. Dec. 436.

*Michigan*. — *Norris v. Mersereau*, 74 Mich. 687, 42 N. W. 153.

*Minnesota*. — *Beauchaine v. McKinnon*, 55 Minn. 318, 56 N. W. 1,065, 43 Am. St. Rep. 506.

*New Jersey*. — *De Greiff v. Wilson*, 30 N. J. Eq. 435.

*New York*. — *Thomas v. Hubbell*, 15 N. Y. 405, 69 Am. Dec. 619.

*Ohio*. — *Miller v. Rhoades*, 20 Ohio St. 494.

*Virginia*. — *Carr v. Meade*, 77 Va. 142.

*Wisconsin*. — *Stephens v. Shafer*, 48 Wis. 54, 3 N. W. 835, 33 Am. Rep. 793.

There are, however, several cases that hold such a judgment conclusive: *Masser v. Strickland*, 17 Serg. & R. (Pa.) 354, 17 Am. Dec. 668; *McMicken v. Com.*, 58 Pa. St. 213; *Chamberlain v. Godfrey*, 36 Vt. 380, 84 Am. Dec. 690; *Tracy v. Goodwin*, 5 Allen (Mass.) 409; *Dennie v. Smith*, 129 Mass. 143.

50. *Hobson v. Yancey*, 2 Gratt. (Va.) 73; *Craddock v. Turner*, 6 Leigh (Va.) 116; *Bennett v. Graham*, 71 Ga. 211; *Gibson v. Robinson*, 90 Ga. 756, 16 S. E. 969; *Lucas v. Governor*, 6 Ala. 826; *Carmichael v. Governor*, 3 How. (Miss.) 236; *Moore v. Alexander*, 96 N. C. 34, 1 S. E. 536; *Cox v. Thomas*, 9 Gratt. (Va.) 323.

51. *Hughes Admiralty*. 355. See article "ADMIRALTY."

52. *Hughes Admiralty*, 354.

53. *United States*. — *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. ed. 381; *The Apollon*, 9 Wheat. 362, 6 L. ed. 111; *McGuire v. Winslow*, 23 Blatchf. 425, 26 Fed. 304; *Williams v. Insurance Co.*, 3 Sumn. 270; *The Ship Fortitude*, 3 Sumn. 228; *Croudson v. Leonard*, 4 Cranch. 434, 2 L. ed. 670.

*Connecticut*. — *Stewart v. Warner*, 1 Day 142, 2 Am. Dec. 61.

*Kentucky*. — *Toms v. Southard*, 2 Dana 475, 26 Am. Dec. 467.

*Louisiana*. — *Blanke v. Peytavin*, 4 Mart. 458, 6 Am. Dec. 705.

*Massachusetts*. — *Baxter v. Insurance Co.*, 6 Mass. 277, 4 Am. Dec. 125.

*South Carolina*. — *Jenkins v. Putnam*, 1 Bay 8, 1 Am. Dec. 594; *Street v. Augusta Ins. Co.*, 12 Rich. L. 13, 75 Am. Dec. 714.

54. *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. ed. 381; *Averill v. Smith*, 17 Wall. (U. S.) 93, 21 L. ed. 613; *Stacey v. Emery*, 97 U. S. 642, 24 L. ed. 1,035; *Cucullu v. Louisiana Ins. Co.*, 5 Mart. (N. S.) (La.) 464,

9. **Foreign Judgments**, with reference to their effect, stand upon a different principle from that relating to those of a sister state of the union.<sup>55</sup> The latter are conclusive by virtue of the effect given to them by the federal constitution,<sup>56</sup> while the effect accorded to the judgment of a foreign court rests upon the considerations of international comity,<sup>57</sup> where the matter is not regulated by treaty.<sup>58</sup>

**The Principle of Reciprocity.** — The legal effect of a judgment obtained in a foreign country would seem to depend in the federal courts upon the principle of reciprocity.<sup>59</sup> Thus, if a judgment rendered by a court of the United States is treated as conclusive by a foreign country, the judgments of the courts of that country are treated as conclusive here;<sup>60</sup> but otherwise foreign judgments are only *prima facie* evidence of the matters determined thereby.<sup>61</sup>

While the several state courts of this country for a long time, by a uniform line of decisions, recognized and assumed as a rule that foreign judgments were only *prima facie* evidence of the matters adjudicated by them,<sup>62</sup> the more modern and growing tendency of these courts is, in the absence of fraud, to hold a foreign judgment conclusive.<sup>63</sup>

16 Am. Dec. 199; *Brown v. Union Ins. Co.*, 4 Day (Conn.) 179, 4 Am. Dec. 204.

55. *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95.

56. *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88; *Jacobs v. Hull*, 12 Mass. 25; *Spencer v. Brockway*, 1 Ohio 259, 13 Am. Dec. 615; *Marsh v. Pier*, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; *Topp v. Branch Bank*, 2 Swan (Tenn.) 184; *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Wernag v. Pawling*, 5 Gill & J. (Md.) 500, 25 Am. Dec. 317; *Smith v. Kander*, 58 Mo. App. 61.

57. *New York*, L. E. & W. R. Co. v. McHenry, 17 Fed. 414; *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95; Story, *Conflict of Laws* (8th ed.), § 38 and note, *Wheaton's Inter. Law* § 147.

58. *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95; 2 Kent, Com. (12th ed.) 120.

59. *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95; *Gioe v. Westervelt*, 116 Fed. 1,017; *Ritchie v. McMullen*, 159 U. S. 235, 40 L. ed. 133.

60. *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95; *Ritchie v. McMullen*, 159 U. S. 235, 40 L. ed. 133; *Gioe v. Westervelt*, 116 Fed. 1,017.

61. *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95.

62. *Connecticut*. — *Aldrich v. Kinney*, 4 Conn. 380, 10 Am. Dec. 151.

*Kentucky*. — *Williams v. Preston*, 3 J. J. Marsh. 600, 20 Am. Dec. 179. *Maine*. — *McKim v. Odom*, 12 Me. 94; *Rankin v. Goddard*, 54 Me. 28, 89 Am. Dec. 718.

*Massachusetts*. — *Butterick v. Allen*, 8 Mass. 273, 5 Am. Dec. 105; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356.

*New Hampshire*. — *Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281.

*New York*. — *Andrews v. Montgomery*, 19 Johns. 162, 10 Am. Dec. 213.

*Rhode Island*. — *Rathbone v. Terry*, 1 R. I. 73.

63. *United States*. — *Croudson v. Leonard*, 4 Cranch. 434, 2 L. ed. 670.

*Alabama*. — *Christian & Craft Grocery Co. v. Coleman*, (Ala.), 27 So. 786.

*California*. — *McGrew v. Mutual L. Ins. Co.*, 132 Cal. 85, 64 Pac. 103.

*Connecticut*. — *Fisher v. Fielding*, 67 Conn. 91, 24 Atl. 714, 32 L. R. A. 236.

*Michigan*. — *Coveney v. Phiscator*, (Mich.), 93 N. W. 619.

*New York*. — *Dunstan v. Higgins*, 138 N. Y. 70, 33 N. E. 729, 20 L. R.

**10. Judgments and Decrees in Proceedings for Divorce** rendered in a sister state are conclusive in subsequent suits in another state, in all cases in which the courts rendering such judgments or decrees had jurisdiction of the subject matter and the parties;<sup>64</sup> but it is held generally by the courts that the recital of jurisdictional facts is not conclusive,<sup>65</sup> and such matters may be examined into,<sup>66</sup> and if the essential jurisdictional facts did not exist, the judgment or decree will be treated as a nullity.<sup>67</sup> The same principle obtains as to a for-

A. 668; *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Monroe v. Douglas*, 4 Sandf. Ch. 126.

*Pennsylvania*.—*Rapelje v. Emery*, 2 Dall. 231, 1 L. ed. 361.

**64.** *California*.—*In re James Estate*, 99 Cal. 374, 33 Pac. 1,112, 37 Am. St. Rep. 60.

*Indiana*.—*Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21.

*Louisiana*.—*Smith v. Smith*, 43 La. Ann. 1,140, 10 So. 248.

*Maine*.—*Slade v. Slade*, 58 Me. 157.

*Massachusetts*.—*Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299.

*Missouri*.—*Williams v. Williams*, 53 Mo. App. 617.

*New York*.—*Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447.

*Rhode Island*.—*Ditson v. Ditson*, 4 R. I. 87.

*South Carolina*.—*Hull v. Hull*, 2 Strob. Eq. 174.

*Wisconsin*.—*Shafer v. Bushnell*, 24 Wis. 372.

**65.** *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; *Thompson v. Whitman*, 18 Wall. (U. S.) 457, 21 L. ed. 897; *Bell v. Bell*, 181 U. S. 175, 45 L. ed. 804; *In re James Estate*, 99 Cal. 374, 33 Pac. 1,112, 37 Am. St. Rep. 60; *Adams v. Adams*, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275; *State v. Fleak*, 54 Iowa 429, 6 N. W. 689.

**66.** *Smith v. Smith*, 43 La. Ann. 1,140, 10 So. 248; *Gregory v. Gregory*, 78 Me. 187, 3 Atl. 280, 57 Am. Rep. 792; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *Reed v. Reed*, 52 Mich. 117, 17 N. W. 720, 50 Am. Rep. 247.

In *Reed v. Reed*, 52 Mich. 117, 17 N. W. 720, 50 Am. Rep. 247, the court in its opinion says: "If the

record by its recitals makes a *prima facie* case of jurisdiction, no one in another state or country is concluded thereby, but he may show what the real fact was and thus disprove the authority for making such a record."

*United States*.—*Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Knowles v. Gaslight Co.*, 19 Wall. 58.

*Illinois*.—*Thompson v. Emmert*, 15 Ill. 415.

*Massachusetts*.—*Bartlet v. Knight*, 1 Mass. 401, 2 Am. Dec. 36; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646.

*Michigan*.—*People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260.

*Missouri*.—*Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432.

*Nebraska*.—*Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365.

*New York*.—*Shumway v. Stillman*, 4 Cow. 292, 15 Am. Dec. 374.

*Ohio*.—*Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 340.

*Pennsylvania*.—*Elder v. Reel*, 62 Pa. St. 308, 1 Am. Rep. 414.

*Virginia*.—*Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673.

**67.** *Indiana*.—*Watkins v. Watkins*, 125 Ind. 163, 25 N. E. 175.

*Iowa*.—*Neff v. Beauchamp*, 74 Iowa 92, 36 N. W. 905.

*Kansas*.—*Litowich v. Litowich*, 19 Kan. 451, 27 Am. Rep. 145.

*Massachusetts*.—*Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203; *Hardy v. Smith*, 136 Mass. 328; *Adams v. Adams*, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275.

*Minnesota*.—*State v. Armington*, 25 Minn. 29.

*New Hampshire*.—*Leith v. Leith*, 39 N. H. 20.

*New York*.—*Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299.

eign decree of divorce.<sup>68</sup>

**11. Conclusive Evidence Dependent upon Contract.**—When, by stipulation between the parties, it is agreed that a certain matter shall be determined in a certain way, the result of that method of determination, in the absence of fraud or mistake, is conclusive of the matter to be ascertained.<sup>69</sup>

**Illustrations.**—The decision of an architect chosen by the parties to a building contract under whose supervision the work is to be done, is final and conclusive as to the matters left by the contract to his determination, in the absence of evidence showing that the conclusion reached was the result of fraud or mistake.<sup>70</sup> So, when

*Tennessee.*—*Gettys v. Gettys*, 3 Lea 260, 31 Am. Rep. 637.

*Vermont.*—*Prosser v. Warner*, 47 Vt. 667, 19 Am. Rep. 132.

<sup>68</sup>. *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81.

<sup>69</sup>. *United States.*—*Kihlberg v. U. S.*, 97 U. S. 398, 24 L. ed. 1,106; *Elliott v. McK. & T. R. Co.*, 74 Fed. 707, 21 C. C. A. 3, 40 U. S. App. 61.

*Arizona.*—*U. S. v. Ellis*, (Ariz.), 14 Pac. 300.

*California.*—*Moore v. Kerr*, 65 Cal. 519, 4 Pac. 542.

*Illinois.*—*McAvoy v. Long*, 13 Ill. 147.

*Indiana.*—*Trustees of W. & E. Canal v. Cokely*, 5 Ind. 164.

*Iowa.*—*Mitchell v. Kavanaugh* 38 Iowa 286.

*Kentucky.*—*Bank v. Webb*, 17 Ky. L. Rep. 1,184, 33 S. W. 1,109.

*Maine.*—*Robinson v. Fiske*, 25 Me. 401.

*Missouri.*—*Nofsinger v. Ring*, 71 Mo. 149, 36 Am. Rep. 456.

**Determination Is Conclusive Though Erroneous.**—Under a contract for the delivery of goods subject to the inspection and approval of the vendee's agent, the judgment of such agent made in good faith, however erroneous, is conclusive between the parties. *Lynn v. B. & O. R. R. Co.*, 60 Md. 404, 45 Am. Rep. 741. See also *Palmer v. Clark*, 106 Mass. 373; *Robinson v. Clark*, 129 Mass. 145; *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271.

**Apparent Error May Be Corrected.**—“Where on the trial of an action to recover for work done under contract an error has been made in the computation of the amount due, the

basis on which the computation is made being admitted to be correct, the error may be corrected, though the contract provides that the computation made shall bind both parties.” *McEwen v. Mayor of Nashville*, (Tenn.), 36 S. W. 968.

**Contract Need Not So Provide, to Make Determination of the Third Party Conclusive.**—Under a contract providing that railroad ties to be furnished by plaintiffs to defendant should conform to certain specifications described therein, and that the ties be subject to inspection by any inspector whom defendant might send, defendant was not bound to accept or pay for any ties rejected by its inspector; it not being necessary that such contract should, in express terms, provide that the inspector's decision should be final. *Chapman v. Kansas City, C. & S. R. Co.*, 114 Mo. 542, 21 S. W. 858.

<sup>70</sup>. *Florida.*—*Wilcox v. Stephenson*, 30 Fla. 377, 11 So. 659.

*Illinois.*—*Lull v. Korf*, 84 Ill. 225; *McAuley v. Carter*, 22 Ill. 53.

*Indiana.*—*Coshy v. Adams*, 1 Wils. 342.

*Minnesota.*—*Trainor v. Worman*, 33 Minn. 484, 24 N. W. 297.

*New York.*—*Wyckoff v. Myers*, 44 N. Y. 143; *Wiberly v. Matthews*, 10 Daly 153.

*Texas.*—*Boettler v. Tendick*, 73 Tex. 488, 11 S. W. 497, 5 L. R. A. 270.

*Wisconsin.*—*Baason v. Baehr*, 7 Wis. 516.

**Conclusion of Architect Not Affected by His Subsequent Statements.**—Where the parties to a building contract agreed that the architect's certificate should be a prerequisite to

the terms of a policy of insurance provide that the amount of the loss shall be determined by arbitrators or appraisers selected by the parties, and such method is adopted by the persons interested, the amount of loss so ascertained is conclusive, unless the finding so made is set aside for fraud or other good cause.<sup>71</sup>

#### IV. EVIDENCE CONCLUSIVE UPON THE PRINCIPLE OF PUBLIC POLICY.

**1. Acts of Legislation.**—There are several instances wherein evidence is made conclusive upon the ground of public policy, the repose and welfare of the community requiring that a sanctity and certainty attach to certain acts and documents forbidding any inquiry into their truth or falsity. Thus, in several states an enrolled bill duly authenticated and filed in the office of the secretary of state is conclusive evidence that it was regularly passed by the legislature, and that the bill was passed as enrolled.<sup>72</sup>

payments, held, that his certificate that the last payment was due was conclusive, in the absence of fraud or mistake; that its conclusiveness was not affected by a letter afterwards written by the architect, in which he stated that the certificate was not intended to conclude any just rebate or offsets. *Weeks v. Little*, 15 Jones & S. (N. Y.) 1.

Where it is stipulated in a contract for the erection of a house that it shall be built according to the plans, and to the "satisfaction" of the architect, his certificate that he accepts the work as done in accordance with the plans and specifications is conclusive on the owners, and cannot be contradicted by them. *Kennedy v. Poor*, 151 Pa. St. 472, 25 Atl. 119, 31 Wkly. Notes Cas. 174.

Where a contract is made, by which one party engages to cut and haul timber from the land of the other, at a specified price per 1,000 feet, "to be estimated by P. (a surveyor named), and cut to his satisfaction," the parties are bound by his estimate, it not appearing that such surveyor acted corruptly, or made any gross mistake. *Oakes v. Moore*, 24 Me. 214.

**71.** *Scania Ins. Co. v. Johnson*, 22 Colo. 476, 45 Pac. 431; *Fleming v. Phoenix Ins. Co.*, 75 Hun 530, 27 N. Y. Supp. 488.

In order to be binding, every one

interested must be a party to the arbitration by which the appraisal of loss is made. *Bergman v. Commercial Union Assur. Co.*, 92 Ky. 494, 18 S. W. 122, 15 L. R. A. 270; *Georgia Home Ins. Co. v. Stein*, 72 Miss. 943, 18 So. 414.

**72.** *California.*—*Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93; *Yolo County v. Cogan*, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41.

*Connecticut.*—*Eld v. Gorham*, 20 Conn. 12.

*Indiana.*—*State v. Boice*, 140 Ind. 506, 40 N. E. 113.

*Iowa.*—*State v. Clare*, 5 Iowa 509; *Duncombe v. Prindle*, 12 Iowa 1.

*Kentucky.*—*Lafferty v. Huffman*, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203.

*Louisiana.*—*The La. State Lottery Co. v. Richoux*, 23 La. Ann. 743, 8 Am. Rep. 602.

*Maine.*—*Weeks v. Smith*, 81 Me. 538, 18 Atl. 325.

*Maryland.*—*Fouke v. Fleming*, 13 Md. 392; *Mayor v. Horwood*, 32 Md. 471, 3 Am. Rep. 161.

*Mississippi.*—*Greer v. State*, 54 Miss. 378; *Green v. Weller*, 32 Miss. 650; *Swan v. Buck*, 40 Miss. 268; *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 825, overruling *Brady v. West*, 50 Miss. 68; *Hunt v. Wright*, 70 Miss. 298, 11 So. 608.

*Missouri.*—*Pacific Railroad v. Governor*, 23 Mo. 353, 66 Am. Dec.

Agreeably to This Rule obtaining in a large number of states, the validity of a law cannot be assailed on the alleged ground that the legislature has not observed the requirements of the constitution as to the manner of its enactment by a reference to the record of the journals of its procedure, when the law itself as to its provisions and as to what it declares is constitutional, and evidence will not be received to show that the law-making body has not complied with the requirements of the constitution in passing it.<sup>73</sup> On the other hand, there is a large number of states in which a contrary doctrine prevails, and in which an enrolled bill, properly signed and deposited with the secretary of state or other proper official, is only *prima facie* evidence of the due regularity of its enactment, and that resort may be had to the legislative journals to show that the essential constitutional requirements have been omitted in passing it, and thereby determine that the enactment is void and the law of no effect.<sup>74</sup> The Supreme Court of the United States holds that an act of Con-

673; *City v. Foster*, 52 Mo. 513; *City v. Riley*, 52 Mo. 424; *Ball v. Fagg*, 67 Mo. 481.

*Nevada*.—*State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721.

*New Jersey*.—*State v. Young*, 32 N. J. L. 29, 5 Am. L. Reg. (N. S.) 679; *Panghorn v. Young*, 32 N. J. L. 29; *Freeholders v. Stevenson*, 46 N. J. L. 173; *Standard Underground Co. v. Attorney General*, 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394.

*North Carolina*.—*State v. Sherrill*, 81 N. C. 409; *Carr v. Coke*, 116 N. C. 223, 22 N. E. 18, 47 Am. St. Rep. 804, 28 L. R. A. 737.

*North Dakota*.—*Power v. Kitching*, 10 N. D. 254, 86 N. W. 737, 88 Am. St. Rep. 691.

*Pennsylvania*.—*Com. v. Martin*, 107 Pa. St. 185; *Kilgore v. McGee*, 95 Pa. St. 401.

*South Carolina*.—*State v. Chester*, 39 S. C. 307, 17 S. E. 752, *overruling State v. Platt*, 2 S. C. 150; *State v. Hagood*, 13 S. C. 46.

*South Dakota*.—*State v. Bacon*, 14 S. D. 394, 85 N. W. 605; *Narregang v. Brown Co.*, 14 S. D. 357, 85 N. W. 602.

*Texas*.—*Williams v. Taylor*, 83 Tex. 66, 19 S. W. 156; *Ex parte Tipton*, 28 Tex. App. 438, 13 S. W. 610.

*Washington*.—*State v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340.

73. See all the cases cited in last

note. In *Missouri* it is now provided by the constitution that the legislative journals may be used as evidence, to determine the question of the proper enactment of a law. *State v. Mead*, 71 Mo. 266.

74. *Alabama*.—*Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.

*Arkansas*.—*English v. Oliver*, 28 Ark. 317; *Worther v. Badgett*, 32 Ark. 515.

*Idaho*.—*Cohn v. Kingsley*, (*Idaho*), 38 L. R. A. 74.

*Illinois*.—*Larrison v. Peoria R. Co.*, 77 Ill. 11.

*Maryland*.—*Berry v. Baltimore Co.*, 41 Md. 446, 20 Am. Rep. 69; *Legg v. Mayor*, 42 Md. 203.

*Michigan*.—*Rode v. Phelps*, 80 Mich. 598, 45 N. W. 493.

*Nebraska*.—*State v. McClelland*, 18 Neb. 236, 25 N. W. 77, 53 Am. Rep. 814.

*New Hampshire*.—*Opinion of the Justices*, 52 N. H. 622.

*Ohio*.—*State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829.

*Texas*.—*Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1,000.

*West Virginia*.—*Price v. City of Moundsville*, 43 W. Va. 523, 27 S. E. 218; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

*Wyoming*.—*State v. Swan*, 7 Wyo. 166, 51 Pac. 209, 75 Am. St. Rep. 889, 40 L. R. A. 195.

gress is not impeachable by the journals of either branch of Congress.<sup>75</sup>

**2. Journals of Legislative Bodies.**—In all those instances where a law-making body is required to keep a journal of its proceedings, the record is conclusive evidence of what it purports to contain, and cannot be contradicted, altered or amended by extraneous evidence.<sup>76</sup>

75. *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294; *Lyons v. Woods*, 153 U. S. 649, 38 L. ed. 854.

**Conflict of Decisions on This Question Reconciled.**—The conflict existing between these two lines of authorities is reconcilable on the ground of constitutional requirement as to what shall appear on the record of the legislative journals, in order to the valid enactment of a law. Thus, where the constitution requires that all bills shall be passed by yea and nay votes, to be recorded on the journal, it may be inspected to determine this essential prerequisite to its validity.

*United States.*—*Mateo Co. v. Southern Pac. R. Co.*, 13 Fed. 722.

*Illinois.*—*Spangler v. Jacoby*, 14 Ill. 297; *Prescott v. Board of Trustees*, 19 Ill. 324; *Turley v. Logan*, 17 Ill. 151.

*Kentucky.*—*Norman v. Kentucky Board of Mgrs.*, 93 Ky. 537, 20 S. W. 901, 18 L. R. A. 556.

*Michigan.*—*Rode v. Phelps*, 80 Mich. 598, 45 N. W. 493; *Detroit v. Detroit Board of Assessors*, 91 Mich. 78, 51 N. W. 787.

*North Carolina.*—*Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487.

*West Virginia.*—*Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

So as to other constitutional requirements that must appear on the face of the journal in order to pass a bill. *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 463; *Fordyce v. Godman*, 20 Ohio St. 1; *Passaic Co. v. Stevenson*, 46 N. J. L. 173; *Smithee v. Garth*, 33 Ark. 17; *Glide-well v. Martin*, 51 Ark. 559, 11 S. W. 882; *Weill v. Kenfield*, 54 Cal. 111; *McCulloch v. State*, 11 Ind. 424; *People v. Burch*, 84 Mich. 408, 47 N. W. 765.

In support of the view of thus reconciling the conflict existing between

two long lines of decisions, it is well settled by the courts that where the constitution of a state requires certain things to be done in the passage of a bill, but does not require the journal affirmatively to show such procedure, where it does not appear that such procedure was not had, the law is conclusive evidence that the constitutional requirements were complied with in its enactment. *Cooley, Const. Lim.* 163-167; *Sutherland, Stat. Constr.* p. 47, § § 146, 147; *Black, Interpretation of Laws*, p. 31, § 13.

*Alabama.*—*Hall v. Steele*, 82 Ala. 562, 2 So. 650.

*Arkansas.*—*Glidewell v. Martin*, 51 Ark. 559, 11 S. W. 882.

*California.*—*People v. Dunn*, 80 Cal. 211, 22 Pac. 140; *Sherman v. Story*, 30 Cal. 253, 89 Am. Dec. 93.

*Colorado.*—*In re Roberts*, 5 Colo. 525.

*Florida.*—*State ex rel. Markens v. Brown*, 20 Fla. 407.

*Illinois.*—*Schuyler Co. Super. v. People, Rock Is. & A. R. Co.*, 25 Ill. 163.

*Indiana.*—*McCulloch v. State*, 11 Ind. 424.

*Kansas.*—*State ex rel. Atty. Gen. v. Francis*, 26 Kan. 724.

*Minnesota.*—*State v. Peterson*, 38 Minn. 143, 36 N. W. 443.

*Ohio.*—*Miller v. State*, 3 Ohio St. 475.

*Tennessee.*—*State v. McConnell*, 3 Lea 332.

*Texas.*—*Blessing v. Galveston*, 42 Tex. 641; *Hunt v. State*, 22 Tex. App. 396, 3 S. W. 233.

76. *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928; *U. S. v. Ballin, Joseph & Co.*, 144 U. S. 1, 36 L. ed. 321; *Cohn v. Kingsley*, 5 Idaho 416, 49 Pac. 985, 38 L. R. A. 74; *Price v. City of Moundsville*, 43 W. Va. 523, 27 S. E. 218; *Wise v. Bigger*, 79 Va.

**3. Conclusiveness of Officer's Return upon Process.** — A. IN GENERAL. — At common law the return of a sheriff or other sworn officer acting in the line of his duty, upon process, whether original, mesne or final, emanating from a court or its proper officer, in relation to facts which it is his legal duty to state in it, is, as between the parties and privies to the suit and others whose rights are necessarily dependent upon it, conclusive of the facts therein stated, so that if injury result to one of such parties from a false return, he is remitted to an action against the officer for damages.<sup>77</sup> But such return as to all other persons is only *prima facie* evidence of such facts, and may be contradicted by any proper testimony.<sup>78</sup> And it is but *prima facie* evidence against the officer in an action for damages for a false return.<sup>79</sup>

B. IDENTITY OF PARTY SERVED. — This rule does not preclude the right of a party to show the identity of the person served; that is, to show that where there are two persons of the same name, and that the one served is not the one intended.<sup>80</sup>

C. CONCLUSIVENESS OF THE RETURN IS THE RULE GENERALLY OBTAINING. — The principle declaring such return conclusive evidence to the extent already stated, in the absence of fraud and collusion, is the one generally obtaining,<sup>81</sup> though in some states such

269; *McCulloch v. State*, 11 Ind. 424; *Koehler v. Hill*, 60 Iowa 543, 14 N. W. 738; *Covington v. Ludlow*, 1 Met. (Ky.) 295; *State v. Moffitt*, 5 Ohio 359.

77. *Illinois*. — *Rivard v. Gardner*, 39 Ill. 125.

*Kentucky*. — *Gray v. Gray*, 3 Litt. 465. *McConnell v. Bowdry*, 4 T. B. Mon. 399.

*Maine*. — *Stinson v. Snow*, 10 Me. 263, 25 Am. Dec. 238.

*Massachusetts*. — *McGough v. Wellington*, 6 Allen 505; *Whitaker v. Sumner*, 7 Pick. 551, 19 Am. Dec. 298.

*Minnesota*. — *Stewart v. Duncan*, 47 Minn. 285, 50 N. W. 227, 28 Am. St. Rep. 367.

*Missouri*. — *McDonald v. Lee-wright*, 31 Mo. 29, 77 Am. Dec. 631; *Heath v. Missouri R. Co.*, 83 Mo. 617; *Stewart v. Stringer*, 41 Mo. 400, 97 Am. Dec. 278.

*New York*. — *Allen v. Martin*, 10 Wend. 300.

*Ohio*. — *Phillips v. Elwell*, 14 Ohio St. 240, 84 Am. Dec. 373; *Callen v. Ellison*, 13 Ohio St. 446.

*Pennsylvania*. — *Knowles v. Lord*, 4 Whart. 500, 34 Am. Dec. 525; *Mentz*

*v. Hamman*, 5 Whart. 150, 34 Am. Dec. 546; *Diller v. Roberts*, 13 Serg. & R. 60, 15 Am. Dec. 578.

*Texas*. — *Ayres v. Duprey*, 27 Tex. 593.

*Vermont*. — *White River Bank v. Downer*, 29 Vt. 332; *Stevens v. Brown*, 3 Vt. 420, 23 Am. Dec. 215.

*Virginia*. — *Smith v. Triplet*, 4 Leigh 590.

*West Virginia*. — *Bowyer v. Knapp*, 15 W. Va. 290; *Stewart v. Stewart*, 27 W. Va. 179; *McClung v. McWhorter*, 47 W. Va. 150, 34 S. E. 740.

78. *Phillips v. Elwell*, 14 Ohio St. 240, 84 Am. Dec. 373; *Stewart v. Duncan*, 47 Minn. 285, 50 N. W. 227, 28 Am. St. Rep. 367.

79. *Heath v. Missouri R. Co.*, 83 Mo. 617; *Stinson v. Snow*, 10 Me. 263, 25 Am. Dec. 238.

80. *Slingluff v. Gainer*, 49 W. Va. 7, 37 S. E. 771.

81. *United States*. — *Walker v. Cronkite*, 40 Fed. 133; *Turnbull v. Payson*, 95 U. S. 418, 24 L. ed. 437; *Bates v. Days*, 17 Fed. 167; *Walker v. Robbins*, 14 How. 584, 14 L. ed. 552; *Knox Co. v. Harshman*, 133 U. S. 152, 33 L. ed. 586.



return is made only *prima facie* evidence of the facts which it embodies.<sup>82</sup> And when the service is made by a private person, his return is only *prima facie* evidence of the matters necessary to be stated in the return.<sup>83</sup> Many cases hold that when the judgment is directly assailed in equity on the ground that the defendant was never served with process commencing the suit, the remedy against the officer is inadequate, and that relief will be afforded,<sup>84</sup> while others hold that to obtain relief in such a case it must appear that the false return was procured or induced by the plaintiff obtaining the judgment.<sup>85</sup>

**D. CONTROVERTING RETURN BY PLEA.**—If the local practice permits the return of the officer on the process commencing the suit to be traversed by a proper plea filed in due time, the conclusiveness of such return must be denied in order to give the defendant the full benefit of all defenses assured him by the law of the forum wherein

*Alabama.*—*Womack v. Dearman*, 7 Port. 513.

*Connecticut.*—*Adams v. Way*, 33 Conn. 419.

*Georgia.*—*Tillman v. Davis*, 28 Ga. 494, 73 Am. Dec. 786.

*Indiana.*—*Adams v. Lisher*, 3 Blackf. 241.

*Kansas.*—*Thomas v. Owen*, 58 Kan. 313, 49 Pac. 73; *Warren v. Wilner*, 61 Kan. 719, 60 Pac. 745; *Studebaker v. Johnson*, 41 Kan. 326, 21 Pac. 271, 13 Am. St. Rep. 287; *Godard v. Harbour*, 56 Kan. 744, 44 Pac. 1,055, 54 Am. St. Rep. 608.

*Kentucky.*—*Taylor v. Lewis*, 2 J. J. Marsh. 400, 19 Am. Dec. 135; *Thomas v. Ireland*, 88 Ky. 581, 11 S. W. 653, 21 Am. St. Rep. 356.

*Maine.*—*Fairfield v. Paine*, 23 Me. 498, 41 Am. Dec. 356.

*Maryland.*—*Fowler v. Lee*, 10 Gill & J. 358, 32 Am. Dec. 172.

*Mississippi.*—*Reynolds v. Ingersoll*, 11 Smed. & M. 249, 49 Am. Dec. 57.

*Nebraska.*—*Johnson v. Jones*, 2 Neb. 126.

*North Carolina.*—*Chadburn v. Johnston*, 119 N. C. 282, 25 S. E. 705; *Isley v. Boon*, 113 N. C. 249, 18 S. E. 174.

*Ohio.*—*Phillips v. Elwell*, 14 Ohio St. 240, 84 Am. Dec. 373.

*Pennsylvania.*—*Williams v. Wilkes*, 14 Pa. St. 228.

*Virginia.*—*Preston v. Kindrick*, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777; *Ramsburg v. Kline*, 96 Va. 465, 31 S. E. 608.

<sup>82</sup>. *Hoitt v. Skinner*, 99 Iowa 360, 68 N. W. 788; *Shepherd v. Marvel*, (Ind.), 45 N. E. 526; *Nietert v. Trentman*, 104 Ind. 390, 4 N. E. 306; *Campbell Prtg. Press & Mfg. Co. v. Marder L. Co.*, 50 Neb. 283, 69 N. W. 774; *Ruff v. Elkin*, 40 S. C. 69, 18 S. E. 220.

An examination of many of the cases cited in support of the rule that the return of the officer is only *prima facie* evidence will show that it is based upon statutes authorizing the contradiction of such return.

<sup>83</sup>. *Peck v. Chambers*, 44 W. Va. 270, 28 S. E. 706; *Lapham v. Campbell*, 61 Cal. 296.

<sup>84</sup>. *Ridgeway v. Bank*, 11 Humph. (Tenn.) 523; *Ryan v. Boyd*, 33 Ark. 778; *Dunklin v. Wilson*, 64 Ala. 162; *Hausworth v. Sullivan*, 6 Mont. 203, 9 Pac. 798.

See authorities cited in *Little Rock R. Co. v. Wells*, 54 Am. St. Rep. 244, and also *Dowell v. Goodwin*, 22 R. I. 287, 47 Atl. 693.

<sup>85</sup>. *Preston v. Kindrick*, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777; *Cully v. Shirk*, 131 Ind. 76, 30 N. E. 882, 31 Am. St. Rep. 414; *Knox Co. v. Harshman*, 133 U. S. 152, 33 L. ed. 586; *Thomas v. Ireland*, 81 Ky. 581, 11 S. W. 653, 21 Am. St. Rep. 356; *Taylor v. Lewis*, 2 J. J. Marsh. (Ky.) 400, 19 Am. Dec. 135 and notes, pp. 137-139; *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; *Smoot v. Judd*, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738.

the suit has been brought.<sup>86</sup>

E. NOTICE TO TAKE DEPOSITIONS. — And as to notices to take depositions, or other like non-judicial notices, the return is only *prima facie* evidence of the facts contained in the return.<sup>87</sup>

## V. WHEN PARTY CONCLUDED BY HIS OWN EVIDENCE.

1. **Impeachment of One's Own Witness.** — The principle forbidding a general impeachment of one's own witness<sup>88</sup> does not forbid the party from producing other witnesses to prove that the facts are not in truth as stated by the former witness, and the party is at liberty to produce other competent and relevant testimony as to the matters or facts in question, though its introduction may incidentally or directly contradict or collaterally discredit his own witnesses.<sup>89</sup> If, however, in the course of his examination of his own witness, a party elicits from him unfavorable testimony, he must abide the consequences, except to show the unfavorable fact to be otherwise, and cannot complain that it is given, with other evidence, to the jury for their consideration.<sup>90</sup>

2. **Admissions Made by a Party to the Suit in His Evidence.** — It is held that an admission against interest made by a party to the cause before the court and jury is conclusive evidence against him, the same as if made in a formal pleading of the party.<sup>91</sup> But as a rule, evidence, though uncontroverted and the witnesses unimpeached, is not conclusive of the truth of the matter which it is adduced to establish.<sup>92</sup>

86. *Sanford v. Bates*, 99 Ga. 145, 25 S. E. 35.

87. *McClung v. McWhorter*, 47 W. Va. 150, 34 S. E. 740.

88. See article "IMPEACHMENT."

89. *United States v. Swift v. Short*, 92 Fed. 567.

*Alabama*. — *Griffin v. Wall*, 32 Ala. 149; *Warren v. Gabriel*, 51 Ala. 235.

*California*. — *People v. Jacobs*, 49 Cal. 384.

*Colorado*. — *Omaha & Grant S. & R. Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185.

*Iowa*. — *Thorn v. Moore*, 21 Iowa 285.

*Kansas*. — *Deering & Co. v. Cunningham*, 63 Kan. 174, 65 Pac. 263, 54 L. R. A. 410.

*Maine*. — *Chamberlain v. Sands*, 27 Me. 458.

*Massachusetts*. — *Adams v. Wheeler*, 97 Mass. 67.

*Michigan*. — *Snell v. Gregory*, 37 Mich. 500.

*Nebraska*. — *Blackwell v. Wright*,

27 Neb. 269, 43 N. W. 116, 20 Am. St. Rep. 662.

*New Jersey*. — *Thorp v. Seibrecht*, 56 N. J. Eq. 499, 39 Atl. 361.

*New York*. — *Gray v. Brooklyn R. Co.*, 72 App. Div. 454, 76 N. Y. Supp. 20; *Coulter v. American Merchants' Union Ex. Co.*, 56 N. Y. 585; *Lawrence v. Barker*, 5 Wend. 301; *McArthur v. Sears*, 21 Wend. 190.

*Vermont*. — *Cox v. Eayres*, 55 Vt. 24, 45 Am. Rep. 583.

*Wisconsin*. — *Smith v. Ehanert*, 43 Wis. 181.

90. *McDade v. State*, 27 Tex. App. 641, 11 S. W. 672, 11 Am. St. Rep. 216.

91. *Holmes v. Leadbetter*, (Mo.), 69 S. W. 23; *Feary v. Railway Co.*, 162 Mo. 75, 62 S. W. 452; *State v. Brooks*, 99 Mo. 137, 12 S. W. 633; *Shea v. Selig*, 89 Mo. App. 146.

See *Rawls v. White*, 127 N. C. 17, 37 S. E. 68. Also Enc. Ev., Vol. I, p. 613.

92. *United States v. Sonnentheil*

**3. Contradiction of Documentary Evidence.** — If in the course of the hearing and trial of a cause a party use documentary proof, he is not thereby necessarily concluded from using other testimony to show the fact or facts to be other than what they purport to be from such written evidence,<sup>93</sup> but not, as a rule, to discredit such testimony as a whole.<sup>94</sup> But in some instances the courts permit the party introducing documentary evidence to impeach it as a whole, if the ends of justice require it.<sup>95</sup>

## VI. RIGHT OF LEGISLATURE TO DECLARE CERTAIN EVIDENCE CONCLUSIVE.

**1. General Rule.** — It is firmly settled by a long line of decisions that the legislature of a state may lawfully declare what shall be *prima facie* evidence of a fact in question, concerning any matter as to which it has power to legislate.<sup>96</sup> Such legislation does not deprive the party of a fair opportunity to establish his case or present his

*v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 43 L. ed. 492.

*Connecticut.* — *McGann v. Sloan*, 74 Conn. 726, 52 Atl. 405.

*Illinois.* — *Hester v. Frary*, 99 Ill. App. 51.

*New York.* — *Corotinsky v. Maimin*, 76 N. Y. Supp. 924; *Elwood v. Western U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Dean v. Metropolitan Elec. R. Co.*, 119 N. Y. 540, 23 N. E. 1,054; *Bell v. Gibson*, 71 App. Div. 472, 75 N. Y. Supp. 753.

*Texas.* — *International & G. N. R. Co. v. Johnson*, 23 Tex. Civ. App. 160, 55 S. W. 772.

**93. United States.** — *Bunce v. Gallagher*, 5 Blatchf. 481.

*Dakota.* — *Waldron v. Evans*, 1 Dak. 11, 46 N. W. 607.

*Georgia.* — *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394.

*Iowa.* — *Dowdell v. Wilcox*, 58 Iowa 199, 12 N. W. 271.

*Kentucky.* — *Chrisman v. Gregory*, 4 B. Mon. 474.

*Massachusetts.* — *Raymond v. Nye*, 5 Metc. 151.

*Mississippi.* — *Handy v. Andrews*, 52 Miss. 626.

*Texas.* — *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. 452.

**94. Merchants' Bank v. Rawls**, 7 Ga. 191, 50 Am. Dec. 394; *Hulbert v. Hammond*, 41 Mich. 343, 1 N. E. 1,040; *Reeves v. Brayton*, 36 S. C. 384, 15 S. E. 658.

**95. Bunce v. Gallagher**, 5 Blatchf. 481; *Dowdell v. Wilcox*, 58 Iowa

199, 12 N. W. 271; *Henny Buggy Co. v. Patt*, 73 Iowa 485, 35 N. W. 587; *Connor v. New England S. & G. P. Co.*, 40 N. H. 537.

**96. United States.** — *Chicago & N. W. R. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744.

*Florida.* — *Wooten v. State*, 24 Fla. 335, 5 So. 39, 1 L. R. A. 819.

*Georgia.* — *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290.

*Illinois.* — *Gage v. Caraher*, 125 Ill. 451, 17 N. E. 777; *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141.

*Indiana.* — *State v. Beach*, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179.

*Iowa.* — *Burlington R. Co. v. Dey*, 82 Iowa 312, 48 N. W. 98, 12 L. R. A. 436.

*Maine.* — *State v. Hurley*, 54 Me. 562.

*Massachusetts.* — *Com. v. Williams*, 6 Gray 1; *Com. v. Kimball*, 24 Pick. 366.

*New York.* — *Howard v. Moot*, 64 N. Y. 262; *Board of Com'rs v. Merchant*, 103 N. Y. 143, 8 N. E. 434, 57 Am. Rep. 705.

*Ohio.* — *Pennsylvania Co. v. McCann*, 54 Ohio St. 10, 42 N. E. 678, 31 L. R. A. 651.

*Tennessee.* — *State v. Yardley*, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 566; *I. C. R. Co. v. Crider*, 91 Tenn. 489, 19 S. W. 618.

defense, and to give in evidence to the court or jury all the facts legitimately bearing on the issues in the cause, to be considered and weighed by the tribunal appointed to determine the controversy.<sup>97</sup> But a law which would cut off the right of a party to offer evidence bearing on the question to be determined, by providing that certain matters or facts shall be conclusive evidence of the truth of the charge, or of that which is to be proved, would be unconstitutional and void, and could not, therefore, be upheld as a valid act of legislation.<sup>98</sup> Hence, a legislature cannot lawfully declare what specific facts shall constitute conclusive proof of any matter sought to be judicially determined and established.<sup>99</sup>

**2. Exception to This Rule.**—To the well-settled principle here stated there is an apparent exception in the matter of tax sales in several of the states of the union.<sup>1</sup> Thus in New York the validity of a statute was upheld which provides that the comptroller's deed of land sold for taxes, after a certain time, shall be conclusive evidence that the sale of the land, and all proceedings relating thereto, and all the notices required to be given within the time allowed to redeem, were regular.<sup>2</sup> And in Louisiana it is held that the legislature may enact a law of constitutional validity making tax deeds

<sup>97</sup>. *State v. Beach*, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179; *Board of Com'rs v. Merchant*, 103 N. Y. 143, 8 N. E. 484, 57 Am. Rep. 705; *State v. Buck*, 120 Mo. 479, 25 S. W. 573; *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141.

<sup>98</sup>. *State v. Beach*, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179; *State v. Buck*, 120 Mo. 479, 25 S. W. 573; *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759; *Wantlan v. White*, 19 Ind. 470; *Felix v. Wallace Co.*, 62 Kan. 832, 62 Pac. 667.

<sup>99</sup>. *United States*.—*Chicago R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970.

*Arkansas*.—*Cairo & Fulton R. Co. v. Parks*, 32 Ark. 131; *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55.

*Indiana*.—*Voght v. State*, 124 Ind. 358, 24 N. E. 680; *State v. Beach*, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179.

*Iowa*.—*McCready v. Sexton*, 29 Iowa 356, 4 Am. Rep. 214.

*Kansas*.—*Missouri, K. & T. R. Co. v. Simonson*, (Kan.), 57 L. R. A. 765.

*Minnesota*.—*Meyer v. Berlandi*,

39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777.

*Missouri*.—*State v. Buck*, 120 Mo. 479, 25 S. W. 573.

<sup>1</sup>. *California*.—*Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58.

*Iowa*.—*Phelps v. Meade*, 41 Iowa 470.

*Louisiana*.—*In re Lake*, 40 La. Ann. 142, 3 So. 479; *In re Douglas*, 41 La. Ann. 765, 6 So. 675; *Breaux v. Negrotto*, 43 La. Ann. 426, 9 So. 502.

*Nebraska*.—*Larson v. Dickey*, 39 Neb. 463, 58 N. W. 167, 42 Am. St. Rep. 595.

*New York*.—*Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604; *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; *People v. Turner*, 117 N. Y. 227, 22 N. E. 1,022; *Ostrander v. Darling*, 127 N. Y. 70, 27 N. E. 353.

*Wisconsin*.—*Smith v. Cleveland*, 17 Wis. 556.

<sup>2</sup>. *California*.—*Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58.

*Iowa*.—*Phelps v. Meade*, 41 Iowa 470.

*Nebraska*.—*Larson v. Dickey*, 39 Neb. 463, 58 N. W. 167, 42 Am. St. Rep. 595.

*New York*.—*Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604; *Ensign*

conclusive as to non-essential prerequisites to the exercise of the taxing power.<sup>3</sup> And in Iowa the courts held that a statute is valid which makes a tax deed conclusive evidence that the tax sale was made at the proper time, and conducted in the proper manner.<sup>4</sup>

So, in Nebraska, the principle is laid down that the legislature has the power to make tax deeds conclusive evidence of compliance with all the requirements of the law which are merely directory, and which pertain to the regulation of the manner of exercising the taxing power, and which requirements it might, in the exercise of its discretion, dispense with entirely.<sup>5</sup>

And it may be stated as a well-recognized principle relating to the law of tax sales that the legislature has the power to make a tax deed conclusive evidence of compliance with all the requirements of the law which are merely directory, and which pertain to the regulation or the manner of the exercise of the taxing power, and which requirements it might, in the exercise of its discretion, dispense with entirely.<sup>6</sup> So, on the other hand, it seems to be equally well established that a legislature has no power to make a tax deed conclusive evidence of the existence of any fact actually essential to the exercise of the power of taxation or sale, divesting the title of the citizen's property for the non-payment of taxes.<sup>7</sup>

*v. Barse*, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; *People v. Turner*, 117 N. Y. 227, 22 N. E. 1,022; *Ostrander v. Darling*, 127 N. Y. 70, 27 N. E. 353.

*Wisconsin*. — *Smith v. Cleveland*, 17 Wis. 556.

3. *In re Lake*, 40 La. Ann. 142, 3 So. 479; *In re Douglas*, 41 La. Ann. 765, 6 So. 675; *Breaux v. Negrotto*, 43 La. Ann. 426, 9 So. 502.

4. *Phelps v. Meade*, 41 Iowa 470. This doctrine is upheld by the supreme court of the United States in *Callanan v. Hurley*, 93 U. S. 387, 23 L. ed. 931.

5. *Larson v. Dickey*, 39 Neb. 463, 58 N. W. 167, 42 Am. St. Rep. 595.

6. *Rollins v. Wright*, 93 Cal. 395, 29 Pac. 58; *Allen v. Armstrong*, 16 Iowa 508; *Gould v. Thompson*, 45 Iowa 450.

7. *United States*. — *Bannon v. Burnes*, 39 Fed. 892; *Marx v. Hanthorn*, 30 Fed. 579; *Marx v. Hanthorn*, 148 U. S. 172.

*Alabama*. — *Stoudenmire v. Brown*, 48 Ala. 699.

*Arkansas*. — *Cairo R. Co. v. Parks*, 32 Ark. 131.

*Indiana*. — *Wantlan v. White*, 19 Ind. 470; *White v. Flynn*, 23 Ind. 46.

*Iowa*. — *McCready v. Sexton*, 29 Iowa 356, 4 Am. Rep. 214; *Immegart v. Gorgas*, 40 Iowa 439; *Allan v. Armstrong*, 16 Iowa 508.

*Kentucky*. — *Maguiar v. Henry*, 84 Ky. 1, 4 Am. St. Rep. 182.

*Louisiana*. — *In re Douglas*, 41 La. Ann. 765, 6 So. 765; *State v. Henon*, 29 La. Ann. 848.

*Michigan*. — *Groesbeck v. Seeley*, 13 Mich. 329; *Quinlon v. Rogers*, 12 Mich. 168.

*Mississippi*. — *Davis v. Vanarsdale*, 59 Miss. 367; *Virden v. Bowers*, 55 Miss. 1; *Dingey v. Paxton*, 60 Miss. 1,038.

*Missouri*. — *Ewart v. Davis*, 76 Mo. 129.

*Nevada*. — *Wright v. Cradelbaugh*, 3 Nev. 341.

*Oregon*. — *Strode v. Washer*, 17 Or. 50, 16 Pac. 926. *Cooley on Taxation*, (2nd ed.) 298, 521; *Cooley, Const. Lim.* (4th ed.) 459; *Blackwell on Tax Titles*, 253.

## CONDONATION.—See Divorce.

# CONFESSIONS.

By JOHN D. WORKS.

## I. DEFINITION AND CHARACTER OF, 297

1. *Defined*, 297
  - A. *General Definition*, 297
  - B. *Distinguished From Admissions*, 297
  - C. *Must Amount to Confession of Guilt*, 298
2. *Different Kinds of*, 298
  - A. *Generally*, 298
  - B. *Judicial*, 299
  - C. *Extra Judicial*, 299
    - a. *Direct*, 299
    - b. *Indirect or Implied*, 299
3. *Requisites of*, 301
  - A. *Must Be Voluntary*, 301
    - a. *What Will Amount to Voluntary Confession*, 302
      - (1.) *Made While in Custody*, 305
      - (2.) *While Under Personal Restraint*, 307
      - (3.) *Obtained by Questions or Solicitations*, 307
        - (A.) *Questions Assuming Guilt*, 307
      - (4.) *Promises and Inducements*, 309
        - (A.) *Generally*, 309
        - (B.) *Promise of Pardon*, 312
        - (C.) *Promise Not to Prosecute*, 312
        - (D.) *Other Inducements*, 312
      - (5.) *Procured by Threats or Violence*, 313
        - (A.) *Generally*, 313
        - (B.) *Fear of Mob Violence*, 313
      - (6.) *By Fraud*, 315
        - (A.) *Generally*, 315
        - (B.) *Deception*, 315
        - (C.) *Promise of Secrecy*, 316
      - (7.) *Need Not Be Spontaneous*, 316
      - (8.) *Affected by Offering Inducement*, 316
        - (A.) *Generally*, 316
        - (B.) *By Committing Magistrate*, 318
        - (C.) *By officer having accused in custody*, 318
        - (D.) *By Prosecuting Officer*, 319
        - (E.) *By Private Detective*, 319
        - (F.) *By Private Individual*, 319
        - (G.) *By Spiritual Adviser*, 321
    - B. *Mental Condition and Age as Affecting*, 321
      - a. *Generally*, 321
  4. *Admissions not Amounting to Confessions*, 322
    - A. *Generally*, 322
      - a. *Declarations Tending to Show Guilt*, 323
      - b. *False or Inconsistent Declarations of Innocence*, 323
    - B. *Confessions of Other Crimes*, 324

- C. *Of Collateral Facts*, 324
- D. *Proof of Voluntary Character Unnecessary*, 324
- 5. *Conduct Not Amounting to Admissions*, 324
  - A. *Generally*, 324
  - B. *Flight*, 325
  - C. *Escapes*, 325
- 6. *Caution Against Making Confession*, 325
  - A. *Generally*, 325
  - B. *When Made to One in Authority*, 326
    - a. *To Committing Magistrate*, 327
    - b. *To Officer Having Accused in Custody*, 327
  - C. *What Sufficient Caution*, 327
- II. **ADMISSIBILITY**, 327
  - 1. *Generally*, 327
  - 2. *In Violation of Provision Against Self-Incrimination*, 328
  - 3. *Preliminary Proof*, 329
    - A. *That Confession Was Voluntary*, 331
    - B. *That Accused Was Duly Cautioned*, 331
      - a. *How Caution Proved*, 331
    - C. *Motive for Making*, 331
      - a. *Generally Immaterial*, 331
      - b. *Made With View to Compromise With Party Injured*, 332
      - c. *Made in Prayer*, 332
      - d. *Made While Asleep*, 332
    - D. *Where Prior Confession Has Been Procured by Improper Means*, 332
      - a. *Generally*, 332
      - b. *Presumption That Second Was Not Voluntary*, 333
      - c. *Burden of Proof*, 333
    - E. *Self-Serving Inadmissible*, 334
      - a. *Exception, When Part of Res Gestae*, 334
  - 4. *Judicial Confessions*, 334
    - A. *Plea of Guilty*, 334
    - B. *At Preliminary Examination*, 334
  - 5. *Made Under Oath*, 334
    - A. *Generally*, 334
    - B. *At Coroner's Inquest*, 336
    - C. *Preliminary Examination*, 338
    - D. *On Arraignment for Final Trial*, 339
    - E. *As a Witness*, 339
      - a. *Generally*, 339
      - b. *In His Trial for the Crime Confessed*, 340
      - c. *In the Trial of Another Action*, 340
    - F. *Caution When Necessary*, 341
  - 6. *Fact disclosed by incompetent confession when admissible*, 341
    - A. *Generally*, 341
  - 7. *Admissibility, How and by Whom Determined*, 343

- A. *Question for the Court*, 343
- B. *Burden of Proof*, 344
- C. *Right of Accused to Offer Evidence*, 345
- D. *When Must Be Determined*, 346
- E. *When May Be Left to Jury*, 346
  - a. *Where Evidence Is Conflicting*, 346

### III. HOW PROVED, 347

- 1. *Generally*, 347
- 2. *Whole Statement Must Be Given*, 348
  - A. *Substance Sufficient*, 348
  - B. *Right to Explain by Proving Other Declarations*, 349
    - a. *If Made at Same Time*, 349
    - b. *Not if Made at Different Time*, 350
    - c. *Prosecution May Disprove Self-serving Portion*, 350
    - d. *Jury May Believe Part and Disbelieve Part*, 350
- 3. *Effect of Refusal to Hear Whole Statement*, 350
- 4. *When Confession Is in Writing*, 351

### IV. EFFECT OF, WHEN PROVED, 352

- 1. *Judicial Confessions*, 352
  - A. *At Preliminary Examination*, 352
  - B. *At Coroner's Inquest*, 352
  - C. *At Final Hearing*, 352
  - D. *Sufficient to Convict*, 352
    - a. *Generally*, 352
    - b. *The Rule in Cases of Treason*, 353
- 2. *Extra Judicial*, 353
  - A. *Generally*, 353
  - B. *Not Conclusive*, 353
  - C. *Whether Sufficient to Convict or Not*, 354
- 3. *Mental Condition as Affecting*, 355
  - A. *Generally*, 355
  - B. *Weakness of Mind*, 355
  - C. *Infancy*, 355
  - D. *Intoxication*, 355
- 4. *Corroboration*, 356
  - A. *When Necessary*, 356
  - B. *What Will Amount to*, 356
  - C. *What Sufficient*, 356
    - a. *Of Corpus Delicti*, 357
- 5. *Weight to Be Given to*, 359
  - A. *Generally Not Conclusive*, 359
  - B. *Jury Must Determine*, 359
  - C. *Should Be Received With Caution*, 360
  - D. *Strong Evidence when freely and deliberately made*, 360
- 6. *Of Other Persons When Admissible*, 360
  - A. *Generally*, 360
  - B. *By Co-Conspirators*, 361
  - C. *By an Accomplice*, 362



SCOPE OF THE ARTICLE. — The term confession is usually limited to admissions of guilt, as distinguished from admissions of facts tending to establish guilt. They are, also, distinguished from admissions against interest tending to establish civil liability. But, in order to make complete an article on this subject, it will be necessary to consider such admissions as are provable against one charged with crime, tending to establish his guilt for the crime charged, but not amounting to a confession; mainly for the purpose of distinguishing between confessions and such admissions, and the rules of evidence relating to each.

## I. DEFINITION AND CHARACTER OF.

1. **Defined.** — A. GENERAL DEFINITION. — A confession is a voluntary admission of guilt of a criminal offense.<sup>1</sup>

B. DISTINGUISHED FROM ADMISSIONS. — They are distinguished from admissions in civil cases,<sup>2</sup> and from admissions of facts in criminal cases tending to prove the offense charged, but not amount-

1. *Alabama.* — Jones v. State, 96 Ala. 102, 11 So. 399.

*California.* — People v. Parton, 49 Cal. 632; People v. Strong, 30 Cal. 157; People v. LeRoy, 65 Cal. 613, 4 Pac. 649; People v. Miller, 122 Cal. 84, 54 Pac. 523.

*Iowa.* — State v. Glynden, 51 Iowa 463, 1 N. W. 750.

*Oregon.* — State v. Porter, 32 Or. 135, 49 Pac. 964.

*South Carolina.* — State v. Carson, 36 S. C. 524, 15 S. E. 588.

*Texas.* — Austin v. State, 15 Tex. App. 388.

**Definitions.** — "A confession of guilt is an admission of the criminal act itself, not an admission of a fact or circumstance from which guilt may be inferred." State v. Red, 53 Iowa 69, 4 N. W. 831.

"A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime." Stephen's Dig. of Ev. (Chase's Ed.) 52.

"The voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same. An admission or acknowledgment by a prisoner, when arraigned for an offense, that he committed the crime with which he is

charged." Bouv. Law Dic., Austin v. State, 15 Tex. App. 388.

"A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt." People v. Ammerman, 118 Cal. 23, 50 Pac. 15.

**Demurrer to an Indictment Not a Confession.** — The defendant in a criminal case does not confess his guilt by demurring to the indictment. Ross v. State, 9 Mo. 696.

**Nature and Effect.** — For an interesting and instructive discussion of the nature and effect of confessions and the distinction between a plea of guilty, the only confession known to the common law, and declarations amounting to evidence of guilt, see State v. Willis, 71 Conn. 293, 41 Atl. 820.

2. See article "ADMISSIONS," Vol. I, p. 348; Greenl. Ev., Vol. I, § 170.

*California.* — People v. Velarde, 59 Cal. 457; People v. Hickman, 113 Cal. 80, 45 Pac. 175; People v. Miller, 122 Cal. 84, 54 Pac. 523; People v. Strong, 30 Cal. 157.

*Georgia.* — Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238; Covington v. State, 79 Ga. 687, 7 S. E. 153.

*Louisiana.* — State v. Picton, 51 La. Ann. 624, 25 So. 375.

*Oregon.* — State v. Heidenreich, 29 Or. 381, 45 Pac. 755; State v. Porter, 32 Or. 135, 49 Pac. 964.

ing to a confession of guilt.<sup>3</sup>

**C. CONFESSION MUST AMOUNT TO CONFESSION OF GUILT.** — To constitute a declaration a confession within the legal meaning of the term it must amount to a confession of the crime charged, or participation in such commission, as distinguished from admissions or other statements tending to prove guilt or innocence;<sup>4</sup> or of facts from which, taken together, guilt is directly deducible.<sup>5</sup>

**Must Know With What He is Charged.** — And necessarily to render his declaration or admission a confession of any specific offense, he must have known what the charge was, and so knowing, confessed his guilt of the offense.<sup>6</sup>

**2. Different Kinds of.** — **A. GENERALLY.** — Confessions are classified as Judicial and Extra Judicial, and some of the cases recognize a distinction between direct and indirect confessions.<sup>7</sup>

**3. Taylor v. State, 37 Neb. 788, 56 N. W. 623; People v. Strong, 30 Cal. 157; State v. Crowder, 41 Kan. 101, 21 Pac. 208; Boston v. State, 94 Ga. 590, 20 S. E. 98; People v. Miller, 122 Cal. 84, 54 Pac. 523; State v. Picton, 51 La. Ann. 624, 25 So. 375.**

**Importance of Distinction.** — These distinctions are important to be observed because they will often determine the admissibility of evidence offered to prove a declaration of the accused, and may materially affect the weight to be given to such evidence when received.

**Confession Defined.** — "A confession is rather a fact to be proved by evidence than evidence to prove a fact. It is not so much proof that the particular thing took place, as it is a waiver, by the party charged, of his right to have certain facts alleged against him technically proved." *State v. Carson, 36 S. C. 524, 15 S. E. 588.*

**Distinguished from Admissions or Declarations.** — "A confession, in criminal law, is the voluntary declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation he had in the same. The word 'confession' is not the mere equivalent of the words, statements or declarations." *People v. Strong, 30 Cal. 157.* See also *State v. Heidenreich, 29 Or. 381, 45 Pac. 755.*

**4. United States.** — *Dimmick v. U. S., 116 Fed. 825, 54 C. C. A. 329.*  
**California.** — *People v. Parton, 49 Cal. 632; People v. LeRoy, 65 Cal. 613, 4 Pac. 649; People v. Velarde,*

*59 Cal. 457; People v. Hickman, 113 Cal. 80, 45 Pac. 175; People v. Ammerman, 118 Cal. 23, 50 Pac. 15; People v. Ashmead, 118 Cal. 508, 50 Pac. 681; People v. Miller, 122 Cal. 84, 54 Pac. 523.*

**Georgia.** — *Covington v. State, 79 Ga. 687, 7 S. E. 153.*

**Iowa.** — *State v. Red, 53 Iowa 69, 4 N. W. 831.*

**Kansas.** — *State v. Crowder, 41 Kan. 101, 21 Pac. 208.*

**Louisiana.** — *State v. Picton, 51 La. Ann. 624, 25 So. 375.*

**Missouri.** — *State v. Jackson, 95 Mo. 623, 8 S. E. 749.*

**Nebraska.** — *Taylor v. State, 37 Neb. 788, 56 N. W. 623.*

**North Carolina.** — *State v. McDowell, 129 N. C. 523, 39 S. E. 840.*

**Oregon.** — *State v. Heidenreich, 29 Or. 381, 45 Pac. 755; State v. Porter, 32 Or. 135, 49 Pac. 964.*

**South Carolina.** — *State v. Carson, 36 S. C. 524, 15 S. E. 588; State v. Mitchell, 49 S. C. 410, 27 S. E. 424.*

**Texas.** — *Hunt v. State, 33 Tex. Crim. App. 252, 26 S. W. 206.*

**5. State v. Porter, 32 Or. 135, 49 Pac. 964.**

**6. Robertson v. State, 30 Tex. App. 498, 17 S. W. 1,068; Porter v. Com., 22 Ky. L. Rep. 1,657, 61 S. W. 16.**

**7. State v. Carr, 53 Vt. 37; Speer v. State, 4 Tex. App. 474; State v. Miller, 9 Houst. (Del.) 564, 32 Atl. 137.**

**Different Kinds of Confessions and the Effects.** — In *People v. Hennessey, 15 Wend. (N. Y.) 147*, it is said: "Generally speaking, the ad-

**B. JUDICIAL.** — Judicial confessions are those which are made before a magistrate, or in a court, in the course of a proceeding where the party making it is charged with crime.<sup>8</sup>

**C. EXTRA JUDICIAL.** — Extra Judicial confessions are such as are not made in any proceeding in court against the party charged with crime.<sup>9</sup>

a. *Direct.* — A direct confession is one made expressly as such.<sup>10</sup>

b. *Indirect or Implied.* — An indirect or implied confession is one that may be inferred from conduct, the language used, or from acquiescence or silence when a statement of his guilt is made in the presence of the accused and not denied.<sup>11</sup> But where the accused

mission of a fact renders it unnecessary to prove it. Of admissions or confessions there are several kinds: 1. A confession in open court of the prisoner's guilt, which is conclusive, and renders any proof unnecessary; 2. The next highest kind of confession is that which is made before a magistrate; 3. The lowest is that which is made to any other person. All these confessions, if voluntary, are competent evidence, and it is said by most writers on the law of evidence, that a confession out of court is sufficient evidence to warrant a conviction, although there is no positive prove *aliunde* that the offense was committed."

8. *Speer v. State*, 4 Tex. App. 474; *White v. State*, 49 Ala. 344.

**Judicial Confessions Defined.** — In *Mathews v. State*, 55 Ala. 187, 28 Am. Rep. 608, judicial confessions are thus defined: "Text-writers usually classify confessions as judicial and extra judicial. The first comprehends confessions made before a committing magistrate, having authority to take and certify the examination of persons accused of a criminal offense, when the preliminary inquiry is being made, whether such offense has been committed, and whether there is probable cause to believe the accused was the guilty agent in its commission. It also comprehends the plea of guilty, deliberately interposed on the arraignment for final trial, after admonition and advice from the court against its interposition."

**What Are Judicial Confessions.** "But neither is the statute, nor were the common law rules of which it is declaratory, applicable to any ex-

amination except that of a person brought before a magistrate on a charge of crime. All other examinations are classified as extra judicial." *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721.

9. *Speer v. State*, 4 Tex. App. 474.

10. *State v. Red*, 53 Iowa 69, 4 N. W. 831; *Speer v. State*, 4 Tex. App. 474.

11. See article "ADMISSIONS," Vol. I, p. 367.

*Alabama.* — *Campbell v. State*, 55 Ala. 80; *Levison v. State*, 54 Ala. 520; *Simmons v. State*, 129 Ala. 41, 29 So. 929; *Davis v. State*, 131 Ala. 10, 31 So. 569.

*California.* — *People v. Abbott*, (Cal.) 4 Pac. 769; *People v. Amaya*, 134 Cal. 531, 66 Pac. 794.

*Delaware.* — *State v. Miller*, 9 Houst. 564, 32 Atl. 137.

*Florida.* — *Leslie v. State*, 35 Fla. 184, 17 So. 599.

*Georgia.* — *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154.

*Illinois.* — *Gilman v. People*, 178 Ill. 19, 52 N. E. 967.

*Indiana.* — *White v. State*, 153 Ind. 689, 54 N. E. 763.

*Mississippi.* — *Brown v. State*, 78 Miss. 637, 29 So. 519; *Heard v. State*, 59 Miss. 545.

*Missouri.* — *State v. Jackson*, 95 Mo. 623, 8 S. W. 749.

*New York.* — *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721; *People v. Wennerholm*, 166 N. Y. 567, 60 N. E. 259.

*Tennessee.* — *Low v. State*, 108 Tenn. 127, 65 S. W. 401; *Deathridge v. State*, 1 Sneed 75.

*Texas.* — *Mitchell v. State*, (Tex. Crim. App.), 62 S. W. 572; *Reeves*

denies the statement, it is inadmissible against him.<sup>12</sup>

**Must be of Charge Made.** — To render the failure to deny a confession of guilt, the charge must necessarily be one of guilt of the crime charged.<sup>13</sup>

**Must Call for Denial.** — And must be made under such circumstances as to call for and give opportunity for a denial.<sup>14</sup>

*v. State*, (Tex. Crim. App.), 24 S. W. 518; *Speer v. State*, 4 Tex. App. 474.

*Vermont.* — *State v. Gilbert*, 36 Vt. 145.

**Rule Stated.** — In *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730, the rule on the subject is thus stated: "The rule in regard to admissions inferred from acquiescence in the verbal statements of others is to be applied with careful discrimination. As was said by Best, C. J., in *Child v. Grace*, 2 Car. & P. 193: 'Really, it is most dangerous evidence.' It should always be received with caution, and ought not to be admitted unless the evidence is of direct declarations of a kind which naturally calls for contradiction, or some assertion made to a party with respect to his rights, in which, by silence, he acquiesces. A distinction is recognized between declarations made by a party interested and those made by a stranger, it having been held that while what one party declares to the other without contradiction is admissible, what is said by a third person may not be."

12. *Brown v. State*, 78 Miss. 637, 29 So. 519.

**Admission That Testimony of Another Witness Is True** renders such testimony competent as explanatory of the admission. *State v. Gilbert*, 36 Vt. 145.

**Unanswered Letter** written to and found in the possession of the accused inadmissible. *People v. Green*, 1 Park. Crim. Rep. (N. Y.) 11; *Dawson v. State*, 38 Tex. Crim. App. 9, 40 S. W. 731; *Dawson v. State*, 38 Tex. Crim. App. 50, 41 S. W. 599; *Packer v. U. S.*, 106 Fed. 906, 46 C. C. A. 35.

**When Not Cautioned.** — It is held under the statute of Texas that the accused being in custody, a failure to deny a confession of another, jointly accused of the offense, is inadmissible unless the accused was

cautioned. *Wright v. State*, 37 Tex. Crim. App. 627, 40 S. W. 491. See also *Gardner v. State*, (Tex. Crim. App.), 34 S. W. 945; *Fulcher v. State*, 28 Tex. App. 465, 13 S. W. 750; *Guinn v. State*, 39 Tex. Crim. App. 257, 45 S. W. 694.

13. *Weaver v. State*, 77 Ala. 26; *Guinn v. State*, 39 Tex. Crim. App. 257, 45 S. W. 694; *Brantley v. State*, 115 Ga. 229, 41 S. E. 695.

14. See article "Admissions," Vol. I, p. 375.

*Alabama.* — *Bob v. State*, 32 Ala. 560.

*California.* — *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; *People v. Williams*, 133 Cal. 165, 65 Pac. 323.

*Georgia.* — *Bell v. State*, 93 Ga. 557, 19 S. E. 244; *Simmons v. State*, 115 Ga. 574, 41 S. E. 983.

*Kentucky.* — *Porter v. Com.*, 22 Ky. L. Rep. 1,657, 61 S. W. 16; *Franklin v. Com.*, 105 Ky. 237, 48 S. W. 986.

*Massachusetts.* — *Com. v. Kenney*, 12 Metc. 235, 46 Am. Dec. 672.

*Missouri.* — *State v. Foley*, 144 Mo. 600, 46 S. W. 733.

*New York.* — *People v. Green*, 1 Park. Crim. Rep. 11; *People v. Bisert*, 71 App. Div. 118, 75 N. Y. Supp. 630; *People v. Young*, 72 App. Div. 9, 76 N. Y. Supp. 275.

*Texas.* — *Gardner v. State*, (Tex. Crim. App.), 34 S. W. 945; *Pryor v. State*, 40 Tex. Crim. App. 643, 51 S. W. 375; *Guinn v. State*, 39 Tex. Crim. App. 257, 45 S. W. 694; *Cook v. State*, (Tex. Crim. App.), 61 S. W. 393; *Funderburk v. State*, (Tex. Crim. App.), 61 S. W. 393.

*Utah.* — *People v. Kessler*, 13 Utah 69, 44 Pac. 97.

**Failure to Deny During Legal Investigation.** — In *Bell v. State*, 93 Ga. 557, 19 S. E. 244, it is held that a failure to deny during a legal investigation before a judicial officer, a statement imputed to him by another accused person, did not constitute a confession, and that silence on such an occasion was, if not required, at

**3. Requisites of.** — **A. MUST BE VOLUNTARY.** — One of the prime requisites of a confession competent to be proved against the party making it is that it be made voluntarily and without restraint, coercion or influence of any kind, but if so made it is competent evidence.<sup>15</sup>

least justified as a matter of decorum in the presence of a tribunal.

**Must Call for Denial.** — "The implication of admissions from silence rests upon the idea of acquiescence. The maxim is, "*qui tacet, consentire videtur*," and it never applies unless an acquiescence in what is said can be presumed. Neither reason nor law will permit the presumption of acquiescence to be drawn from the silence, unless the circumstances were not only such as afforded the party an opportunity to act or speak, but such also as would properly and naturally call for some action or reply from men similarly situated." *Bob v. State*, 32 Ala. 560.

**Failure to Deny When Under Arrest Not a Confession.** — *Com. v. Kenney*, 12 Metc. (Mass.) 235, 46 Am. Dec. 672; *Gardner v. State*, (Tex. Crim. App.), 34 S. W. 945; *Porter v. Com.*, 22 Ky. L. Rep. 1,657, 61 S. W. 16; *Funderburk v. State*, (Tex. Crim. App.), 61 S. W. 393. But see *People v. Amaya*, 134 Cal. 531, 66 Pac. 794.

**Admission of Truth of Statement Made by Another** is competent. *State v. Schmidt*, 136 Mo. 644, 38 S. W. 719.

**When Told by Officer to Keep Quiet** a failure to deny a statement made in his presence cannot be proved against the accused. *People v. Kessler*, 13 Utah 69, 44 Pac. 97.

**A General Denial of Guilt** without meeting each item of a detailed statement of facts, specifically, is sufficient to avoid any claim of a confession by silence or acquiescence. *Ware v. State*, 96 Ga. 394, 23 S. E. 410.

**Whether the Statement by Another Was Heard** by the accused or not is properly left to the jury. *State v. Marsh*, 70 Vt. 288, 40 Atl. 836.

**Conclusions Stated or Arguments Made** by another party, in conversation with the accused, cannot be proved against him because they

were not denied or refuted by him. *State v. Foley*, 144 Mo. 600, 46 S. W. 733.

**Officer in Performance of His Duty** not called upon to deny. *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630.

**Opportunity to Deny as a Witness** and a failure to do so renders the evidence competent. *State v. Dexter*, 115 Iowa 678, 87 N. W. 417.

**15. United States.** — *Bram v. U. S.*, 168 U. S. 532, 18 Sup. Ct. 183; *U. S. v. Nott*, 1 McLean 499, 27 Fed. Cas. No. 15,900; *U. S. v. Charles*, 2 Cranch C. C. 76, 25 Fed. Cas. No. 14,786.

**Alabama.** — *Aiken v. State*, 35 Ala. 399; *Miller v. State*, 40 Ala. 54; *Mose v. State*, 36 Ala. 211; *Kendall v. State*, 65 Ala. 492; *Murphy v. State*, 63 Ala. 1; *Porter v. State*, 55 Ala. 95; *Levison v. State*, 54 Ala. 520; *Banks v. State*, 84 Ala. 430, 4 So. 382; *Dinah v. State*, 39 Ala. 359; *Bob v. State*, 32 Ala. 560; *Gregg v. State*, 106 Ala. 44, 17 So. 321.

**Arkansas.** — *Hardin v. State*, 66 Ark. 53, 48 S. W. 904; *Corley v. State*, 50 Ark. 305, 7 S. W. 255; *Love v. State*, 22 Ark. 336; *Young v. State*, 50 Ark. 501, 8 S. W. 828.

**California.** — *People v. Jim Ti*, 32 Cal. 60; *People v. Ah How*, 34 Cal. 218.

**Colorado.** — *Beery v. U. S.*, 2 Colo. 186.

**Connecticut.** — *State v. Potter*, 18 Conn. 166.

**Florida.** — *Simon v. State*, 5 Fla. 285.

**Georgia.** — *Green v. State*, 88 Ga. 516, 15 S. E. 10, 30 Am. St. Rep. 167; *Dixon v. State*, 113 Ga. 1,039, 39 S. E. 846.

**Illinois.** — *Austin v. People*, 51 Ill. 236; *Miller v. People*, 39 Ill. 457.

**Kansas.** — *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805.

**Kentucky.** — *Rector v. Com.*, 80 Ky. 468.

**Louisiana.** — *State v. Young*, 52 La. Ann. 478, 27 So. 50; *State v.*

a. *What Will Amount to Voluntary Confession.*—The courts have shown the greatest liberality in the exclusion of declarations offered as confessions, particularly when made while in custody, or under personal restraint, or where they have been obtained by questions assuming guilt, solicitations, promises or other induce-

Hamilton, 42 La. Ann. 1,204, 8 So. 304.

*Maine.*—State v. Grover, 96 Me. 363, 52 Atl. 757.

*Massachusetts.*—Com. v. Tucker-man, 10 Gray 173; Com. v. Knapp, 9 Pick. 496, 20 Am. Dec. 491; Com. v. Preece, 140 Mass. 276, 5 N. E. 494.

*Michigan.*—Flagg v. People, 40 Mich. 706; People v. Stewart, 75 Mich. 21, 42 N. W. 662; People v. McCullough, 81 Mich. 25, 45 N. W. 515.

*Mississippi.*—Ammous v. State, 80 Miss. 592, 32 So. 9; Blalack v. State, 79 Miss. 517, 31 So. 105; Simon v. State, 37 Miss. 288; Harvey v. State, (Miss.), 20 So. 837; Garrard v. State, 50 Miss. 147; Serpentine v. State, 1 How. 256.

*Missouri.*—State v. Brockman, 46 Mo. 566; State v. Hagan, 54 Mo. 192; Hawkins v. State, 7 Mo. 190; State v. Jones, 54 Mo. 478.

*Montana.*—Territory v. McClintock, 1 Mont. 394.

*Nebraska.*—Basye v. State, 45 Neb. 261, 63 N. W. 811; Heldt v. State, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835; Taylor v. State, 37 Neb. 788, 56 N. W. 623.

*New Jersey.*—Roessel v. State, 62 N. J. L. 216, 41 Atl. 408.

*New York.*—People v. Mackinder, 61 N. Y. St. 523, 29 N. Y. Supp. 842; People v. Wentz, 37 N. Y. 303; People v. Thoms, 3 Park. Crim. Rep. 256; O'Brien v. People, 48 Barb. 274.

*North Carolina.*—State v. Davis, 125 N. C. 612, 34 S. E. 198; State v. Whitfield, 70 N. C. 356; State v. Dildy, 72 N. C. 325; State v. George, 50 N. C. 233.

*Ohio.*—Rufert v. State, 25 Ohio St. 464; Spears v. State, 2 Ohio St. 583.

*Pennsylvania.*—Fife v. Com., 29 Pa. St. 429.

*South Carolina.*—State v. Kirby, 1 Strob L. 155; State v. Crank, 2 Bailey L. 66, 23 Am. Dec. 117; State v. Branham, 13 S. C. 389; State v.

Vaigneur, 5 Rich. L. 391; State v. Carson, 36 S. C. 524, 15 S. E. 588.

*Tennessee.*—Deathridge v. State, 1 Sneed 75; Alfred v. State, 2 Swan 581; State v. Fields, 4 Tenn. 140; Boyd v. State, 2 Humph. 39.

*Texas.*—Carr v. State, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; Allen v. State, 12 Tex. App. 190; Warren v. State, 29 Tex. 369; Clayton v. State, 31 Tex. Crim. App. 489, 21 S. W. 255; Womack v. State, 16 Tex. App. 178; Harris v. State, 6 Tex. App. 97; Gallaher v. State, 40 Tex. Crim. App. 296, 50 S. W. 388; Gallagher v. State, (Tex. Crim. App.), 24 S. W. 288.

*Vermont.*—State v. Walker, 34 Vt. 296; State v. Carr, 37 Vt. 191; State v. Phelps, 11 Vt. 116, 34 Am. Dec. 672.

*Wisconsin.*—Miller v. State, 25 Wis. 384.

**Two Grounds Only for Exclusion.** In Rex v. Derrington, 2 Car. & P. 418, 12 Eng. C. L. 650, it is held that there are but two grounds for the exclusion of confessions: 1. Where the prisoner is induced to make it in consequence of the prosecutor, etc., holding out any threat or promise to induce him to confess, and 2d, Where the communication is privileged. State v. Carson, 36 S. C. 524, 15 S. E. 588.

**Modified by Statute.**—In some of the states confessions made under inducements, other than fear produced by threats, are by statute rendered admissible with proof of all the circumstances connected therewith. State v. Munson, 7 Wash. 239, 34 Pac. 932. This makes it a question of the weight to be given to the confession instead of one of competency.

**Inadmissible for Purposes of Impeachment.**—If the confession is involuntary it is equally inadmissible if offered to impeach the testimony of the accused, as if offered as a confession. People v. Yeaton, 75 Cal. 415, 17 Pac. 544.

ments, threats or fraud; and the question of the admissibility of such declarations has in many instances turned upon the question whether they were made to one having official authority over the accused, or one sustaining toward him some confidential relation, such as his spiritual advisor, or having control over or power to punish him.<sup>16</sup>

16. *Alabama*.—Wyatt v. State, 25 Ala. 9; Spicer v. State, 69 Ala. 159; Bob v. State, 32 Ala. 560; Owen v. State, 78 Ala. 425, 56 Am. Rep. 40; Lacey v. State, 58 Ala. 385; Dinah v. State, 39 Ala. 359.

*Arkansas*.—Corley v. State, 50 Ark. 305, 7 S. W. 255.

*Colorado*.—Beery v. U. S., 2 Colo. 186.

*Georgia*.—Dixon v. State, 113 Ga. 1,039, 39 S. E. 846; Green v. State, 88 Ga. 516, 15 S. E. 10, 30 Am. St. Rep. 167.

*Kentucky*.—Rector v. Com., 80 Ky. 468.

*Maryland*.—Biscoe v. State, 67 Md. 6, 8 Atl. 571.

*Massachusetts*.—Com. v. Tuckerman, 10 Gray 173.

*Michigan*.—Flagg v. People, 40 Mich. 706.

*Mississippi*.—Ammous v. State, 80 Miss. 592, 32 So. 9; Simmons v. State, 61 Miss. 243; Blalack v. State, 79 Miss. 517, 31 So. 105; Peter v. State, 4 Smed. & M. 31.

*Missouri*.—Couley v. State, 12 Mo. 462.

*Nebraska*.—May v. State, 38 Neb. 211, 56 N. W. 804.

*New Jersey*.—State v. Guild, 10 N. J. L. 163, 18 Am. Dec. 404.

*South Carolina*.—State v. Branhams, 13 S. C. 389; State v. Kirby, 1 Strob. 155.

*Tennessee*.—State v. Fields, 4 Tenn. 140; Deathridge v. State, 1 Sneed 75; Beggarly v. State, 8 Baxt. 520.

*Texas*.—Womack v. State, 16 Tex. App. 178; Gallaher v. State, 40 Tex. Crim. App. 296, 50 S. W. 388; Barnes v. State, 36 Tex. 356; Dill v. State, 35 Tex. Crim. App. 240, 33 S. W. 126, 60 Am. St. Rep. 37; Harris v. State, 6 Tex. App. 97; Thomas v. State, 35 Tex. Crim. App. 178, 32 S. W. 771.

**Limitation of the Rule Excluding Confession.**—The following language was used in the case of U. S. v.

Nott, 1 McLean 499, 27 Fed. Cas. No. 15,900: "To make a confession, therefore, evidence, it must be made, so far as can be ascertained, in the absence of any excitement which creates a hope to obtain favor, or to avoid a threatened punishment. But the court in such cases must judge of the motives which induce the confession, from the confession itself, and the circumstances under which it was made. The modern doctrine on this subject in England seems to have been carried great lengths in favor of the prisoner. And in one of the cases read, the confession was excluded because a bystander, unknown to the prisoner, and who had no right to interfere, observed in his hearing that he had better confess. This was going farther to exclude confessions than the reason of the rule would seem to require. And in some of the cases, all subsequent confessions are supposed to have been made under the influence which at first operated; and on this ground they have also been excluded from the jury."

**What Will Constitute an Involuntary Confession.**—In *Bram v. U. S.*, 168 U. S. 532, 18 Sup. Ct. 183, it is said: "In approaching the adjudicated cases for the purpose of endeavoring to deduce from them what quantum of proof, in a case presented, is adequate to create, by the operation of hope or fear, an involuntary condition of the mind, the difficulty encountered is, that all the decided cases necessarily rest upon the state of facts which existed in the particular case, and therefore furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different although somewhat similar condition of fact. Indeed, the embarrassment which comes from the varying state of fact,

**No Fixed Rule to Determine Whether Voluntary or Not.** — There is no fixed rule as to what will constitute a voluntary or involuntary confession. Each case must depend upon its own facts and circumstances;<sup>17</sup> the test in every case being whether it was or was not the free, uninfluenced statement of the party making it.<sup>18</sup>

considered in the decided cases, has given rise to the statement that there was no general rule of law by which the admissibility of a confession could be determined, but that the courts had left the rule to be evolved from the facts of each particular case. 2 Taylor Ev. § 872. And, again, it has been said that so great was the perplexity resulting from an attempt to reconcile the authorities that it was manifest that not only must each case solely depend upon its own facts, but that even the legal rule to be applied was involved in obscurity and confusion."

**Governed by Statute.** — In many of the states the requisites of a confession and the preliminary proof necessary to render it admissible are expressly provided by statute. Barnes v. State, 36 Tex. 356; Warren v. State, 29 Tex. 369; Rains v. State, 33 Tex. Crim. App. 294, 26 S. W. 398.

17. *United States.* — Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183.

*Alabama.* — Porter v. State, 55 Ala. 95.

*Georgia.* — Green v. State, 88 Ga. 516, 15 S. E. 10, 30 Am. St. Rep. 167.

*Maryland.* — Biscoe v. State, 67 Md. 6, 8 Atl. 571.

*Missouri.* — State v. Patterson, 73 Mo. 695.

*Pennsylvania.* — Com. v. Dillon, 4 Dall. 116.

*South Carolina.* — State v. Kirby, 1 Strob. L. 155; State v. Crank, 2 Bailey L. 66, 23 Am. Dec. 117; State v. Branham, 13 S. C. 389.

*Tennessee.* — McGlothlin v. State, 2 Coldw. 223.

*Texas.* — Walker v. State, 7 Tex. App. 245, 32 Am. Rep. 595.

*Vermont.* — State v. Walker, 34 Vt. 296.

18. *England.* — Rex v. Thomas, 7 Car. & P. 345, 32 Eng. C. L. 648.

*United States.* — U. S. v. Stone, 8 Fed. 232; U. S. v. Chapman, 4 Am. L. J. 440, 25 Fed. Cas. No. 14,783.

*Alabama.* — Aaron v. State, 37 Ala. 106; Perkins v. State, 66 Ala. 457; Mose v. State, 36 Ala. 211; Burton v. State, 107 Ala. 108, 18 So. 284; Porter v. State, 55 Ala. 95; Wyatt v. State, 25 Ala. 9; Levison v. State, 54 Ala. 520; Sullins v. State, 53 Ala. 474; Kelly v. State, 72 Ala. 244.

*Arkansas.* — Young v. State, 50 Ark. 501, 8 S. W. 828; Corley v. State, 50 Ark. 305, 7 S. W. 255.

*Georgia.* — Williams v. State, 94 Ga. 400, 20 S. E. 334.

*Illinois.* — Bartley v. People, 156 Ill. 234, 40 N. E. 831.

*Iowa.* — State v. Fortner, 43 Iowa 494.

*Kansas.* — State v. White, 17 Kan. 487; State v. Ingram, 16 Kan. 14.

*Louisiana.* — State v. Albert, 50 La. Ann. 481, 23 So. 609.

*Maine.* — State v. Grant, 22 Me. 171; State v. Soper, 16 Me. 293, 33 Am. Dec. 665.

*Massachusetts.* — Com. v. Smith, 119 Mass. 305; Com. v. Tuckerman, 10 Gray 173; Com. v. Morey, 1 Gray 461.

*Michigan.* — People v. Stewart, 75 Mich. 21, 42 N. W. 662; People v. Swetland, 77 Mich. 53, 43 N. W. 779; People v. McCullough, 81 Mich. 25, 45 N. W. 515.

*Minnesota.* — State v. Staley, 14 Minn. 105.

*Mississippi.* — Lynes v. State, 36 Miss. 617; Simon v. State, 36 Miss. 636.

*Missouri.* — State v. Hopkirk, 84 Mo. 278.

*Nebraska.* — Strong v. State, 63 Neb. 440, 88 N. W. 772; May v. State, 38 Neb. 211, 56 N. W. 804.

*New Jersey.* — Bullock v. State, 65 N. J. L. 557, 47 Atl. 62.

*New York.* — People v. Druse, 103 N. Y. 655, 8 N. E. 733.

*North Carolina.* — State v. Davis, 125 N. C. 612, 34 S. E. 198; State v. Chisenhall, 106 N. C. 676, 11 S. E. 518.

*Pennsylvania.* — Com. v. Johnson,



(1.) **Made While in Custody.** — Whether a confession is the free and voluntary act of the accused must depend upon the circumstances of each case, and the mere fact that he was at the time the declaration was made in custody charged with the offense alleged to have been confessed is material to be considered.<sup>19</sup> In some cases it is held, broadly, that a confession made while under arrest is inadmissible.<sup>20</sup>

But, independently of statutory provisions, the mere fact that he was in custody at the time does not render the confession incom-

162 Pa. St. 63, 29 Atl. 280; *Fife v. Com.*, 29 Pa. St. 429; *Com. v. Dillon*, 4 Dall. 116.

*South Carolina.* — *State v. Kirby*, 1 Strob. L. 378; *State v. Kirby*, 1 Strob. L. 155.

*Tennessee.* — *State v. Henry*, 6 Baxt. 539; *Beggarly v. State*, 8 Baxt. 520; *McGlothlin v. State*, 2 Coldw. 223.

*Texas.* — *Gallaher v. State*, 40 Tex. Crim. App. 296, 50 S. W. 388; *Paris v. State*, 35 Tex. Crim. App. 82, 31 S. W. 855; *Maddox v. State*, 41 Tex. 205.

*Vermont.* — *State v. Carr*, 37 Vt. 191; *State v. Walker*, 34 Vt. 294; *State v. Gorham*, 67 Vt. 365, 31 Atl. 845.

**Must Amount to Promise or Threat.** — In *Fife v. Com.*, 29 Pa. St. 429, it is held that in order to render a confession incompetent, the inducement must amount to either a promise or threat.

**Must Be Calculated to Make Confession Untrue.** — *People v. Smith*, 3 How. Pr. (N. Y.) 226.

19. *United States.* — *Bram v. U. S.*, 168 U. S. 532, 18 Sup. Ct. 183.

*Alabama.* — *Meinaka v. State*, 55 Ala. 47; *Grant v. State*, 55 Ala. 201; *Mauil v. State*, 95 Ala. 1, 11 So. 218.

*Delaware.* — *State v. Trusty*, 1 Pen. 319, 40 Atl. 766.

*Florida.* — *Green v. State*, 40 Fla. 191, 23 So. 851.

*Louisiana.* — *State v. Jones*, 47 La. Ann. 1,524, 18 So. 515; *State v. Auguste*, 50 La. Ann. 488, 23 So. 612.

*Michigan.* — *People v. Howes*, 81 Mich. 396, 45 N. W. 961.

*Mississippi.* — *Jones v. State*, 58 Miss. 349.

*Missouri.* — *State v. Guy*, 69 Mo. 430.

*New Hampshire.* — *State v. York*, 37 N. H. 175.

*New York.* — *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *People v. Mackinder*, 61 N. Y. St. 523, 29 N. Y. Supp. 842.

*Pennsylvania.* — *Com. v. Eagan*, 190 Pa. St. 10, 42 Atl. 374.

*South Carolina.* — *State v. Carson*, 36 S. C. 524, 15 S. E. 588.

20. *Grosse v. State*, 11 Tex. App. 364; *People v. McMahon*, 15 N. Y. 384; *Gilder v. State*, 35 Tex. Crim. App. 360, 33 S. W. 867; *State v. Jones*, 47 La. Ann. 1,524, 18 So. 515; *Conoly v. State*, 2 Tex. App. 412; *Austin v. State*, 15 Tex. App. 388; *Wren v. State*, (Tex. App.), 13 S. W. 865.

See on this subject *State v. Braham*, 13 S. C. 389.

**While Under Arrest.** — It is said in *People v. McMahon*, 15 N. Y. 384: "Here the prisoner, at the time he was called upon to testify, was under arrest by a public officer upon a suspicion of having committed the crime. There can, I apprehend, be no doubt that, had he been under arrest upon a warrant issued by the coroner or by a magistrate, under a direct charge of having committed the murder, the evidence must be excluded."

**Competent if Cautioned.** — It is held under the statute of Texas that a confession made to the officer having the accused in custody is competent if he is properly cautioned as to the use that may be made of the confession. *Shafer v. State*, 7 Tex. App. 239; *Davis v. State*, 19 Tex. App. 201; *Wornack v. State*, 16 Tex. App. 178.

Where the accused is in custody for another offense the statute is held not to apply. *Mathis v. State*, 39 Tex. Crim. App. 549, 47 S. W. 464.

petent if it was in fact made voluntarily within the legal meaning of the term.<sup>21</sup>

21. *United States*.—*Jackson v. U. S.*, 102 Fed. 473, 42 C. C. A. 452.

*Alabama*.—*Spicer v. State*, 69 Ala. 159; *Mose v. State*, 36 Ala. 211; *Meinaka v. State*, 55 Ala. 47; *Sands v. State*, 80 Ala. 201; *Mauill v. State*, 95 Ala. 1, 11 So. 218; *Dodson v. State*, 86 Ala. 60, 5 So. 485; *Hornsby v. State*, 94 Ala. 55, 10 So. 522; *Redd v. State*, 68 Ala. 492; *Jackson v. State*, 69 Ala. 249; *King v. State*, 40 Ala. 314; *McElroy v. State*, 75 Ala. 9; *Franklin v. State*, 28 Ala. 9; *Goodwin v. State*, 102 Ala. 87, 15 So. 571; *White v. State*, 133 Ala. 122, 32 So. 139.

*Arkansas*.—*Youngblood v. State*, 35 Ark. 35; *Meyer v. State*, 19 Ark. 156; *Austin v. State*, 14 Ark. 555.

*California*.—*People v. Abbott*, (Cal.), 4 Pac. 769; *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73; *People v. Miller*, 135 Cal. 69, 67 Pac. 12.

*Florida*.—*Green v. State*, 40 Fla. 191, 23 So. 851.

*Georgia*.—*Price v. State*, 114 Ga. 855, 40 S. E. 1,015; *Fuller v. State*, 109 Ga. 809, 35 S. E. 298; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238; *Willis v. State*, 93 Ga. 208, 19 S. E. 43; *Stephen v. State*, 11 Ga. 225; *Cobb v. State*, 27 Ga. 648.

*Idaho*.—*State v. Ellington*, 4 Idaho 529, 43 Pac. 60; *State v. Davis*, (Idaho), 53 Pac. 678.

*Indiana*.—*Walker v. State*, 136 Ind. 663, 36 N. E. 356.

*Iowa*.—*State v. Novak*, 109 Iowa 717, 79 N. W. 465; *State v. Peterson*, 110 Iowa 647, 82 N. W. 329; *State v. Fortner*, 43 Iowa 494; *State v. Soper*, 70 Iowa 494, 30 N. W. 917.

*Kansas*.—*State v. Ingram*, 16 Kan. 14.

*Kentucky*.—*Brown v. Com.*, 20 Ky. L. Rep. 1,552, 49 S. W. 545.

*Louisiana*.—*State v. Berry*, 50 La. Ann. 1,309, 24 So. 329; *State v. Hamilton*, 4 La. Ann. 1,204, 8 So. 304; *State v. Johnson*, 47 La. Ann. 1,225, 17 So. 789; *State v. Alphonse*, 34 La. Ann. 9; *State v. Perkins*, 31 La. Ann. 192.

*Massachusetts*.—*Com. v. Whittemore*, 11 Gray 201; *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Holt*, 121

Mass. 61; *Com. v. Smith*, 119 Mass. 305; *Com. v. Sheehan*, 163 Mass. 170, 39 N. E. 791; *Com. v. Chance*, 174 Mass. 245, 54 N. E. 551; *Com. v. Devaney*, 182 Mass. 33, 64 N. E. 402.

*Michigan*.—*People v. Howes*, 81 Mich. 396, 45 N. W. 961.

*Mississippi*.—*Simon v. State*, 36 Miss. 636.

*Missouri*.—*State v. Guy*, 69 Mo. 430; *State v. Patterson*, 73 Mo. 695; *State v. Hopkirk*, 84 Mo. 278; *State v. Simon*, 50 Mo. 370; *State v. Carlisle*, 57 Mo. 102; *State v. McClain*, 137 Mo. 307, 38 S. W. 906; *State v. Vaughan*, 152 Mo. 73, 53 S. W. 420.

*Nebraska*.—*Reinoehl v. State*, 62 Neb. 619, 87 N. W. 355; *Furst v. State*, 31 Neb. 403, 47 N. W. 1,116; *Anderson v. State*, 25 Neb. 550, 41 N. W. 357; *Ballard v. State*, 19 Neb. 609, 28 N. W. 271.

*New Jersey*.—*Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408.

*New York*.—*People v. Thoms*, 3 Park. Crim. Rep. 256; *People v. Mackinder*, 61 N. Y. St. 523, 29 N. Y. Supp. 842; *People v. Druse*, 103 N. Y. 665, 8 N. E. 733; *Balbo v. People*, 80 N. Y. 484; *Cox v. People*, 80 N. Y. 500; *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469; *People v. Cassidy*, 39 N. Y. St. 27, 14 N. Y. Supp. 349; *Murphy v. State*, 63 N. Y. 590; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

*North Carolina*.—*State v. Conly*, 130 N. C. 683, 41 S. E. 534; *State v. Flemming*, 130 N. C. 688, 41 S. E. 549; *State v. Whitfield*, 109 N. C. 876, 13 S. E. 726; *State v. Rogers*, 112 N. C. 874, 17 S. E. 297; *State v. Cruse*, 74 N. C. 491; *State v. George*, 93 N. C. 567.

*Pennsylvania*.—*Com. v. Mosler*, 4 Pa. St. 264; *Com. v. Johnson*, 162 Pa. St. 63, 29 Atl. 280; *Com. v. Eagan*, 190 Pa. St. 10, 42 Atl. 374.

*Rhode Island*.—*State v. Habib*, 18 R. I. 558, 30 Atl. 462.

*South Carolina*.—*State v. Gossett*, 9 Rich. L. 428; *State v. Cook*, 15 Rich. L. 29; *State v. Branham*, 13 S. C. 389; *State v. Vaigneur*, 5 Rich. L. 391; *State v. Crank*, 2 Bailey I. 66, 23 Am. Dec. 117.

And there is no reason why it may not be proved by the jailor or other officer having him in custody.<sup>22</sup>

(2.) **While Under Personal Restraint.** — The fact that the defendant was under personal restraint, and thus under the influence of the person to whom the confession was made, is material to be considered, and may render the confession inadmissible.<sup>23</sup>

(3.) **Obtained by Questions or Solicitations.** — The fact that the alleged confession was not spontaneous, but the result of questioning, suggestion or solicitation is also important.<sup>24</sup>

*Tennessee.* — *Wiley v. State*, 3 Coldw. 362; *Harris v. State*, 7 Lea 538.

*Texas.* — *Spiars v. State*, (Tex. Crim. App.), 69 S. W. 533; *Nicks v. State*, 40 Tex. Crim. App. 1, 48 S. W. 186; *White v. State*, (Tex. Crim. App.), 57 S. W. 100; *Carlisle v. State*, 37 Tex. Crim. App. 108, 38 S. W. 991; *Williams v. State*, 37 Tex. Crim. App. 147, 38 S. W. 999; *Mixon v. State*, 36 Tex. Crim. App. 66, 35 S. W. 394; *Paris v. State*, 35 Tex. Crim. App. 82, 31 S. W. 855; *Harris v. State*, 6 Tex. App. 97; *Thomas v. State*, 35 Tex. Crim. App. 178, 32 S. W. 771; *Adam v. State*, (Tex. Crim. App.), 20 S. W. 548; *Matthews v. State*, (Tex. Crim. App.), 28 S. W. 474; *Waite v. State*, 13 Tex. App. 169; *Adams v. State*, 35 Tex. Crim. App. 285, 33 S. W. 354; *Wilson v. State*, 32 Tex. 112.

*Vermont.* — *State v. Bradley*, 67 Vt. 465, 32 Atl. 238; *State v. Gorham*, 67 Vt. 365, 31 Atl. 845.

*Virginia.* — *Venable v. Com.*, 24 Gratt. 639.

*Washington.* — *State v. Munson*, 7 Wash. 239, 34 Pac. 932.

**Made While in Custody, Admissible.** — In *Waite v. State*, 13 Tex. App. 169, the rule is thus stated:

"After his rearrest and confinement in jail defendant wrote out a voluntary statement of the facts concerning the killing, after he had been duly warned that it would be used against him on his trial. This statement was produced in court, identified, and read in evidence without objection from defendant. Had the evidence been illegal, defendant could not be heard to complain of its introduction, if he interposed no objection at the time. On the other hand, the statement was not only a voluntary confession, freely made, without compulsion or persuasion.

but it was written out, signed, and delivered by defendant to the witness after he had been previously warned and fully apprised of the fact that it would be used as evidence against him. Such being the case it was admissible, and should have been admitted, even though objection had been made at the time it was offered in evidence. (Code Crim. Proc., Art. 750)."

**Controlled by Statute.** — The conflict in the decided cases on this subject will be found to result from statutory provisions in some of the states rendering such confessions inadmissible, under certain circumstances, notably in Texas. *Neiderluck v. State*, (Tex. App.), 17 S. W. 467; *Womack v. State*, 16 Tex. App. 178.

**Under Illegal Arrest.** — The fact that the accused is under illegal arrest does not affect the competency of his confession if voluntarily made. *Balbo v. People*, 80 N. Y. 484; *People v. Devine*, 46 Cal. 45; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

**What Will Constitute a Holding in Custody.** — *Boyett v. State*, 26 Tex. App. 689, 9 S. W. 275.

**Confined in Penitentiary, Confession Competent.** — *Nicks v. State*, 40 Tex. Crim. App. 1, 48 S. W. 186.

22. *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814; *Jackson v. State*, 69 Ala. 249; *McElroy v. State*, 75 Ala. 9; *Russell v. State*, 38 Tex. Crim. App. 590, 44 S. W. 159; *State v. Edwards*, 126 N. C. 1,051, 35 S. E. 540.

23. *McNeezar v. State*, 63 Ala. 169; *Wyatt v. State*, 25 Ala. 9; *Joe v. State*, 38 Ala. 422; *Newman v. State*, 49 Ala. 9; *Jim v. State*, 15 Ga. 535.

24. *United States.* — *Lucasey v.*

But the fact that the confession was in response to questions involving no threats, intimidations, menace or inducement does not affect its admissibility.<sup>25</sup> Nor will importunity or advice to tell the truth, whether guilty or innocent, render the confession incompetent if it involves no element of inducement, hope or fear, tending to elicit a confession.<sup>26</sup>

U. S., 2 Hayw. & H. 86, 15 Fed. Cas. No. 8,588a.

*Alabama*.—Carroll v. State, 23 Ala. 28, 58 Am. Dec. 282.

*Delaware*.—State v. Bostick, 4 Harr. 563.

*Kansas*.—State v. Kornstett, 62 Kan. 221, 61 Pac. 805.

*Louisiana*.—State v. Auguste, 50 La. Ann. 488, 23 So. 612.

*Massachusetts*.—Com. v. Holt, 121 Mass. 61.

*Missouri*.—State v. Hopkirk, 84 Mo. 278.

*New Hampshire*.—State v. Squires, 48 N. H. 364.

*New York*.—Cox v. People, 80 N. Y. 500; People v. Cassidy, 39 N. Y. St. 27, 14 N. Y. Supp. 349.

*South Carolina*.—State v. Carson, 36 S. C. 524, 15 S. E. 588.

*Texas*.—Tidwell v. State, (Tex. Crim. App.), 47 S. W. 466.

25. *Alabama*.—Spicer v. State, 69 Ala. 159; McQueen v. State, 94 Ala. 50, 10 So. 433; Redd v. State, 68 Ala. 492; Meinaka v. State, 55 Ala. 47; Levison v. State, 54 Ala. 520.

*Georgia*.—Fuller v. State, 109 Ga. 809, 35 S. E. 298.

*Kansas*.—State v. Kornstett, 62 Kan. 221, 61 Pac. 805.

*Louisiana*.—State v. Meekins, 41 La. Ann. 543, 6 So. 822.

*Maine*.—State v. Grover, 96 Me. 363, 52 Atl. 757.

*Maryland*.—Young v. State, 89 Md. 579, 45 Atl. 531.

*Massachusetts*.—Com. v. Whittemore, 11 Gray 201; Com. v. Cuffee, 108 Mass. 285.

*Mississippi*.—Sam v. State, 33 Miss. 347.

*Missouri*.—State v. Patterson, 73 Mo. 695; State v. Hopkirk, 84 Mo. 278; State v. Anderson, 96 Mo. 241, 9 S. W. 636.

*New Jersey*.—Roesel v. State, 62 N. J. L. 216, 41 Atl. 408; State v. Abatto, 64 N. J. L. 658, 47 Atl. 10.

*New York*.—People v. Cassidy,

39 N. Y. St. 27, 14 N. Y. Supp. 349; People v. Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

*Pennsylvania*.—Com. v. Johnson, 162 Pa. St. 63, 29 Atl. 280.

*South Carolina*.—State v. Brancham, 13 S. C. 389; State v. Kirby, 1 Strob. L. 378.

*Texas*.—Bailey v. State, 26 Tex. App. 706, 9 S. W. 270.

*Virginia*.—Hite v. Com., 96 Va. 489, 31 S. E. 895.

*Wisconsin*.—Boden v. Maher, 95 Wis. 65, 69 N. W. 980.

26. *Alabama*.—Meinaka v. State, 55 Ala. 47; Aaron v. State, 37 Ala. 106; Dotson v. State, 88 Ala. 208, 7 So. 259; Aaron v. State, 39 Ala. 75; King v. State, 40 Ala. 314; Kelly v. State, 72 Ala. 244; Hoffman v. State, 130 Ala. 89, 30 So. 394.

*Arkansas*.—Hardin v. State, 66 Ark. 53, 48 S. W. 904.

*District of Columbia*.—Hardy v. U. S., 3 App. D. C. 35.

*Georgia*.—Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238; Stafford v. State, 55 Ga. 691.

*Louisiana*.—State v. Meekins, 41 La. Ann. 543, 6 So. 822.

*Maine*.—State v. Soper, 16 Me. 293, 33 Am. Dec. 665.

*Maryland*.—Ross v. State, 67 Md. 286, 10 Atl. 218.

*Massachusetts*.—Com. v. Nott, 135 Mass. 269.

*Minnesota*.—State v. Staley, 14 Minn. 105.

*Missouri*.—State v. Armstrong, (Mo.), 66 S. W. 961; State v. Hopkirk, 84 Mo. 278; Hawkins v. State, 7 Mo. 190.

*Nebraska*.—Heldt v. State, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835.

*New York*.—People v. Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

*North Carolina*.—State v. Harrison, 115 N. C. 706, 20 S. E. 175.

*Ohio*.—Fouts v. State, 8 Ohio St. 98.

(A.) **QUESTIONS ASSUMING GUILT.** — The fact that the confession was the result of questioning is peculiarly important where the questions put assume the guilt of the party questioned.<sup>27</sup> But it is held that the confession is not incompetent solely because it was made in response to such questions.<sup>28</sup>

(4.) **Promises and Inducements.** — (A.) **GENERALLY.** — The fact that the confession was the result of promises or other inducements calculated to produce it renders it incompetent.<sup>29</sup>

*Pennsylvania.* — *Com. v. Dillon*, 4 Dall. 116.

*Rhode Island.* — *State v. Habib*, 18 R. I. 558, 30 Atl. 462.

*Texas.* — *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247; *Griminger v. State*, (Tex. Crim. App.), 69 S. W. 583.

But see *Rex v. Kingston*, 4 Car. & P. 387, 19 Eng. C. L. 567; *People v. Stewart*, 75 Mich. 21, 42 N. W. 662; *Dixon v. State*, 113 Ga. 1,039, 39 S. E. 846; *State v. York*, 37 N. H. 175.

**Advice.** — Mere advice given to tell the truth does not render the confession inadmissible. *Dodson v. State*, 86 Ala. 60, 5 So. 485; *Dotson v. State*, 88 Ala. 208, 7 So. 259; *State v. Meekins*, 41 La. Ann. 543, 6 So. 822; *Thompson v. State*, 19 Tex. App. 593.

But see to the contrary, where the advice is given by one in authority. *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

**Where Importunity Was by One in Authority.** — A distinction has been made between a private individual and one in authority, in respect of such importunities or advice to tell the truth, and confessions so procured by one in authority have been excluded. *Kelly v. State*, 72 Ala. 244; *People v. Phillips*, 42 N. Y. 200; *Com. v. Nott*, 135 Mass. 269.

**Where Carried Inducement With It**, held inadmissible. *Com. v. Nott*, 135 Mass. 269; *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494.

**Must Be Such as to Lead to Untrue Statement.** — *State v. Harrison*, 115 N. C. 706, 20 S. E. 175.

<sup>27.</sup> *State v. Auguste*, 50 La. Ann. 488, 23 So. 612; *Hardin v. State*, 66 Ark. 53, 48 S. W. 904; *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408; *Greer v. State*, (Tex. Crim. App.), 45 S. W. 12.

<sup>28.</sup> *Alabama.* — *Miller v. State*, 40

Ala. 54; *Levison v. State*, 54 Ala. 520; *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *White v. State*, 133 Ala. 122, 32 So. 139.

*Arkansas.* — *Austin v. State*, 14 Ark. 555.

*Louisiana.* — *State v. Berry*, 50 La. Ann. 1,309, 24 So. 329.

*Minnesota.* — *State v. Staley*, 14 Minn. 105.

*New York.* — *People v. Wentz*, 37 N. Y. 303.

*South Carolina.* — *State v. Branhams*, 13 S. C. 389; *State v. Kirby*, 1 Strob. L. 378.

*Virginia.* — *Hite v. Com.*, 96 Va. 489, 31 S. E. 895.

**Questions Calculated to Entrap.** But see *Com. v. Mosler*, 4 Pa. St. 264, where it is intimated that a question calculated to entrap the accused into an answer amounting to a confession will render the same incompetent. See also *People v. Swetland*, 77 Mich. 53, 43 N. W. 779; *McClain v. Com.*, 110 Pa. St. 263, 1 Atl. 45; *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282.

**Where Previous Confession Had Been Procured by Duress.** — So, where a previous confession had been procured from a slave, after a whipping, a second one procured by assuming the guilt previously confessed, was held inadmissible. *State v. Clarissa*, 11 Ala. 57.

**Accompanied by Surroundings Calculated to Intimidate.** — If the questions are put under such surroundings, conditions and circumstances as to appear to be a demand, under menace and intimidation, the answers are inadmissible. *State v. Auguste*, 50 La. 488, 23 So. 612.

So if they are accompanied with facts or circumstances tending to inspire hope. *Hardin v. State*, 66 Ark. 53, 48 S. W. 904.

<sup>29.</sup> *United States.* — U. S. v.

**Must be by One in Authority.** — But it is held in some cases that to render the confession inadmissible, the promises or threats must be made by some one in authority,<sup>30</sup> or be so made as to be likely to

*Pumphreys*, 1 Cranch C. C. 74, 27 Fed. Cas. No. 16,097.

*Alabama*. — *Ward v. State*, 50 Ala. 120; *Levison v. State*, 54 Ala. 520; *Anderson v. State*, 104 Ala. 83, 16 So. 108; *Gregg v. State*, 106 Ala. 44, 17 So. 321.

*Arkansas*. — *White v. State*, 70 Ark. 24, 65 S. W. 937; *Love v. State*, 22 Ark. 336; *Corley v. State*, 50 Ark. 305, 7 S. W. 255.

*California*. — *People v. Ah How*, 34 Cal. 218; *People v. Gonzales*, 136 Cal. 666, 69 Pac. 487.

*Colorado*. — *Beery v. U. S.*, 2 Colo. 186.

*Delaware*. — *State v. Jackson*, 3 Pen. 15, 50 Atl. 270.

*Georgia*. — *Stephen v. State*, 11 Ga. 225; *Byrd v. State*, 68 Ga. 661.

*Illinois*. — *Robinson v. People*, 159 Ill. 15, 42 N. E. 375.

*Iowa*. — *State v. Jay*, 116 Iowa 264, 89 N. W. 1,070.

*Kentucky*. — *Collins v. Com.*, 15 Ky. L. Rep. 691, 25 S. W. 743; *Taylor v. Com.*, 19 Ky. L. Rep. 836, 42 S. W. 1,125; *Hudson v. Com.*, 2 Duv. 531.

*Louisiana*. — *State v. Mims*, 43 La. Ann. 532, 9 So. 113.

*Maryland*. — *Biscoe v. State*, 67 Md. 6, 8 Atl. 571.

*Massachusetts*. — *Com. v. Curtis*, 97 Mass. 574; *Com. v. Taylor*, 5 Cush. 605; *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491.

*Mississippi*. — *State v. Smith*, 72 Miss. 420, 18 So. 482; *Ford v. State*, 75 Miss. 101, 21 So. 524; *Simmons v. State*, 61 Miss. 243; *Peter v. State*, 4 Smed. & M. 31.

*Missouri*. — *State v. Brockman*, 46 Mo. 566; *State v. Jones*, 54 Mo. 478; *State v. Hagan*, 54 Mo. 192.

*Montana*. — *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398.

*Nebraska*. — *Bubster v. State*, 33 Neb. 663, 50 N. W. 953.

*New Hampshire*. — *State v. Howard*, 17 N. H. 171.

*New Jersey*. — *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408.

*New York*. — *People v. Phillips*, 42 N. Y. 200.

*North Carolina*. — *State v. Drake*, 113 N. C. 624, 18 S. E. 166.

*Ohio*. — *Spears v. State*, 2 Ohio St. 583.

*South Carolina*. — *State v. Carson*, 36 S. C. 524, 15 S. E. 588.

*Tennessee*. — *State v. Fields*, 4 Tenn. 140; *Boyd v. State*, 2 Humph. 39; *Alfred v. State*, 2 Swan 581; *Wiley v. State*, 3 Coldw. 362.

*Texas*. — *McVeigh v. State*, (Tex. Crim. App.), 62 S. W. 757; *Gallagher v. State*, (Tex. Crim. App.), 24 S. W. 288; *Clayton v. State*, 31 Tex. Crim. App. 489, 21 S. W. 255.

**Confession to One, Promise by Another.** — In *Paris v. State*, 35 Tex. Crim. App. 82, 31 S. W. 855, the confession was made to one officer after a promise to aid the accused, if he would confess, by another officer, and the confession was held to be admissible.

**By Whom Hope Must Be Held Out.** — In some of the states the rule is so modified as to limit the hope held out to stipulations made by the prosecuting officer not to prosecute. *People v. Mackinder*, 61 N. Y. St. 523, 29 N. Y. Supp. 842; *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

**Rule Changed by Statute.** — *State v. Freeman*, 12 Ind. 100; *People v. Cassidy*, 39 N. Y. St. 27, 14 N. Y. Supp. 349; *People v. McCallam*, 103 N. Y. 587, 9 N. E. 502; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

**May Be Received "With All the Circumstances."** — Except when made under the influence of fear produced by threats, the confession "with all the circumstances" may be given in evidence under the statute in Indiana. *Brown v. State*, 71 Ind. 470; *Palmer v. State*, 136 Ind. 393, 36 N. E. 130.

So a similar statute exists in Washington. *State v. McCallum*, 18 Wash. 394, 51 Pac. 1,044.

<sup>30</sup> *England*. — *Rex v. Gibbons*, 1 Car. & P. 96, 12 Eng. C. L. 66; *Rex*

lead the accused to suppose they were made with the sanction of a person in authority.<sup>31</sup>

**Nature of the Promise.** — And it must amount to a promise of something resulting or well calculated to result in the confession,<sup>32</sup>

*v. Tyler*, 1 Car. & P. 128, 12 Eng. C. L. 85.

*Georgia*. — *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

*Idaho*. — Territory *v. McKern*, 2 Idaho 759, 26 Pac. 123.

*Louisiana*. — *State v. George*, 15 La. Ann. 145.

*Maine*. — *State v. Soper*, 16 Me. 293, 33 Am. Dec. 665.

*Massachusetts*. — *Com. v. Myers*, 160 Mass. 530, 36 N. E. 481.

*Michigan*. — *Ulrich v. People*, 39 Mich. 245.

*Minnesota*. — *State v. Holden*, 42 Minn. 350, 44 N. W. 123.

*Mississippi*. — *Hamilton v. State*, 77 Miss. 675, 27 So. 606.

*Missouri*. — *State v. Patterson*, 73 Mo. 695.

*Nebraska*. — *Burlingim v. State*, 61 Neb. 276, 85 N. W. 76.

*New Jersey*. — *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408.

*Tennessee*. — *Wiley v. State*, 3 Coldw. 362.

*Texas*. — *Rice v. State*, 22 Tex. App. 654, 3 S. W. 791; *Thompson v. State*, 19 Tex. App. 593; *Cannada v. State*, 29 Tex. App. 537, 16 S. W. 341; *Lawson v. State*, (Tex. Crim. App.), 50 S. W. 345.

*Virginia*. — *Hite v. Com.*, 96 Va. 489, 31 S. E. 895.

31. *State v. Holden*, 42 Minn. 350, 44 N. W. 123.

**Rule Stated.** — In *Hite v. Com.*, 96 Va. 489, 31 S. E. 895, it is said:

"The rule is that a confession may be given in evidence, unless it appear that it was obtained from the party by some inducement of a worldly or temporal character, in the nature of a threat, or promise of benefit held out to him, in respect of his escape from the consequences of the offense, or the mitigation of the punishment by a person in authority, or with the apparent sanction of such a person."

32. *Alabama*. — *Rice v. State*, 47 Ala. 38.

*California*. — *People v. Jim Ti*, 32 Cal. 60.

*Connecticut*. — *State v. Potter*, 18 Conn. 166.

*District of Columbia*. — *Hardy v. U. S.*, 3 D. C. App. 35.

*Georgia*. — *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

*Illinois*. — *Bartley v. People*, 156 Ill. 234, 40 N. E. 831.

*Iowa*. — *State v. Jordan*, 87 Iowa 86, 54 N. W. 63.

*Louisiana*. — *State v. Bruce*, 33 La. Ann. 186.

*Maine*. — *State v. Soper*, 16 Me. 293, 33 Am. Dec. 665.

*Massachusetts*. — *Com. v. Sego*, 125 Mass. 210; *Com. v. Crocker*, 108 Mass. 464.

*Mississippi*. — *Simmons v. State*, 61 Miss. 243.

*Missouri*. — *State v. Hopkirk*, 84 Mo. 278.

*New York*. — *People v. McCallam*, 103 N. Y. 587, 9 N. E. 502.

*North Carolina*. — *State v. Harrison*, 115 N. C. 706, 20 S. E. 175.

*Pennsylvania*. — *Com. v. Dillon*, 4 Dall. 116; *Com. v. Johnson*, 162 Pa. St. 63, 29 Atl. 280.

*Texas*. — *Rice v. State*, 22 Tex. App. 654, 3 S. W. 791; *Thompson v. State*, 19 Tex. App. 593.

**What Will Amount to Inducement.** — It is said in *Bohanan v. State*, 92 Ga. 28, 18 S. E. 302: "The hope that excludes is that, and that only, which some other person kindles or excites. Some inducement must be held out by another person tending, according to human nature, and the law of human motives, either to overpower the will or seduce it; either to coerce through fear, or persuade through hope."

See also *Anderson v. State*, (Tex. Crim. App.), 54 S. W. 581.

**Must Be Personal.** — In *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491, it is held that the promise must be of something personal to the accused. See also *Mathews v. State*, 9 Lea (Tenn.) 128, 42 Am. Rep. 667.

**Need Not Be Personal.** — But this rule has been modified in some

and must operate at the time.<sup>33</sup>

(B.) **PROMISE OF PARDON.** — The hope or promise of a pardon is within the rule.<sup>34</sup>

(C.) **PROMISES NOT TO PROSECUTE.** — The rule extends to promises made not to prosecute or to dismiss or release the accused, if the confession is made.<sup>35</sup>

(D.) **OTHER INDUCEMENTS.** — The character of the inducement is not material if it is such as to induce the hope of personal advantage to the accused in the matter of the charge made against him and produce the confession.<sup>36</sup>

**Must be Direct and Not Collateral.** — The hope held out must go directly to the benefit of the accused, personally, by way of escape from punishment for the offense charged.<sup>37</sup>

of the cases. Thus it is said in *State v. Grant*, 22 Me. 171, that the inducement must be personal "unless the collateral inducement be so strong as to make it reasonable to believe that it might have produced an untrue statement as a confession."

**Inducement to Confess One Crime, Confession of Another.** — *State v. Fortner*, 43 Iowa 494.

**Must Be Positive.** — *Cannada v. State*, 29 Tex. App. 537, 16 S. W. 341.

**Hope Must Be Excited by Some Other Person.** — The hope of immunity from punishment, unless excited by some other person, will not exclude the confession. *Minton v. State*, 99 Ga. 254, 25 S. E. 626; *Price v. State*, 114 Ga. 855, 40 S. E. 1,015.

**Must Relate to Benefit to Be Derived by Prisoner in the criminal prosecution.** *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408; *State v. Wentworth*, 37 N. H. 196; *State v. Hardee*, 83 N. C. 619.

**33.** *Mose v. State*, 36 Ala. 211; *Porter v. State*, 55 Ala. 95; *Levison v. State*, 54 Ala. 520; *Murdock v. State*, 68 Ala. 567; *State v. Soper*, 16 Me. 293, 33 Am. Dec. 665; *Com. v. Dillon*, 4 Dall. (Pa.) 116; *Ward v. People*, 3 Hill (N. Y.) 395.

**34.** *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

**Must Be Made by One in Authority.** — But it is held that a promise of pardon must, to exclude the confession, have been made by one having authority or power to grant or procure it. *State v. Kirby*, 1 Strob. L. (S. C.) 378.

**35.** *Ward v. State*, 50 Ala. 120;

*Boyd v. State*, 2 Humph. (Tenn.) 39; *Simmons v. State*, 61 Miss. 243; *Murdock v. State*, 68 Ala. 567; *People v. Kurtz*, 42 Hun (N. Y.) 335.

**36.** *State v. Walker*, 34 Vt. 296; *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; *Gregg v. State*, 106 Ala. 44, 17 So. 321.

**37.** *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238; *Stone v. State*, 105 Ala. 60, 17 So. 114; *Mathews v. State*, 9 Lea (Tenn.) 128, 42 Am. Rep. 667; *State v. Tatro*, 50 Vt. 483; *Com. v. Wilson*, 186 Pa. St. 1, 40 Atl. 283.

**Nature of Inducement That Will Render Incompetent.** — The rule as to what kind of inducement will render a confession incompetent is thus stated in *Frank v. State*, 39 Miss. 705:

"Anything reasonably tending to hold out the hope or promise of reward or benefit for confession, or of punishment or injury for the failure to confess, is in law an unwarrantable inducement to confess, which renders the confession so obtained incompetent evidence. But there may be other 'inducements' held out to a party, which are not within this rule. An appeal to the character or circumstances of a party, to his family connection and situation in life — to the claims of justice of others whose rights or safety were involved in his declaring the truth — to his responsibility to a tribunal above all earthly courts for his falsification or suppression of the truth — these and others might very naturally be an 'inducement' to a party to make a confession. Yet a confession so in-



**Must Be External.**—Whatever the inducement, it must be external, and not the mere operation of the mind of the accused, leading him to believe that it will be better for him to confess.<sup>38</sup>

(5.) **Procured by Threats or Violence.**—(A.) **GENERALLY.**—The admissibility of an alleged confession is precluded by the fact that it was the result of a putting in fear by threats or intimidation intended to elicit such confession.<sup>39</sup> This, however, has been denied in some cases, unless the threat was made or sanctioned by some one in

duced would not necessarily be incompetent; for the inducement would not be illegal."

**Must Be Direct and Not Collateral.**—But it is held that the inducement must have reference to the escape of the accused from the crime with which he is charged. *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

**Promise to Allow Accused to Turn State's Evidence** renders a confession induced thereby incompetent. *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

**But Not if He Subsequently Refuses to Testify.**—*Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; *State v. Moran*, 15 Or. 262, 14 Pac. 419.

See, however, *Womack v. State*, 16 Tex. App. 178, in which it is said: "That defendant subsequently repudiated the agreement, does not, and cannot, affect the question as to the circumstances under which the confession was made. At the time it was made, was he not induced to make it through the promise or hope held out to him by Henderson? If so, then no subsequent act of bad faith on his part could or would render valid and legal that which *per se* was illegal and inadmissible as a voluntary confession."

Also *Lauderdale v. State*, (Tex. App.), 19 S. W. 679; *Lopez v. State*, 12 Tex. App. 27; *Neeley v. State*, 27 Tex. App. 324, 11 S. W. 376.

**Collateral Inducements** go not to the competency of the confession, but to its weight. *Com. v. Wilson*, 186 Pa. St. 1, 40 Atl. 283.

**Collateral Promise** not sufficient ground for exclusion. *State v. Tatrot*, 50 Vt. 483; *Cox v. People*, 80 N. Y. 500.

38. *Com. v. Knapp*, 9 Pick.

(Mass.) 496, 20 Am. Dec. 491; *Lopez v. State*, 12 Tex. App. 27.

39. **United States.**—U. S. v. Pumphreys, 1 Cranch C. C. 74, 27 Fed. Cas. No. 16,097.

*Alabama.*—*Hoover v. State*, 81 Ala. 51, 1 So. 574; *Wyatt v. State*, 25 Ala. 9; *Joe v. State*, 38 Ala. 422; *Beckham v. State*, 100 Ala. 15, 14 So. 859.

*California.*—*People v. Ah How*, 34 Cal. 218.

*Florida.*—*Simon v. State*, 5 Fla. 285.

*Georgia.*—*Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238; *Johnson v. State*, 63 Ga. 355; *Irwin v. State*, 54 Ga. 39.

*Idaho.*—*State v. Mason*, 4 Idaho 543, 43 Pac. 63.

*Indiana.*—*Smith v. State*, 10 Ind. 106; *State v. Freeman*, 12 Ind. 100.

*Iowa.*—*State v. Chambers*, 39 Iowa 179; *State v. Fidment*, 35 Iowa 541.

*Kentucky.*—*Wiggington v. Com.*, 13 Ky. L. Rep. 641, 17 S. W. 634; *Taylor v. Com.*, 19 Ky. L. Rep. 836, 42 S. W. 1,125.

*Louisiana.*—*State v. Albert*, 50 La. Ann. 481, 23 So. 609.

*Michigan.*—*People v. Stewart*, 75 Mich. 21, 42 N. W. 662.

*Mississippi.*—*Whitley v. State*, 78 Miss. 255, 28 So. 852; *Peter v. State*, 4 Smed. & M. 31.

*Missouri.*—*State v. Jones*, 54 Mo. 478.

*North Carolina.*—*State v. Crowson*, 98 N. C. 595, 4 S. E. 143; *State v. Parish*, 78 N. C. 492.

*Tennessee.*—*State v. Fields*, 4 Tenn. 140, *State v. Doherty*, 1 Tenn. 79; *Deathridge v. State*, 1 Sneed 75.

*Texas.*—*Clayton v. State*, 31 Tex. Crim. App. 489, 21 S. W. 255.

*Washington.*—*State v. McCullum*, 18 Wash. 394, 51 Pac. 1,044.

authority.<sup>40</sup>

The rule also excludes confessions induced by personal violence whereby one is put in fear.<sup>41</sup>

But the mere fact that the prisoner is in a state of fright without cause other than the fear of conviction of the crime does not render his confession incompetent.<sup>42</sup>

**Fear How Must Be Produced.**—The fear to render the confession incompetent must be the result of the wrongful acts of the person by whom it is induced.<sup>43</sup> And if the confession appears to have been induced by such putting in fear, it is inadmissible, because not free and voluntary.<sup>44</sup>

**Made After Fear Removed.**—But a confession voluntarily made after the fear and its cause are removed is admissible.<sup>45</sup>

So if it is apparent that the fear was not such as to induce the confession.<sup>46</sup>

(B.) FEAR OF MOB VIOLENCE. — The fact that the accused is laboring under well-grounded fear of mob violence is material to be con-

40. *State v. Patterson*, 73 Mo. 695; *State v. Jones*, 54 Mo. 478. But see *Murphy v. State*, 63 Ala. 1.

41. *Miller v. People*, 39 Ill. 457; *Hector v. State*, 2 Mo. 166, 22 Am. Dec. 454; *Simon v. State*, 37 Miss. 288; *State v. Gilbert*, 2 La. Ann. 244.

42. *People v. Thoms*, 3 Park. Crim. Rep. (N. Y.) 256; *Com. v. Smith*, 119 Mass. 305; *Allen v. State*, 12 Tex. App. 190; *State v. Anderson*, 96 Mo. 241, 9 S. W. 636; *Honeycutt v. State*, 8 Baxt. (Tenn.) 371.

**Fear of Punishment as Inducement.**—A confession made as a result of fear of punishment, or with the hope that punishment may be averted or ameliorated by such confession, if no promise or threat has intervened, does not render the confession inadmissible. *Allen v. State*, 12 Tex. App. 190; *Honeycutt v. State*, 8 Baxt. (Tenn.) 371.

**Induced by Confinement in Dark Cell incompetent.** *State v. McCullum*, 18 Wash. 394, 51 Pac. 1,044.

43. *Kentucky*.—*Bush v. Com.*, 13 Ky. L. Rep. 425, 17 S. W. 330.

*Massachusetts*.—*Com. v. Smith*, 119 Mass. 305.

*North Carolina*.—*State v. De Graff*, 113 N. C. 688, 18 S. E. 507.

*Tennessee*.—*Honeycutt v. State*, 8 Baxt. 371.

*Texas*.—*Allen v. State*, 12 Tex. App. 190.

*Washington*.—*State v. Coella*, 3 Wash. 99, 28 Pac. 28.

44. *Young v. State*, 68 Ala. 569; *Redd v. State*, 69 Ala. 255.

**Put in Fear by Torture of Another** charged with same crime, confession incompetent. *State v. Lawson*, 61 N. C. 47.

45. *Alabama*.—*Mose v. State*, 36 Ala. 211; *Porter v. State*, 55 Ala. 95; *Sampson v. State*, 54 Ala. 241.

*Iowa*.—*State v. Ostrander*, 18 Iowa 435.

*Kentucky*.—*Mathis v. Com.*, 11 Ky. L. Rep. 882, 13 S. W. 360.

*Massachusetts*.—*Com. v. Myers*, 160 Mass. 530, 36 N. E. 481.

*Mississippi*.—*Peter v. State*, 4 Smed. & M. 31.

*Missouri*.—*State v. Jones*, 54 Mo. 478.

*Texas*.—*Walker v. State*, 9 Tex. App. 38.

46. *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *Frank v. State*, 39 Miss. 705; *State v. Watt*, 47 La. Ann. 630, 17 So. 164; *State v. Anderson*, 96 Mo. 241, 9 S. W. 636; *State v. Sullivan*, 51 Iowa 142, 50 N. W. 572; *Connors v. State*, 95 Wis. 77, 69 N. E. 981; *Dugan v. Com.*, 19 Ky. L. Rep. 1,273, 43 S. W. 418.

**Must Be Threat of Criminal Prosecution.**—A threat to sue for the property stolen in case of larceny will not exclude the confession. *Cropper v. U. S.*, *Morris (Iowa)* 259.

sidered in determining whether the confession is free and voluntary or not.<sup>47</sup>

And if the confession is produced by such putting in fear it is incompetent.<sup>48</sup>

(6.) **By Fraud.**—(A.) **GENERALLY.**—If the confession is procured by fraud, without which it would not have been made, it is not voluntary, and it therefore is inadmissible.<sup>49</sup>

But in some cases it is held, broadly, that the fact that a confession is procured by fraud does not render it incompetent.<sup>50</sup>

(B.) **DECEPTION.**—It is held that the fact that the confession was procured by artifice, falsehood or deception does not render it inadmissible, if it was voluntary.<sup>51</sup>

47. *Self v. State*, 6 Baxt. (Tenn.) 244; *Young v. State*, 68 Ala. 569; *State v. Chambers*, 39 Iowa 179; *State v. Hopkirk*, 84 Mo. 278; *Redd v. State*, 69 Ala. 255; *Taylor v. Com.*, 19 Ky. L. Rep. 836, 42 S. W. 1, 125; *State v. Moore*, 160 Mo. 443, 61 S. W. 199.

48. *Peter v. State*, 4 Smed. & M. (Miss.) 31; *Wiggington v. Com.*, 13 Ky. L. Rep. 641, 17 S. W. 634.

49. *Com. v. Mosler*, 4 Pa. St. 264; *Cook v. State*, 32 Tex. Crim. App. 27, 22 S. W. 23, 40 Am. St. Rep. 758; *Com. v. Goodwin*, 186 Pa. St. 218, 40 Atl. 412, 65 Am. St. Rep. 852; *Sanders v. State*, 113 Ga. 267, 38 S. E. 841.

**Contained in Letter Delivered to Be Mailed.**—In *Sanders v. State*, 113 Ga. 267, 38 S. E. 841, it is held that a letter containing incriminating admissions, delivered by the accused to the sheriff having him in custody, to be mailed, and by the latter opened and kept, is competent.

50. *State v. Staley*, 14 Minn. 105; *People v. Wentz*, 37 N. Y. 303; *Burton v. State*, 107 Ala. 108, 18 So. 284; *Marable v. State*, 89 Ga. 425, 15 S. E. 453.

51. *England.*—*Rex. v. Derrington*, 2 Car. & P. 418, 12 Eng. C. L. 650.

*Alabama.*—*Levison v. State*, 54 Ala. 520; *King v. State*, 40 Ala. 314; *Stone v. State*, 105 Ala. 60, 17 So. 114.

*Arkansas.*—*Austin v. State*, 14 Ark. 555.

*Georgia.*—*Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238; *Marable v. State*, 89 Ga. 425, 15 S. E. 453;

*Cornwall v. State*, 91 Ga. 277, 18 S. E. 154.

*Illinois.*—*Gates v. People*, 14 Ill. 433.

*Kentucky.*—*Wiggington v. Com.*, 13 Ky. L. Rep. 641, 17 S. W. 634.

*Michigan.*—*People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

*Minnesota.*—*State v. Staley*, 14 Minn. 105.

*Missouri.*—*State v. Jones*, 54 Mo. 478; *State v. Phelps*, 74 Mo. 128; *State v. Rush*, 95 Mo. 199, 8 S. W. 221; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257.

*Nebraska.*—*Heldt v. State*, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835.

*New York.*—*People v. McMahan*, 15 N. Y. 384; *People v. Wentz*, 37 N. Y. 303.

*North Carolina.*—*State v. Harrison*, 115 N. C. 706, 20 S. E. 175.

*Pennsylvania.*—*Com. v. Wilson*, 186 Pa. St. 1, 40 Atl. 283; *Com. v. Goodwin*, 186 Pa. St. 218, 40 Atl. 412, 65 Am. St. Rep. 852; *Com. v. Cressinger*, 193 Pa. St. 326, 44 Atl. 433.

**False Statements by Detective.**

In *Burton v. State*, 107 Ala. 108, 18 So. 284, the confession was made by one in custody, charged with murder, to a detective, who, in order to procure the confession, represented to the defendant that he was himself a murderer and planning to escape, and the confession thus procured was held to be admissible, the court saying: "The fact that the defendant was deceived does not in the least tend to show that his statements in regard to the killing of

But if the deception is such as to entrap the accused into making a confession the effect of which he did not understand, or would not otherwise have made, this may be sufficient ground for excluding it.<sup>52</sup>

(C.) **PROMISE OF SECRECY.** — The fact that the confession was made under a promise of the party to whom it was made to keep it a secret does not render it incompetent.<sup>53</sup>

(7.) **Need Not Be Spontaneous.** — It follows that the confession need not be spontaneous and unmoved by the acts or words of another to render it admissible.<sup>54</sup>

(8.) **How Affected by Person Offering Inducement.** — (A.) **GENERALLY.** The question of the competency of the confession may depend materially upon the further question whether it was made under the influence of one in authority or to a private individual, and if to a private individual, whether he has any undue control or power over the accused.<sup>55</sup>

Evans were induced by hope or fear or calculated to elicit an untrue statement." See also *King v. State*, 40 Ala. 314; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257.

**Letter Withheld from the Mail** by an officer to whom it was given to be mailed, and given to the prosecuting officer, is competent as a confession. *Com. v. Goodwin*, 186 Pa. St. 218, 40 Atl. 412, 65 Am. St. Rep. 852.

52. *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *State v. Hopkirk*, 84 Mo. 278; *State v. Mosler*, 4 Pa. St. 264; *People v. McCullough*, 81 Mich. 25, 45 N. W. 515; *McClain v. Com.*, 110 Pa. St. 263, 1 Atl. 45.

See dissenting opinion of *Sherwood J.* in *State v. Brooks*, 92 Mo. 542, 5 S. W. 257.

53. *Rex v. Shaw*, 6 Car. & P. 371, 25 Eng. C. L. 480; *Com. v. Goodwin*, 186 Pa. St. 218, 40 Atl. 412, 65 Am. St. Rep. 852.

54. *State v. Hopkirk*, 84 Mo. 278; *Levison v. State*, 54 Ala. 520; *Com. v. Goodwin*, 186 Pa. St. 218, 40 Atl. 412, 65 Am. St. Rep. 852; *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408; *State v. Grover*, 96 Me. 363, 52 Atl. 757.

**Confession Need Not Be Spontaneous.** — At to what will amount to an involuntary confession within the meaning of the rule, see *State v. Hopkirk*, 84 Mo. 278, in which it is said:

"It is by no means necessary that the confession be spontaneous, other-

wise no confession ever made would be receivable. It is only where the confession may be said to be extorted, dragged reluctantly from the breast of the prisoner, through exciting his hopes or practicing on his fears, by some promise or some threat, that the confession subsequently made is inadmissible, and a mere adjuration to speak the truth, no threats or promises being employed, or if it be apparent that there was no connection between the promise or threat and the confession, or that trick or artifice or intoxicating liquors were used to induce a confession, the confession will not be rejected."

55 *United States*. — *U. S. v. Stone*, 8 Fed. 232.

*Alabama*. — *Kelly v. State*, 72 Ala. 244; *Stone v. State*, 105 Ala. 60, 17 So. 114; *Murphy v. State*, 63 Ala. 1.

*Arkansas*. — *White v. State*, 70 Ark. 24, 65 S. W. 937.

*California*. — *People v. Smith*, 15 Cal. 408; *People v. Barric*, 49 Cal. 342; *People v. Castro*, 125 Cal. 521, 58 Pac. 133.

*Florida*. — *Green v. State*, 40 Fla. 191, 23 So. 851.

*Georgia*. — *Miller v. State*, 94 Ga. 1, 21 S. E. 128; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

*Illinois*. — *Robinson v. People*, 159 Ill. 115, 42 N. E. 375.

*Kentucky*. — *Dugan v. Com.*, 19 Ky. L. Rep. 1,273, 43 S. W. 418; *Young v. Com.*, 8 Bush 366.

*Louisiana*. — *State v. Albert*, 50

La. Ann. 481, 23 So. 609; *State v. Augustine*, 50 La. Ann. 488, 23 So. 612. *Maine*.—*State v. Grover*, 96 Me. 363, 52 Atl. 757.

*Maryland*.—*Biscoe v. State*, 67 Md. 6, 8 Atl. 571.

*Massachusetts*.—*Com. v. Curtis*, 97 Mass. 574; *Com. v. Taylor*, 5 Cush. 605; *Com. v. Myers*, 160 Mass. 530, 36 N. E. 481.

*Michigan*.—*People v. Stewart*, 75 Mich. 21, 42 N. W. 662; *Ulrich v. People*, 39 Mich. 245; *Flagg v. People*, 40 Mich. 706.

*Minnesota*.—*State v. Staley*, 14 Minn. 105.

*Mississippi*.—*State v. Smith*, 72 Miss. 420, 18 So. 482; *Garrard v. State*, 50 Miss. 147; *Ford v. State*, 75 Miss. 101, 21 So. 524; *Harvey v. State*, (Miss.), 20 So. 837; *Draughn v. State*, 76 Miss. 574, 25 So. 153; *Hamilton v. State*, 77 Miss. 675, 27 So. 606.

*Missouri*.—*State v. Brockman*, 46 Mo. 566; *Couley v. State*, 12 Mo. 462; *State v. Patterson*, 73 Mo. 695; *State v. Jones*, 54 Mo. 478.

*Montana*.—*Territory v. McClintock*, 1 Mont. 394; *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398.

*Nebraska*.—*Strong v. State*, 63 Neb. 440, 88 N. W. 772.

*Nevada*.—*State v. Carrick*, 16 Nev. 120.

*New York*.—*People v. Phillips*, 42 N. Y. 200.

*Ohio*.—*Spears v. State*, 2 Ohio St. 583.

*Oregon*.—*State v. Wintzingerode*, 9 Or. 153.

*South Carolina*.—*State v. Kirby*, 1 Strob. L. 155; *State v. Kirby*, 1 Strob. L. 378.

*Tennessee*.—*Self v. State*, 6 Baxt. 244; *Beggarly v. State*, 8 Baxt. 520; *Deathridge v. State*, 1 Sneed 75.

*Texas*.—*Cannada v. State*, 29 Tex. App. 537, 16 S. W. 341.

**Rule Stated.**—“The rule is, without exception, that such a promise made by one in authority will exclude a confession. Public policy absolutely requires the rejection of confessions obtained by means of inducements held out by such persons. It may be true, even in such cases—owing to the variety in character and circumstances—that the promise may not in fact induce the confession. But as it is thought to succeed

in a large majority of instances, it is wisely adopted as a rule of law applicable to them all.” *People v. Barric*, 49 Cal. 342.

**Is the Person to Whom Confession Made Material?**—In discussing this question, it is said in the case of *Spears v. State*, 2 Ohio St. 583: “That the decided cases, upon the subject of the admissibility in evidence of confessions, are conflicting, is undeniable. That the conflict is not so great as is sometimes supposed, is equally true. Thus, an idea prevails to some extent that a confession which is the offspring of hope or fear, excited by representations, or threats, is nevertheless admissible, if the representations or threats were not made by, or in the presence of, a person having some authority or control over the prosecution of the accused. On the other hand, it is frequently asserted that it is wholly immaterial circumstance whether the representation or threat was made by, or in the presence of, such a person, or by a person having no such authority or control, and out of the presence of any such official or controlling individual. . . .

“The question in every case where a confession has followed representations or threats is, was it thus produced? This question is to be decided by the judge, if proof of the confession, when offered, is objected to. If he answers in the affirmative, the testimony must be rejected; if in the negative, it must be admitted. But in deciding it, he is to have regard to the following rule, namely, that if the representations or threats were made by, or in the presence of, a person having authority or control over the prosecution of the accused, it is presumed that the confession was produced by such representations or threats, unless it appear that their influence was totally done away before the confession was made. If, on the other hand, the representations or threats were made by a person having no such authority or control, it is not necessarily to be presumed that they induced the confession.”

**Inducement by Private Individual.**—In *Beggarly v. State*, 8 Baxt. (Tenn.) 520, it is said: “In regard to the person by whom the inducements were offered, there has

(B.) BY COMMITTING MAGISTRATE. — If voluntarily made after the proper caution, a confession made to the committing magistrate is competent.<sup>56</sup> But any threats or promises made by such magistrate by which the confession is induced will render it incompetent.<sup>57</sup>

(C.) BY OFFICER HAVING ACCUSED IN CUSTODY. — The fact, alone, that the confession was made to an officer having the accused in custody, even when elicited by proper questions put by the officer, will not render it inadmissible.<sup>58</sup>

But the arresting officer is one in authority under the rule that any inducement, whether of hope or fear by one in authority, will render the confession incompetent.<sup>59</sup>

And, independent of this rule of law, the fact that the induce-

been conflict in the authorities, some holding that the inducements held out by private persons, not being prosecutor, officer, or having any authority over the prisoner, are not sufficient to exclude confessions thus obtained; but the sounder rule manifestly is, that this is a mixed question of law and fact for the judge, and while it is proper to note the difference between confessions obtained by prosecutor, officer, or person in authority, and those obtained by private persons, yet, if, in fact, the confessions were forced from the prisoner through hope or fear presented to his mind by a third person, it should be rejected."

#### Who Are Persons in Authority.

In a note to *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238, it is said that sheriffs, constables, policemen, magistrates, prosecuting attorneys, the master or mistress of a slave, the prosecuting witness, or the person likely to prosecute the accused are regarded as persons in authority. *Com. v. Chabcock*, 1 Mass. 144.

**Owner of Building** in case of arson. *White v. State*, 70 Ark. 24, 65 S. W. 937.

<sup>56.</sup> *State v. McLaughlin*, 44 Iowa 82.

<sup>57.</sup> *Biscoe v. State*, 67 Md. 6, 8 Atl. 571; *Ford v. State*, 75 Miss. 101, 21 So. 524; *Simon v. State*, 5 Fla. 285.

<sup>58.</sup> *Alabama*. — *Spicer v. State*, 69 Ala. 159; *Maull v. State*, 95 Ala. 1, 11 So. 218; *Redd v. State*, 68 Ala. 492; *Grant v. State*, 55 Ala. 201; *Jackson v. State*, 69 Ala. 249.

*California*. — *People v. Castro*, 125 Cal. 521, 58 Pac. 133.

*Iowa*. — *State v. Sopher*, 70 Iowa 494, 30 N. W. 917.

*Louisiana*. — *State v. Demarest*, 41 La. Ann. 617, 6 So. 136; *State v. Jones*, 47 La. Ann. 1,524, 18 So. 515.

*Massachusetts*. — *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Smith*, 119 Mass. 305.

*Michigan*. — *People v. Simpson*, 48 Mich. 474, 12 N. W. 662.

*Mississippi*. — *Harvey v. State*, (Miss.), 20 So. 837.

*Montana*. — *Territory v. McClintock*, 1 Mont. 394.

*New York*. — *People v. Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Cox v. People*, 80 N. Y. 500.

*South Carolina*. — *State v. Kirby*, 1 Strob. L. 378.

*Texas*. — *Harris v. State*, 6 Tex. App. 97; *Waite v. State*, 13 Tex. App. 169.

<sup>59.</sup> *California*. — *People v. Barrie*, 49 Cal. 342.

*Iowa*. — *State v. Jay*, 116 Iowa 264, 89 N. W. 1,070.

*Kentucky*. — *Young v. Com.*, 8 Bush 366; *Collins v. Com.*, 15 Ky. L. Rep. 691, 25 S. W. 743.

*Massachusetts*. — *Com. v. Curtis*, 97 Mass. 574.

*Minnesota*. — *State v. Staley*, 14 Minn. 105.

*Missouri*. — *Couley v. State*, 12 Mo. 462.

*Montana*. — *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398.

*New York*. — *People v. Phillips*, 42 N. Y. 200.

*Oregon*. — *State v. Wintzingerode*, 9 Or. 153.

*Tennessee*. — *Self v. State*, 6 Baxt. 244.

ment comes from such a source is calculated to give it greater weight, and is important to be considered.<sup>60</sup>

**Surrounding Circumstances to Be Considered.** — And if they are such as to show intimidation, or menace, calculated to induce the confession, it must be excluded.<sup>61</sup>

(D.) **By PROSECUTING OFFICER.** — The district attorney, or other prosecuting officer, is one in authority, and promises or inducements held out by him will render the confession incompetent.<sup>62</sup>

And the fact may be taken into account that the confession was made to him in arriving at the weight to be given to it.<sup>63</sup>

(E.) **By PRIVATE DETECTIVE.** — A private detective having authority to investigate the facts, and to institute civil and criminal cases involving the matter under investigation, is not one "in authority" within the meaning of the term as used in the decided cases.<sup>64</sup>

(F.) **By PRIVATE INDIVIDUAL.** — There are cases holding that a confession made to a private individual, acting without authority, is admissible, although obtained by him by threats, promises or other inducements, that, if made by one in authority, would render the confession incompetent.<sup>65</sup>

60. *Spencer v. Hamilton*, 113 N. C. 49, 18 S. E. 167, 37 Am. St. Rep. 611; *People v. Stewart*, 75 Mich. 21, 42 N. W. 662; *State v. Albert*, 50 La. Ann. 481, 23 So. 609; *State v. Auguste*, 50 La. Ann. 488, 23 So. 612.

61. *State v. Auguste*, 50 La. Ann. 488, 23 So. 612.

62. *People v. Swetland*, 77 Mich. 53, 43 N. W. 779; *Corley v. State*, 50 Ark. 305, 7 S. W. 255; *Robinson v. People*, 159 Ill. 115, 42 N. E. 375.

63. *U. S. v. Stone*, 8 Fed. 232; *People v. Howes*, 81 Mich. 396, 45 N. W. 961.

64. *U. S. v. Stone*, 8 Fed. 232; *Stone v. State*, 105 Ala. 60, 17 So. 114; *Corwall v. State*, 91 Ga. 277, 18 S. E. 154.

65. *England*. — *Reg. v. Taylor*, 8 Car. & P. 733, 34 Eng. C. L. 990; *Rex v. Spencer*, 7 Car. & P. 775, 32 Eng. C. L. 867.

*United States*. — *U. S. v. Stone*, 8 Fed. 232.

*Alabama*. — *Kelly v. State*, 72 Ala. 244; *Murphy v. State*, 63 Ala. 1.

*Connecticut*. — *State v. Potter*, 18 Conn. 166.

*Georgia*. — *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

*Maine*. — *State v. Grover*, 96 Me. 363, 52 Atl. 757.

*Michigan*. — *Ulrich v. People*, 39 Mich. 245.

*Mississippi*. — *Jones v. State*, 58 Miss. 349; *Hamilton v. State*, 77 Miss. 675, 27 So. 606.

*Missouri*. — *State v. Patterson*, 73 Mo. 695; *State v. Jones*, 54 Mo. 478.

*Nebraska*. — *Strong v. State*, 63 Neb. 440, 88 N. W. 772.

*South Carolina*. — *State v. Kirby*, 1 Strob. L. 155.

*Texas*. — *Cannada v. State*, 29 Tex. App. 537, 16 S. W. 341.

**Inducement Must Be Made by Party in Authority.** — "While, therefore, it is clear that confessions induced by the promises, threats or advice of the prosecutor or officer having the prisoner in charge, or of any one having authority over him, or the prosecution itself, or of 'a private person in the presence of one in authority,' whose acquiescence may be presumed, will not be deemed voluntary, and will be rejected, the rule is generally the reverse in relation to confessions superinduced by indifferent persons, acting officiously, without any kind of authority, and confessions made under such circumstances will be admitted in evidence." *Young v. Com.*, 8 Bush (Ky.) 366.

**Made to the Judge Trying the Case.** — In *State v. Chambers*, 45 La. Ann. 36, 11 So. 944, the judge of the court went to the jail where the prisoner was confined, and interrogated

But if made to one having no official authority, but possessing control over the accused, and power to punish, as in cases of master and slave, a different rule has been declared.<sup>66</sup>

And there are other cases holding that promises or other inducements held out by private individuals, if in fact the confession was procured thereby, render it incompetent.<sup>67</sup>

**Independently.**—A confession made to a private individual is *prima facie* voluntary within the technical rule on that subject, and admissible in evidence as such.<sup>68</sup>

But if brought about by duress, threats or other inducements, on the part of a private individual, it is inadmissible.<sup>69</sup>

him, resulting in a confession, and at the trial of the case before his successor in office the judge was permitted to testify to such confession. The court, while condemning the course taken by the judge, held the confession admissible.

**By Whom Inducements Must Be Offered.**—"It may be, if the confession of a prisoner, or a person charged with a criminal offense, is obtained by promises of favor, made by one who is known to him to have no connection with the prosecution, no interest in it, and no power to control it, that it will be received in evidence; and it is, perhaps, true that the more recent authorities favor the admissibility of confessions, unless it is shown that they were made under inducements held out, or threats made, by a person having authority—an *officer of the law*. I Wharton's Cr. Law, §§686-92. We feel constrained by our former decisions to hold that a confession induced by hope or fear, excited in the mind by the representations of any one connected with the prosecution, or connected with the accused, who may, considering his relations and condition, be fairly supposed by him to have power to secure him whatever of benefit is promised, or to influence the threatened injury, cannot be regarded as voluntary, and ought not to be received in evidence." *Murphy v. State*, 63 Ala. 1.

**By Owner of Goods Stolen.**—Inducements held out by the owner of the goods stolen render the confession inadmissible. *Com. v. Chabcock*, 1 Mass. 144; *People v. Smith*,

15 Cal. 408; *Sullivan v. State*, 66 Ark. 506, 51 S. W. 828.

66. *State v. Kirby*, 1 Strob. L. (S. C.) 155; *Wyatt v. State*, 25 Ala. 9; *Bob. v. State*, 32 Ala. 560; *Hamilton v. State*, 77 Miss. 675, 27 So. 606; *Murphy v. State*, 63 Ala. 1.

**By Employer to Employee When Will Exclude.**—*Hamilton v. State*, 77 Miss. 675, 27 So. 606.

67. *Beggarly v. State*, 8 Baxt. (Tenn.) 520; *State v. Brockman*, 46 Mo. 566; *State v. Smith*, 72 Miss. 420, 18 So. 482; *Miller v. State*, 94 Ga. 1, 21 S. E. 128; *Murphy v. State*, 63 Ala. 1.

**Is There Any Such Distinction?** In *People v. Smith*, 15 Cal. 408, it is said: "A distinction is made, by many English cases, between confessions induced by one having no authority or control over the prisoner, and those induced by persons who have such authority, as constables, prosecutors and the like. But the cases seem to hold the owner of the goods stolen to stand in this relation. The record here does not show whether the other witnesses, except Barnes, stood in this relation to the prisoner; *nor are the authorities agreed as to the soundness or fact of this distinction.*" And most of the cases, as seen above, make no distinction as to the person by whom the inducements are offered or threats made.

68. *Leslie v. State*, 35 Fla. 184, 17 So. 559; *Spears v. State*, 2 Ohio St. 583; *Young v. Com.*, 8 Bush (Ky.) 366; *Miller v. State*, 94 Ga. 1, 21 S. E. 128.

69. *Hoober v. State*, 81 Ala. 51, 1 So. 574; *State v. Brockman*, 46 Mo.



**In Presence of Officer.** — If made in the presence of an officer, although made to one not in authority, the rule may be different, depending upon the circumstances surrounding the confession, tending to show whether it was freely and spontaneously made or not.<sup>70</sup>

(G.) **By SPIRITUAL ADVISER.** — The fact that the confession was made to the spiritual adviser of the accused, and induced by moral suasion, or hope of benefit in a future life, does not render it incompetent.<sup>71</sup>

**B. MENTAL CONDITION AND AGE AS AFFECTING.** — a. *Generally.* The mental condition of the accused and his age are proper to be considered in passing upon the admissibility, as well as the weight of his confession.<sup>72</sup>

566; *State v. Smith*, 72 Miss. 420, 18 So. 482; *Miller v. State*, 94 Ga. 1, 21 S. E. 128.

But see *U. S. v. Stone*, 8 Fed. 232.

70. *Alabama.* — *Kelly v. State*, 72 Ala. 244.

*California.* — *People v. Barrick*, 49 Cal. 342.

*Connecticut.* — *State v. Potter*, 18 Conn. 166.

*Georgia.* — *Green v. State*, 88 Ga. 516, 15 S. E. 10, 30 Am. St. Rep. 167.

*Kentucky.* — *Young v. Com.*, 8 Bush 366.

*New York.* — *People v. Phillips*, 42 N. Y. 200.

*South Carolina.* — *State v. Kirby*, 1 Strob. L. 155.

*Tennessee.* — *Morehead v. State*, 9 Humph. 635.

**By Private Individual in Presence of Officer.** — In *Kelly v. State*, 72 Ala. 244, a confession made in the presence of an officer having him in custody, upon inducements offered by a private individual, in the same presence, was held inadmissible on the ground that the inducements, although offered by a private individual, were offered in the presence of one in authority.

71. *Com. v. Drake*, 15 Mass. 161.

**Procured by Spiritual Exhortations Competent.** — *Com. v. Goodwin*, 186 Pa. St. 218, 40 Atl. 412, 65 Am. St. Rep. 852.

72. *Alabama.* — *Hoover v. State*, 81 Ala. 51, 1 So. 574; *Newman v. State*, 49 Ala. 9; *Washington v. State*, 53 Ala. 29.

*California.* — *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

*Connecticut.* — *State v. Potter*, 18 Conn. 166.

*Idaho.* — *State v. Mason*, 4 Idaho 543, 43 Pac. 63.

*Maryland.* — *Biscoe v. State*, 67 Md. 6, 8 Atl. 571.

*Michigan.* — *Flagg v. People*, 40 Mich. 706.

*Mississippi.* — *State v. Smith*, 72 Miss. 420, 18 So. 482; *Hamilton v. State*, 77 Miss. 675, 27 So. 606; *Ford v. State*, 75 Miss. 101, 21 So. 524.

*Pennsylvania.* — *Com. v. Sheets*, 197 Pa. St. 69, 46 Atl. 753.

*Tennessee.* — *Deathridge v. State*, 1 Sneed 75.

*Texas.* — *Grayson v. State*, 40 Tex. Crim. App. 573, 51 S. W. 246.

**Effect of Age and Intelligence of Accused.** — It is said, in *Biscoe v. State*, 67 Md. 6, 8 Atl. 571, "much, very much, we may add, depends upon the age, the experience, the intelligence and character of the prisoner."

**Incompetent as a Witness** for want of years, confession should not be received. *Grayson v. State*, 40 Tex. Crim. App. 573, 51 S. W. 246.

**Rule Established for the Weak-minded.** — But in *Dinah v. State*, 39 Ala. 359, it is said: "The court cannot undertake to measure the nature, character and constitutional firmness or weakness of each individual who may invoke the benefit of the rule; and, therefore, it is wisely and properly settled, so as to meet the cases of those who are weak, or ignorant, and who might be tempted, seduced, or overawed by influences which could not affect the minds of the more intelligent, or more intrepid."

**While in State of Intoxication.** The fact that the accused was in a

But it is held that the capacity to commit the crime necessarily supposes the capacity to confess it.<sup>73</sup>

**4. Admissions Not Amounting to Confessions.**—A. GENERALLY. As we have seen, a confession is an acknowledgment of guilt, and is only admitted under certain restrictions. But one charged with crime may, directly or indirectly, make admissions of material facts tending to establish his guilt or to disprove his defense, but not amounting to a confession, in the technical sense, and these are admissible against him.<sup>74</sup>

state of intoxication at the time does not render the confession inadmissible. *State v. Feltes*, 51 Iowa 133, 1 N. W. 755; *State v. Berry*, 50 La. Ann. 1,309, 24 So. 329; *State v. Haworth*, 24 Utah 398, 68 Pac. 155. But see *McCabe v. Com.*, (Pa. St.). 8 Atl. 45, where liquor was furnished the prisoner by the officer having him in arrest.

**Cannot Prove Mental Condition** before confession is proved, but may afterwards to show what weight it should have. *State v. Haworth*, 24 Utah 398, 68 Pac. 155; *State v. Feltes*, 51 Iowa 133, 1 N. W. 755.

**73.** *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Martin v. State*, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844.

**Under Age of Fourteen Years**, confession competent. *Martin v. State*, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844.

**74. United States.**—U. S. v. Tardy, 1 Pet. C. C. 458, 28 Fed. Cas. No. 16,432.

**Alabama.**—*Banks v. State*, 84 Ala. 430, 4 So. 382; *Pentecost v. State*, 107 Ala. 81, 18 So. 146; *Curry v. State*, 120 Ala. 336, 25 So. 237; *Spicer v. State*, 69 Ala. 159.

**California.**—*People v. Joy*, 135 Cal. XIX, 66 Pac. 964; *People v. Ashmead*, 118 Cal. 508, 50 Pac. 681; *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *People v. LeRoy*, 65 Cal. 613, 4 Pac. 649; *People v. Strong*, 30 Cal. 157; *People v. Knowlton*, 122 Cal. 357, 55 Pac. 141.

**Georgia.**—*Powell v. State*, 101 Ga. 9, 29 S. E. 309; *Taylor v. State*, 110 Ga. 150, 35 S. E. 161; *Shaw v. State*, 102 Ga. 660, 29 S. E. 477.

**Illinois.**—*Bergen v. People*, 17 Ill. 425, 65 Am. Dec. 672; *Bow v. People*, 160 Ill. 438, 43 N. E. 593.

**Iowa.**—*State v. Carroll*, 85 Iowa 1, 51 N. W. 1,159; *State v. Red*, 53 Iowa 69, 4 N. W. 831.

**Kansas.**—*State v. Crowder*, 41 Kan. 101, 21 Pac. 208.

**Kentucky.**—*Cogswell v. Com.*, 17 Ky. L. Rep. 822, 32 S. W. 935.

**Louisiana.**—*State v. Picton*, 51 La. Ann. 624, 25 So. 375; *State v. Lewis*, 39 La. Ann. 1,110, 3 So. 343.

**Massachusetts.**—*Com. v. Crowe*, 165 Mass. 139, 42 N. E. 563; *Com. v. Devaney*, (Mass.) 64 N. E. 402.

**Nebraska.**—*McLain v. State*, 18 Neb. 154, 24 N. W. 720; *Taylor v. State*, 37 Neb. 788, 56 N. E. 623.

**New York.**—*People v. Hughson*, 154 N. Y. 153, 47 N. E. 1,092.

**Oregon.**—*State v. Heidenreich*, 29 Or. 381, 45 Pac. 755.

**Pennsylvania.**—*Com. v. Johnson*, 162 Pa. St. 63, 29 Atl. 280.

**Tennessee.**—*Deathridge v. State*, 1 Sneed 75.

**Texas.**—*Banks v. State*, 13 Tex. App. 182; *Ferguson v. State*, 31 Tex. Crim. App. 93, 19 S. W. 901; *Corporal v. State*, (Tex. Crim. App.), 24 S. W. 96; *Davis v. State*, (Tex. Crim. App.), 23 S. W. 687; *McAdoo v. State*, (Tex. Crim. App.), 35 S. W. 966.

**Washington.**—*State v. Munson*, 7 Wash. 239, 34 Pac. 932; *State v. McCauley*, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382.

**Admission of Facts Not Amounting to Confession.**—In *State v. Crowder*, 41 Kan. 101, 21 Pac. 208, it is said:

"Admissions by persons accused of crime, suggesting the inference that such crime was in fact committed as alleged, are always admissible against the person making the admission. In this case, the appellant admits by his statement under oath the fact that

*a. Declarations Tending to Show Guilt.* — The rule admitting such evidence extends to admissions of fact tending to show guilt.<sup>75</sup> Thus in the prosecution of an offense where proof of the marriage of the accused is essential, the fact may be proved by his admission of the fact.<sup>76</sup>

*b. False or Inconsistent Declarations of Innocence.* — So false or inconsistent declarations tending, or intended, to establish his innocence, but indicating or tending to establish his guilt, may be proved against the accused.<sup>77</sup>

he offered the witness, Wilson, money to absent himself and not to testify in the Magruder case, but these admissions are always coupled with explanatory statements of the intent with which the offer was made, so that the most that can be said about his various declarations is that the offer of money is an admitted fact, and the sole remaining inquiry is as to the motive and intent of the offer. It is not either a judicial confession as a plea of guilty, nor is it an extra judicial confession of guilt. It is an admission reduced to writing so far as the affidavit for continuance is concerned, and it becomes subject to the rules governing documentary evidence. It is a most satisfactory establishment of the fact that money was offered Wilson not to testify, and that is the limit of the legal effect that can be given it."

**Disclosing Place Where Stolen Goods Were Concealed.** — "The offer of defendant to conduct the parties who had him under arrest to the place where the stolen goods were concealed, his having done so, and the discovery of the goods at such place, were properly received in evidence, though such offer was preceded by an assurance that it would be best for him to tell all about it." *Banks v. State*, 84 Ala. 430, 4 So. 382.

In *State v. Motley*, 7 Rich. L. (S. C.) 327, it is said, "If Blackledge had shown these remains, or had been traced to the spot when engaged in an effort to conceal them, by one on the watch, or if a dog, even, of one of them, had retraced the spot and disinterred the remains, either fact would have been competent in this investigation — any act of Blackledge's, showing his knowledge of the locality of these remains, was

competent. This did not necessarily implicate the prisoner; but *the fact* that one charged as an accomplice gave information, which led to the discovery, was one in a chain of circumstances entitled to be heard and competent."

75. *Taylor v. State*, 37 Neb. 788, 56 N. W. 623; *Banks v. State*, 13 Tex. App. 182; *West v. State*, 1 Wis. 209; *Com. v. Robinson*, 165 Mass. 426, 43 N. E. 121; *State v. Carroll*, 85 Iowa 1, 51 N. W. 1,159; *People v. Hickman*, 113 Cal. 80, 45 Pac. 175.

76. *United States*. — *Miles v. U. S.*, 103 U. S. 304.

*Alabama*. — *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111.

*Indiana*. — *Squire v. State*, 46 Ind. 459; *State v. Seals*, 16 Ind. 352.

*Kentucky*. — *Com. v. Jackson*, 11 Bush 679, 21 Am. Rep. 225.

*Maine*. — *Cayford's case*, 7 Greenl. 57; *Ham's case*, 11 Me. 391; *State v. Libby*, 44 Me. 469, 69 Am. Dec. 115.

*Missouri*. — *State v. McDonald*, 25 Mo. 176.

*North Carolina*. — *State v. Melton*, 120 N. C. 591, 26 S. E. 933; *State v. Wylde*, 110 N. C. 500, 15 S. E. 5.

*Ohio*. — *Wolverton v. State*, 16 Ohio 173, 47 Am. Dec. 373.

*South Carolina*. — *State v. Hilton*, 3 Rich. L. 434; *State v. Britton*, 4 McCord 256.

*Wisconsin*. — *West v. State*, 1 Wis. 209.

**Tending to Show Motive.** — *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770.

77. *Levison v. State*, 54 Ala. 520; *Com. v. Johnson*, 162 Pa. St. 63, 29 Atl. 280; *State v. Carroll*, 85 Iowa 1, 51 N. W. 1,159; *People v. Hughson*, 154 N. Y. 153, 47 N. E. 1,092; *State v. Oliver*, 55 Kan. 711, 41 Pac. 954; *People v. Ashmead*, 118 Cal. 508, 50 Pac. 681; *Com. v. Devaney*, (Mass.), 64 N. E. 402.

**B. CONFESSIONS OF OTHER CRIMES.** — It is not competent to prove a confession of another crime in no way connected with the one charged.<sup>78</sup>

**C. OF COLLATERAL FACTS.** — It is not competent to prove an admission of purely collateral facts. The admission must be of facts material to the issue.<sup>79</sup>

**D. CAUTION, AND PROOF OF VOLUNTARY CHARACTER OF, UNNECESSARY.** — Admissions of the kind under consideration differ from confessions as to their admissibility in some very material respects, chief of which is that the same safeguards against proof of involuntary statements are not extended to the accused. Therefore it is not necessary to the competency of such admissions that it be shown that they were voluntarily made, after due caution being given, as in case of confessions.<sup>80</sup>

**5. Conduct Not Amounting to Admissions.** — **A. GENERALLY.** — It is not only the confessions and admissions of a party that are competent against him, but his acts and conduct, not amounting to either, but tending to throw light on the investigation and arrive at the truth, are admissible.<sup>81</sup>

78. *State v. Jackson*, 95 Mo. 623, 8 S. W. 749; *Com. v. Wilson*, 186 Pa. St. 1, 40 Atl. 283; *Tidwell v. State*, 40 Tex. Crim. App. 38, 48 S. W. 184; *Drury v. Territory*, 9 Okla. 398, 60 Pac. 101.

If Part of Conversation Relating to Offense Charged is so connected as not to be severable, it is not error to admit the whole, although other crimes are confessed. *State v. Cowen*, 56 Kan. 470, 43 Pac. 687.

79. *State v. Jackson*, 95 Mo. 623, 8 S. W. 749.

80. *Alabama*. — *Spicer v. State*, 69 Ala. 159; *Banks v. State*, 84 Ala. 430, 4 So. 382; *Curry v. State*, 120 Ala. 336, 25 So. 237.

*California*. — *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15; *People v. Ashmead*, 118 Cal. 508, 50 Pac. 681; *People v. Knowlton*, 122 Cal. 357, 55 Pac. 141; *People v. Joy*, 135 Cal. XIX, 66 Pac. 964; *People v. Sexton*, 132 Cal. 37, 64 Pac. 107; *People v. Parton*, 49 Cal. 632; *People v. Hickman*, 113 Cal. 80, 45 Pac. 175.

*Colorado*. — *Beery v. U. S.*, 12 Colo. 186.

*Connecticut*. — *State v. Willis*, 71 Conn. 293, 41 Atl. 820.

*Louisiana*. — *State v. Picton*, 51 La. Ann. 624, 25 So. 375.

*Massachusetts*. — *Com. v. Robinson*, 165 Mass. 426, 43 N. E. 121.

*Nebraska*. — *Taylor v. State*, 37 Neb. 788, 56 N. W. 623.

*Tennessee*. — *Deathridge v. State*, 1 Sneed 75.

*Texas*. — *Rhodes v. State*, 11 Tex. App. 563; *Ferguson v. State*, 31 Tex. Crim. App. 93, 19 S. W. 901; *Quintana v. State*, 29 Tex. App. 401, 16 S. W. 258, 25 Am. St. Rep. 730; *Corporal v. State*, (Tex. Crim. App.), 24 S. W. 96; *Griffin v. State*, (Tex. Crim. App.), 20 S. W. 552; *McKenzie v. State*, (Tex. Crim. App.), 32 S. W. 543; *Adams v. State*, 35 Tex. Crim. App. 285, 33 S. W. 354; *Villegas v. State*, (Tex. Crim. App.), 41 S. W. 610.

81. *Alabama*. — *Levison v. State*, 54 Ala. 520; *Henry v. State*, 107 Ala. 22, 19 So. 23.

*California*. — *People v. Ashmead*, 118 Cal. 508, 50 Pac. 681.

*Colorado*. — *Beery v. U. S.*, 2 Colo. 186.

*Iowa*. — *State v. Minard*, 96 Iowa 267, 65 N. W. 147.

*Kentucky*. — *Clark v. Com.*, 17 Ky. L. Rep. 540, 32 S. W. 131.

*Mississippi*. — *Belote v. State*, 36 Miss. 96, 72 Am. Dec. 163.

*Missouri*. — *State v. Moore*, 117 Mo. 395, 22 S. W. 1,086; *State v. Foster*, 136 Mo. 653, 38 S. W. 721; *State v. Hill*, 134 Mo. 663, 36 S. W. 223; *State v. Jackson*, 95 Mo. 623, 8 S. W. 749.

**B. FLIGHT.** — Of the acts competent to be proved as tending to establish the guilt of the accused is his flight to avoid arrest or prosecution.<sup>82</sup>

**C. ESCAPES.** — The same is true of escapes or attempts to escape.<sup>83</sup>

**6. Caution Against Making Confession.** — **A. GENERALLY.** — If a confession is made under such circumstances as to render it probable that it was the result of influence of any kind, it must not only appear that it was freely given, but that the accused was cautioned against making it.<sup>84</sup> But this rule does not extend to acts done by the accused. Nor, as we have seen, to admissions of fact not

*Nebraska.* — *Clough v. State*, 7 Neb. 320.

*New York.* — *People v. Hughson*, 154 N. Y. 153, 47 N. E. 1,092.

*Ohio.* — *Moore v. State*, 2 Ohio St. 500.

*Texas.* — *Rhodes v. State*, 11 Tex. App. 563; *Elizabeth v. State*, 27 Tex. 329; *Waite v. State*, 13 Tex. App. 169; *Adams v. State*, 35 Tex. Crim. App. 285, 33 S. W. 354; *Villegas v. State*, (Tex. Crim. App.), 41 S. W. 610; *Hardin v. State*, 40 Tex. Crim. App. 208, 49 S. W. 607; *Baines v. State*, (Tex. Crim. App.), 66 S. W. 847.

**Producing Stolen Property.** Thus, where the accused produced gold dust, alleged to have been stolen, it was held that the act of producing the stolen property could be proved, although his declarations accompanying the act were inadmissible, because not voluntary. *Beery v. U. S.*, 2 Colo. 186.

**Conduct and Acts Admissible.** In *Moore v. State*, 2 Ohio St. 500, it is said:

"Now, where a crime has been committed, and has been concealed, as is alleged in the present instance, so that none but the perpetrator knows who committed it, the discovery of who did the deed is generally ascertained by the conduct, and acts, and sayings of the perpetrator himself. From our knowledge of the human mind and its workings, we expect, with almost positive certainty, that when it is the sole repository of so dreadful a secret, it will affect the conduct and sayings of the person; hence the mind naturally looks to these with the most anxious scrutiny, and would require for its satisfaction, if such a thing

were possible, a complete transcript of the person's conduct and sayings. Nor is there any rule by which the mind of the person containing the secret can be presumed to influence his conduct and sayings. The conduct, under the circumstances, is generally unnatural; which is commonly what leads to detection; and this, generally, by the observation of small, and, taken by themselves, unimportant acts."

**Failure to Claim Property** alleged to have been innocently obtained. *People v. Ashmead*, 118 Cal. 508, 50 Pac. 681.

**82.** *Waite v. State*, 13 Tex. App. 169; *Burris v. State*, 38 Ark. 221; *State v. Foster*, 136 Mo. 653, 38 S. W. 721; *State v. Chase*, 68 Vt. 405, 35 Atl. 336; *State v. Minard*, 96 Iowa 267, 65 N. W. 147; *People v. Hughson*, 154 N. Y. 153, 47 N. E. 1,092; *State v. Harris*, 48 La. Ann. 1,189, 20 So. 729; *State v. Pancoast*, (N. D.), 67 N. W. 1,052; *State v. Davis*, (Idaho), 53 Pac. 678.

**83.** *State v. Jackson*, 95 Mo. 623, 8 S. W. 749; *Burris v. State*, 38 Ark. 221; *State v. Moore*, 117 Mo. 395, 22 S. W. 1,086; *Clark v. Com.*, 17 Ky. L. Rep. 540, 32 S. W. 131; *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216.

**84.** *Van Buren v. State*, 24 Miss. 512; *O'Brien v. People*, 48 Barb. (N. Y.) 274; *De La Rosa v. State*, (Tex. Crim. App.), 21 S. W. 192; *State v. Young*, 119 Mo. 495, 24 S. W. 1,038; *Gilder v. State*, 35 Tex. Crim. App. 360, 33 S. W. 867; *State v. Rorie*, 24 N. C. 148.

**When Caution Necessary.** — When made under the effect of threats, or the sanction of an oath, without the proper caution being given that he need not answer, and that what he

amounting to confessions.<sup>85</sup> Nor, according to some cases, is any caution necessary to render competent extra judicial confessions of any kind.<sup>86</sup>

**B. WHEN MADE TO ONE IN AUTHORITY.** — In some of the states a confession made while under arrest, or to persons having authority, is rendered inadmissible by statute, unless it is shown that the accused was properly cautioned and informed of his rights, and the use that may be made of such confession.<sup>87</sup> Under such provisions the confessions are admissible only where the proper caution is shown.<sup>88</sup> And in some cases a distinction is made between confes-

says may be used against him, and some other circumstances, the admissions are excluded as matter of law. *O'Brien v. People*, 48 Barb. (N. Y.) 274.

**At What Time Caution Must Be Given.** — *Barth v. State*, 39 Tex. Crim. App. 381, 46 S. W. 228, 73 Am. St. Rep. 935.

**No Caution Necessary.** — In *Coil v. State*, 62 Neb. 15, 86 N. W. 925, it is held that no warning as to the use that may be made of the confession, if made, is necessary, the court saying: "Declarations, or admissions against interest, would be of little or no practical value if it were necessary to advise those making them that the statements could be used against them, before being admissible as evidence."

**Where Accused Was Young and Ignorant of His Rights.** — In *State v. Young*, 119 Mo. 495, 24 S. W. 1,038, it was held that statements made by a defendant, in a murder case, on his examination before a coroner's jury, were not admissible where such examination was made to obtain from him criminating admissions and it appeared that he was an ignorant boy and was not advised as to his rights, or the use that might be made of his testimony.

**When Must Be Given and by Whom.** — *Martin v. State*, (Tex. Crim. App.), 41 S. W. 620; *Henry v. State*, 38 Tex. Crim. App. 306, 42 S. W. 559; *Petty v. State*, (Tex. Crim. App.), 65 S. W. 917.

<sup>85</sup> *Beery v. U. S.*, 2 Colo. 186; *Villegas v. State*, (Tex. Crim. App.), 41 S. W. 610. But see *Nolen v. State*, 14 Tex. App. 474, 46 Am. Rep. 247.

"A distinction has always been made between acts performed and

confessions made by a defendant while under arrest. The former are admitted, whilst the latter are not, unless coming strictly within the letter of the statute." *Rhodes v. State*, 11 Tex. App. 563.

**Nor Where Facts Are Disclosed, as for Example** where statement is made as to the whereabouts of property or other evidences of the crime which upon investigation prove to be true. *Binyon v. State*, (Tex. Crim. App.), 56 S. W. 339; *Winfield v. State*, (Tex. Crim. App.), 54 S. W. 584.

<sup>86</sup> *Dick v. State*, 30 Miss. 593; *State v. Conrad*, 95 N. C. 666.

**Where Confession Is Introduced by the Defendant** in his own testimony no proof that he was warned as to the use that might be made of it is necessary. *Fendrick v. State*, (Tex. Crim. App.), 56 S. W. 626.

<sup>87</sup> *White v. State*, (Tex. Crim. App.), 38 S. W. 169; *State v. Rorie*, 74 N. C. 148.

<sup>88</sup> *Moore v. State*, (Tex. Crim. App.), 33 S. W. 971; *Matthews v. State*, (Tex. Crim. App.), 28 S. W. 474; *Clayton v. State*, 31 Tex. Crim. App. 489, 21 S. W. 255; *White v. State*, (Tex. Crim. App.), 38 S. W. 169; *Wright v. State*, 36 Tex. Crim. App. 427, 37 S. W. 732; *Guin v. State*, (Tex. Crim. App.), 50 S. W. 350; *Bailey v. State*, 40 Tex. Crim. App. 150, 49 S. W. 102.

**Caution by One, Admission to Another.** — Where the proper caution or warning is given by one person and the confession made to another, it is competent. *Hamlin v. State*, 39 Tex. Crim. App. 759, 47 S. W. 656; *Russell v. State*, 38 Tex. Crim. App. 590, 44 S. W. 159.

**Facts Disclosed by and Found to Be True No Caution Necessary.**

sions made to one having judicial authority, and to those made to other persons, a caution being required in the former and not in the latter case.<sup>89</sup>

a. *To Committing Magistrate.* — Where the confession is made to the committing magistrate, on the hearing, it must appear that the proper caution was given, or the confession is inadmissible.<sup>90</sup>

b. *To Officer Having Accused in Custody.* — In some of the states the fact that the accused is in custody renders it necessary to caution him as to the effect of making confession, to render it competent.<sup>91</sup>

C. WHAT SUFFICIENT CAUTION. — The caution need not be given by a magistrate or one in authority. If given by another, and understood, it is sufficient.<sup>92</sup> As to what will amount to a sufficient caution, see cases cited below.<sup>93</sup>

## II. ADMISSIBILITY.

1. **Generally.** — The admissibility of confessions depends not only upon the existence of the requisites of a binding confession,

*Parker v. State*, 40 Tex. Crim. App. 119, 49 S. W. 80.

**What Insufficient Warning.** — *Unsell v. State*, 39 Tex. Crim. App. 330, 45 S. W. 1,022.

**Not Under Arrest No Warning Necessary.** — *Ross v. State*, (Tex. Crim. App.), 58 S. W. 105.

**Applies to Letters Written While in Jail.** — *McColloh v. State*, (Tex. Crim. App.) 69 S. W. 141.

<sup>89.</sup> *Simon v. State*, 36 Miss. 636; *Dick v. State*, 30 Miss. 593.

<sup>90.</sup> *Dick v. State*, 30 Miss. 593; *U. S. v. Chapman*, 4 Am. Law J. 440, 25 Fed. Cas. No. 14,783; *State v. Rorie*, 74 N. C. 148. But if made before examination commences it is competent. *State v. Conrad*, 95 N. C. 666.

<sup>91.</sup> *Mississippi.* — *Simon v. State*, 36 Miss. 636.

*South Carolina.* — *State v. Cook*, 15 Rich. (S. C.) 29.

*Texas.* — *Guin v. State*, (Tex. Crim. App.), 50 S. W. 350; *De La Rosa v. State*, (Tex. Crim. App.), 21 S. W. 192; *Morales v. State*, 36 Tex. Crim. App. 234, 36 S. W. 435; *Rodriguez v. State*, (Tex. Crim. App.), 36 S. W. 439; *Walker v. State*, (Tex. App.), 12 S. W. 503; *Williams v. State*, 10 Tex. App. 526; *Jackson v. State*, 7 Tex. App. 363; *Davis v. State*, 2 Tex. App. 588; *Marshall v. State*, 5 Tex. App. 273; *Adams v.*

*State*, 34 Tex. 526; *Wimberly v. State*, 22 Tex. App. 506, 3 S. W. 717; *Lancaster v. State*, (Tex. Crim. App.), 31 S. W. 515; *Baker v. State*, 25 Tex. App. 1, 8 S. W. 23, 8 Am. St. Rep. 427.

**Must Be Under Arrest.** — To bring the accused within the exception and exclude his statements he must have been under arrest. It is not enough that he believed he was in custody at the time. *Lopez v. State*, 37 Tex. Crim. App. 649, 40 S. W. 972.

<sup>92.</sup> **Caution by Prisoner's Attorney.** — In *Hamilton v. State*, 3 Ind. 552, it was held that confessions made by a prisoner after he had been professionally advised of their effect by his attorney, were admissible in evidence against him.

<sup>93.</sup> *Alabama.* — *Calloway v. State*, 103 Ala. 27, 15 So. 821.

*Florida.* — *Green v. State*, 40 Fla. 474, 24 So. 537.

*North Carolina.* — *State v. Rorie*, 74 N. C. 148.

*Pennsylvania.* — *Rizzolo v. Com.*, 126 Pa. St. 54, 17 Atl. 520.

*Texas.* — *Moore v. State*, (Tex. Crim. App.), 33 S. W. 971; *Baldwin v. State*, (Tex. Crim. App.), 28 S. W. 951; *Baker v. State*, 25 Tex. App. 1, 8 S. W. 23, 8 Am. St. Rep. 427; *Matthews v. State*, (Tex. Crim. App.), 28 S. W. 474; *Mixon v. State*, 36 Tex. Crim. App. 66, 35 S. W. 394;

above mentioned, but also, under some circumstances, upon preliminary proof, by the state, of their existence.<sup>94</sup>

**2. In Violation of Provision Against Self Incrimination.**—If the confession is obtained by threats or undue influence of arresting officers, or others in authority, it is inadmissible, on the ground that it is, in effect, to compel the accused to criminate himself, and, therefore, in violation of his constitutional rights.<sup>95</sup> This, however, is opposed to what seems to be the common law rule, that the reason for the exclusion of the confession is because of its unreliability,<sup>96</sup>

*Guin v. State*, (Tex. Crim. App.), 50 S. W. 350; *Perry v. State*, (Tex. Crim. App.), 61 S. W. 400; *Baines v. State*, (Tex. Crim. App.), 66 S. W. 847.

**94. United States.**—U. S. v. Cooper, 3 Quart. Law J. 42, 25 Fed. Cas. No. 14,864.

*Alabama.*—*Young v. State*, 68 Ala. 569; *Redd v. State*, 69 Ala. 255; *Bradford v. State*, 104 Ala. 68, 16 So. 107, 53 Am. St. Rep. 24; *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40; *Johnson v. State*, 59 Ala. 37; *Jackson v. State*, 83 Ala. 76, 3 So. 847; *McAlpine v. State*, 117 Ala. 93, 23 So. 130.

*Arkansas.*—*Love v. State*, 22 Ark. 336; *Corley v. State*, 50 Ark. 305, 7 S. W. 255.

*California.*—*People v. Soto*, 49 Cal. 67.

*Florida.*—*Murray v. State*, 25 Fla. 528, 6 So. 408; *Green v. State*, 40 Fla. 474, 24 So. 537.

*Kentucky.*—*Laughlin v. Com.*, 18 Ky. L. Rep. 640, 37 S. W. 590.

*Louisiana.*—*State v. Mims*, 43 La. Ann. 532, 9 So. 113; *State v. Berry*, 50 La. Ann. 1,309, 24 So. 329.

*Mississippi.*—*Carter v. State*, (Miss.), 24 So. 307; *Mitchell v. State*, (Miss.), 24 So. 312.

*Montana.*—*Territory v. Underwood*, 8 Mont. 131, 19 Pac. 308.

*Nebraska.*—*Snider v. State*, 56 Neb. 309, 76 N. W. 574.

*New Jersey.*—*State v. Young*, 67 N. J. L. 223, 51 Atl. 939.

*Texas.*—*Greer v. State*, 31 Tex. 129; *Williams v. State*, 37 Tex. 474; *Gallagher v. State*, 40 Tex. Crim. App. 296, 50 S. W. 388.

*Virginia.*—*Thompson v. Com.*, 20 Gratt. 724.

**Necessity for Preliminary Proof.** In *Bonner v. State*, 55 Ala. 242, it is said: "When such testimony is of-

fered, preliminary proof should first be made, showing the circumstances under which the alleged confession was made; and when desired by either party, the court, before admitting the evidence, should hear the testimony offered on each side, and from it determine whether the testimony establishes the fact that the confession was voluntarily made."

**Preliminary Proof Unnecessary.** *Harrison v. State*, (Tex. Crim. App.), 43 S. W. 1,002.

**What Sufficient Proof** that confession was voluntary. *Snider v. State*, 56 Neb. 309, 76 N. W. 574.

**Are Prima Facie Inadmissible.** It is held in *Banks v. State*, 84 Ala. 430, 4 So. 382, that confessions are *prima facie* inadmissible, and therefore it must be satisfactorily shown that they were not improperly obtained.

**Prima Facie Voluntary and Competent.**—In *Rufer v. State*, 25 Ohio St. 464, the opposite is held, viz: that a confession must be presumed to have been voluntary and that the burden is on the accused to prove the contrary in support of his objection to its admissibility. To the same effect, *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; *Com. v. Culver*, 126 Mass. 464; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516; *Williams v. State*, 19 Tex. App. 276; *Hauk v. State*, 148 Ind. 238, 46 N. E. 127; *Com. v. Bond*, 170 Mass. 41, 48 N. E. 756; *State v. Storms*, 113 Iowa 416, 85 N. W. 610, 86 Am. St. Rep. 380; *Dixon v. State*, 13 Fla. 636; *Nicholson v. State*, 38 Md. 140.

**95. Elizabeth v. State**, 27 Tex. 329; *Bram v. U. S.*, 168 U. S. 532, 18 Sup. Ct. 183; *State v. Andrews*, 35 Or. 388, 58 Pac. 765; *Davis v. State*, 131 Ala. 10, 31 So. 569.

**96. Elizabeth v. State**, 27 Tex.



which renders the confession admissible, notwithstanding the means by which it was obtained, if corroborated by facts discovered by means of such confession.<sup>97</sup> But this would go to their weight rather than their admissibility.<sup>98</sup> A different rule prevailed under the civil law.<sup>99</sup>

**Want of Reliability.**—But one reason for their exclusion, when not voluntary, in case of sworn statements in court at least, is that the accused has thus been forced to criminate himself in violation of the constitution.<sup>1</sup> But most of the cases in this country still place their exclusion of such evidence on the ground of its want of reliability.<sup>2</sup>

**3. Preliminary Proof.**—Under certain circumstances from which

329; *People v. McMahon*, 15 N. Y. 384; *Austine v. People*, 51 Ill. 236; *State v. Harrison*, 115 N. C. 706, 20 S. E. 175.

97. *Elizabeth v. State*, 27 Tex. 329.

98. *State v. Jenkins*, 2 Tyler (Vt.) 377.

99. *People v. McMahon*, 15 N. Y. 384.

**Rule Under the Civil Law.**—The rule as it prevailed under the civil law is thus stated in *People v. McMahon*, 15 N. Y. 384:

"Confessions and statements made by persons charged with crime have been very differently regarded by the civil and the common law. The former, reposing with confidence upon the assumption that one who is innocent will never admit that which tends to show guilt, treats the declarations and admissions of the accused as evidence of the most satisfactory kind. To such an extent does it carry this idea, that in all except capital cases a confession by the accused is deemed conclusive evidence of guilt, unless met by overwhelming proof of the contrary."

See also *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

1. *Elizabeth v. State*, 27 Tex. 329; *Bram v. U. S.*, 168 U. S. 532, 18 Sup. Ct. 183; *Self v. State*, 6 Baxt. (Tenn.) 244; *State v. Willis*, 71 Conn. 293, 41 Atl. 820; *State v. Andrews*, 35 Or. 388, 58 Pac. 765.

2. *United States v. Stone*, 8 Fed. 232.

*Arkansas v. Young v. State*, 50 Ark. 501, 8 S. W. 828.

*California v. People v. Ah Ki*, 20 Cal. 178.

*Connecticut v. State v. Willis*, 71 Conn. 293, 41 Atl. 820.

*Georgia v. Cornwall v. State*, 91 Ga. 277, 18 S. E. 154.

*Iowa v. State v. Novak*, 109 Iowa 717, 79 N. W. 465.

*Louisiana v. State v. Edwards*, 106 La. 674, 31 So. 308.

*Massachusetts v. Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491; *Com. v. Morey*, 1 Gray. 461.

*Michigan v. People v. Wolcott*, 51 Mich. 612, 17 N. W. 78.

*Nevada v. State v. Carrick*, 16 Nev. 120.

*New Jersey v. Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408.

*New York v. People v. Smith*, 3 How. Pr. 226; *People v. McMahon*, 15 N. Y. 384; *O'Brien v. People*, 48 Barb. 274; *People v. Thomas*, 3 Park. Crim. Rep. 256.

*North Carolina v. State v. Harrison*, 115 N. C. 706, 20 S. E. 175.

*Pennsylvania v. Fife v. Com.*, 29 Pa. St. 429.

*South Carolina v. State v. Kirby*, 1 Strob. L. 378.

**Ground of Exclusion.**—The ground for excluding confessions involuntarily made is thus stated in *Com. v. Morey*, 1 Gray (Mass.) 461:

"The ground on which confessions made by a party accused, under promises of favor, or threats of injury, are excluded as incompetent, is, not because any wrong is done to the accused in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him, without regard to their truth, in order to obtain the promised relief, or avoid the threatened danger, and therefore admissions so obtained have no just

it may fairly be assumed that the confession was not voluntary, as, for example, where it was made while the accused was under arrest charged with the crime, and objection is made to its admission, preliminary proof showing *prima facie* that the confession was voluntarily made and not improperly obtained, is required as a prerequisite to its admission in evidence.<sup>3</sup>

and legitimate tendency to prove the facts admitted."

**Want of Reliability.**—"But the reason is that in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced by the hope of advantage, or fear of injury, to state things which are not true." *Com. v. Knapp*, 9 Pick (Mass.) 496, 20 Am. Dec. 491.

**Excluded Because Unreliable.**—In *People v. McMahon*, 15 N. Y. 384, the rule that such confessions are excluded on the ground of their want of reliability is thus stated:

"The principle upon which this rule is based is obvious. It is, that we cannot safely judge of the relation between the motives and the declarations of the accused, when to the natural agitation consequent upon being charged with crime is superadded the disturbance produced by hopes or fears artificially excited. It is because it is in its nature unreliable, and not on account of any impropriety in the manner of obtaining it, that the evidence is excluded. In this all the authorities agree. Mr. Phillips, speaking on this subject, says: 'A confession so obtained cannot be received, on account of the uncertainty and doubt whether the prisoner might not have been induced, from motives of fear or interest, to make an *untrue statement*.'"

**Not Excluded Because of Any Wrong to the Accused.**—*Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408.

**Ground for Exclusion.**—In *State v. Carrick*, 16 Nev. 120, the reason for excluding confessions on the ground of their involuntary character is thus stated:

"The law excluding confessions is based in a spirit of charity for the weakness of human nature, and rests upon the theory that a man when charged with crime and threatened with the punishment of the law, or promised immunity therefrom, may be induced, while in an alarmed and

excited condition of mind, to make statements that are not true. Such statements, when so made, are, and should be, excluded by the courts. . . . It is only in cases where the confession is obtained by mob violence, or by threats of harm, or promises of favor or worldly advantage held out by some person in authority or standing in such intimate relation from which the law will presume that his promises or threats will be likely to exercise such an influence over the mind of the accused as to induce him to state things that are not true, that will authorize the courts to exclude the confession or admission. The law in its general application to this question, as well as others, is founded in reason and common sense. Its object is to ascertain the truth, and it is not its purpose to reject any reliable and competent means of attaining it."

**How Character of, Determines.** The character of the alleged confession depends on the question whether the making of the statement was voluntary, and not whether the particular statements in it were voluntary or not. *Bram v. U. S.*, 168 U. S. 532, 18 Sup. Ct. 183.

3. *Alabama*.—*Meinaka v. State*, 55 Ala. 47; *Ward v. State*, 50 Ala. 120; *Bradford v. State*, 104 Ala. 68, 16 So. 107, 53 Am. St. Rep. 24; *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40; *Young v. State*, 68 Ala. 569.

*Arkansas*.—*Corley v. State*, 50 Ark. 305, 7 S. W. 255.

*California*.—*People v. Soto*, 49 Cal. 67.

*Florida*.—*Murray v. State*, 25 Fla. 528, 6 So. 498.

*Kentucky*.—*Laughlin v. Com.*, 18 Ky. L. Rep. 640, 37 S. W. 590.

*Louisiana*.—*State v. Berry*, 50 La. Ann. 1,309, 24 So. 329.

*Michigan*.—*People v. Foley*, 64 Mich. 148, 31 N. W. 94.

*Mississippi*.—*Peter v. State*, 4 Smed. & M. 31.

A. THAT CONFESSION WAS VOLUNTARY. — This involves preliminary proof, satisfactory to the court, that the confession was voluntary.<sup>4</sup>

B. THAT ACCUSED WAS DULY CAUTIONED. — And further, if made under circumstances requiring caution to be given, that before making it the accused was properly cautioned as to his rights, and the use that might be made of any statement he might make, and its effect.<sup>5</sup>

a. *How Caution Proved.* — Where confession is made before a committing magistrate at the preliminary hearing, the fact that the proper caution was given need not appear from the record of the magistrate, but may be proved by parol.<sup>6</sup> Usually, the proof that no influences were brought to bear is made by verbal answers of the party or parties to whom the confession was made.<sup>7</sup>

C. MOTIVE FOR MAKING. — a. *Generally Immaterial.* — As a rule the motive for making the admission is immaterial in respect to its admissibility.<sup>8</sup>

*Nebraska.* — Ballard v. State, 19 Neb. 609, 28 N. W. 271.

*New Jersey.* — State v. Young, 67 N. J. L. 223, 51 Atl. 939.

*Texas.* — Barnes v. State, 36 Tex. 356; Cain v. State, 18 Tex. 387; Thomas v. State, 35 Tex. Crim. App. 178, 32 S. W. 771; Walker v. State, 7 Tex. App. 245; Gallaher v. State, 40 Tex. Crim. App. 296, 50 S. W. 388.

*When Proof Must Be Made.* — In those states in which the confession is *prima facie* involuntary, proof that it was so made as to render it competent is always required before the proof of it can be heard. Bradford v. State, 104 Ala. 68, 16 So. 107, 53 Am. St. Rep. 24; Banks v. State, 84 Ala. 430, 4 So. 382.

But where the contrary is held, the rule, of course, is different, and preliminary proof on the part of the state, in the first instance, is only necessary in peculiar cases.

4. *Alabama.* — Miller v. State, 40 Ala. 54; Young v. State, 68 Ala. 569; Banks v. State, 84 Ala. 430, 4 So. 382; Owen v. State, 78 Ala. 425, 56 Am. Rep. 40.

*Arkansas.* — Corley v. State, 50 Ark. 305, 7 S. W. 255.

*California.* — People v. Soto, 49 Cal. 67.

*Florida.* — Murray v. State, 25 Fla. 528, 6 So. 408; Green v. State, 40 Fla. 474, 24 So. 537.

*Georgia.* — Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238.

*Louisiana.* — State v. Berry, 50 La. Ann. 1309, 24 So. 329.

*New Jersey.* — Roesel v. State, 62 N. J. L. 216, 41 Atl. 408.

*Texas.* — Barnes v. State, 36 Tex. 356; Cain v. State, 18 Tex. 387; Gallaher v. State, 40 Tex. Crim. App. 296, 50 S. W. 388.

*Vermont.* — State v. Carr, 53 Vt. 37.

#### How Admissibility Determined.

In determining the question of the admissibility of a confession the court should take into account the inducement, if any, and all the surrounding circumstances tending to show whether the confession was voluntary or not. Thomas v. State, 35 Tex. Crim. App. 178, 32 S. W. 771.

#### Defendant Entitled to Make Proof.

The defendant is entitled to show, in support of his objection, that the confession was not voluntary. Rufer v. State, 25 Ohio St. 464; Maples v. State, 3 Heisk. (Tenn.) 408.

5. Barnes v. State, 36 Tex. 356; Peter v. State, 4 Smed & M. (Miss.) 31; Van Buren v. State, 24 Miss. 512; Thomas v. State, 35 Tex. Crim. App. 178, 32 S. W. 771; Gallaher v. State, 40 Tex. Crim. App. 296, 50 S. W. 388.

6. State v. Lamb, 28 Mo. 218.

7. Mose v. State, 36 Ala. 211; Wyatt v. State, 25 Ala. 9; Gallaher v. State, 40 Tex. Crim. App. 296, 50 N. W. 388.

8. People v. Smalling, 94 Cal. 111,

b. *Made With View to Compromise With Party Injured.* — But an exception is made in case of a confession made with a view to a compromise with the injured party, the rule excluding admissions for such purpose in civil cases being applied.<sup>9</sup>

c. *Made in Prayer.* — The fact that the declaration was made, not to any one, but while engaged in prayer, and overheard, does not render it incompetent.<sup>10</sup>

d. *Made While Asleep.* — But if the statements which would amount to a confession are made in sleep, they are not voluntary, and therefore not admissible.<sup>11</sup>

D. WHERE PRIOR CONFESSION HAS BEEN PROCURED BY IMPROPER MEANS. — a. *Generally.* — The fact that a prior confession has been procured by improper means does not of itself render a subsequent confession incompetent.<sup>12</sup> But the fact that such prior con-

29 Pac. 421; *Allen v. State*, 12 Tex. App. 190.

**Motive for Making Immaterial.** In *People v. Smalling*, 94 Cal. 111, 29 Pac. 421, it was held that a voluntary confession of murder was not inadmissible because it appeared to have been made to free the defendant's sister, then under arrest for the crime, from suspicion.

9. *Austine v. People*, 51 Ill. 236. See article "ADMISSIONS," Vol. I p. 596.

**Made With a View to Compromise.** In the case of *Austine v. People*, 51 Ill. 236, it is said:

"In civil cases, what is confessed by way of compromise or to buy peace is never allowed to be taken advantage of and made evidence, inasmuch as the admission may have been made not from a consciousness of the validity or justice of the claim set up, but from a desire to avoid litigation. The rule is not essentially different in criminal cases."

But see to the contrary *State v. Soper*, 16 Me. 293, 33 Am. Dec. 665; *State v. Bruce*, 33 La. Ann. 186.

**Made Without Hope Promised** that settlement would be made without prosecution will not exclude the confession, although the accused entertained the hope or belief that it would so result. *Hecox v. State*, 105 Ga. 625, 31 S. E. 592.

10. *Woodfolk v. State*, 85 Ga. 69, 11 S. E. 814.

11. *People v. Robinson*, 10 Cal. 41; *Daniels v. People*, 78 Ga. 98, 6 Am. St. Rep. 238.

12. *Alabama.* — *Levison v. State*,

54 Ala. 520; *Porter v. State*, 55 Ala. 95.

*Colorado.* — *Beery v. U. S.*, 2 Colo. 186.

*Kentucky.* — *Laughlin v. Com.*, 18 Ky. L. Rep. 640, 37 S. W. 590; *Mathis v. Com.*, 11 Ky. L. Rep. 882, 13 S. W. 360.

*Louisiana.* — *State v. Washington*, 40 La. Ann. 669, 4 So. 864.

*Massachusetts.* — *Com. v. Myers*, 160 Mass. 530, 36 N. E. 481; *Com. v. Howe*, 132 Mass. 250; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534.

*Missouri.* — *State v. Jones*, 54 Mo. 478.

*Mississippi.* — *Simmons v. State*, 61 Miss. 243; *Peter v. State*, 4 Smed. & M. (Miss.) 31.

*New Jersey.* — *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Bullock v. State*, 65 N. J. L. 557, 47 Atl. 62.

*North Carolina.* — *State v. Needham*, 78 N. C. 474.

*Pennsylvania.* — *Com. v. Sheets*, 197 Pa. St. 69, 46 Atl. 753.

*Tennessee.* — *State v. Henry*, 6 Baxt. 539; *Maples v. State*, 3 Heisk. 408.

*Texas.* — *Walker v. State*, 7 Tex. App. 245; *Reeves v. State*, (Tex. Crim. App.), 24 S. W. 518.

*Vermont.* — *State v. Carr*, 37 Vt. 191.

*Virginia.* — *Moore v. Com.*, 2 Leigh 701; *Thompson v. Com.*, 20 Gratt. 724.

**Rule as to Admissibility of Subsequent Confession.** — The rule is that it must appear that the impression produced by inducements offered, and resulting in the first confession, was

fession was so procured is important to be considered in determining whether the subsequent one was made freely and without influence.<sup>13</sup>

b. *Presumption That Second Was Not Voluntary.* — And as the influence to confess, once shown, is presumed to continue, it will be presumed that the second confession was not voluntary, where the prior one was not.<sup>14</sup>

c. *Burden of Proof.* — Therefore, the fact that the first confession was procured by improper means casts upon the prosecution the burden of showing that the second was free from its effects or influence.<sup>15</sup>

entirely removed and obliterated and did not contribute in any degree to the making of the second confession to render it competent. *Porter v. State*, 55 Ala. 95; *Walker v. State*, 7 Tex. App. 245.

13. *Walker v. State*, 7 Tex. App. 245; *Redd v. State*, 69 Ala. 255; *Ward v. State*, 50 Ala. 120; *Com. v. Harman*, 4 Pa. St. 269; *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40; *Com. v. Van Horn*, 188 Pa. St. 143, 41 Atl. 469; *Com. v. Sheets*, 197 Pa. St. 69, 46 Atl. 753.

14. *United States*. — *U. S. v. Chapman*, 4 Am. Law J. 440, 25 Fed. Cas. No. 14,783; *U. S. v. Charles*, 2 Cranch C. C. 76, 25 Fed. Cas. No. 14,786; *U. S. v. Cooper*, 3 Quart. Law J. 42, 25 Fed. Cas. No. 14,864.

*Alabama*. — *Levison v. State*, 54 Ala. 520; *Porter v. State*, 55 Ala. 95; *Banks v. State*, 84 Ala. 430, 4 So. 382; *Dinah v. State*, 39 Ala. 359; *Redd v. State*, 69 Ala. 255; *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40; *Joe v. State*, 38 Ala. 422.

*Arkansas*. — *Love v. State*, 22 Ark. 336; *Williams v. State*, 69 Ark. 599, 65 S. W. 103.

*California*. — *People v. Johnson*, 41 Cal. 452.

*Florida*. — *Murray v. State*, 25 Fla. 528, 6 So. 498.

*Georgia*. — *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

*Iowa*. — *State v. Chambers*, 39 Iowa 179.

*Massachusetts*. — *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534.

*Mississippi*. — *Simon v. State*, 37 Miss. 288; *Whitley v. State*, 78 Miss. 255, 28 So. 852; *Peter v. State*, 4 Smed. & M. 31.

*Missouri*. — *State v. Brown*, 73 Mo. 631; *State v. Jones*, 54 Mo. 478.

*New Jersey*. — *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404.

*North Carolina*. — *State v. Roberts*, 12 N. C. 259; *State v. Drake*, 82 N. C. 592; *State v. Fisher*, 51 N. C. 478.

*Ohio*. — *Jackson v. State*, 39 Ohio St. 37.

*Oregon*. — *State v. Wintzingerode*, 9 Or. 153.

*Pennsylvania*. — *Com. v. Harman*, 4 Pa. St. 269; *Com. v. Sheets*, 197 Pa. St. 69, 46 Atl. 753.

*Tennessee*. — *Wilson v. State*, 3 Heisk. 232; *Deathridge v. State*, 1 Sneed 75.

*Texas*. — *Barnes v. State*, 36 Tex. 356; *Walker v. State*, 7 Tex. App. 245; *Gallagher v. State*, (Tex. Crim. App.), 24 S. W. 288.

But if it appears that the influence that produced the first confession did not produce the second, the latter is admissible. *State v. Fisher*, 51 N. C. 478; *Sarah v. State*, 28 Ga. 576; *State v. Howard*, 17 N. H. 171.

*Statutory Provisions.* — In some cases the rule has been held differently under statutory provision. *Jackson v. State*, 39 Ohio St. 37.

*Made to a Different Person.* Where the second confession was made to a person different from the one who induced it by promises it was held admissible. *Simmons v. State*, 61 Miss. 243, *Mathis v. Com.*, 11 Ky. L. Rep. 882, 13 S. W. 360; *State v. Jones*, 54 Mo. 478.

But see *Com. v. Van Horn*, 188 Pa. St. 143, 41 Atl. 469.

15. *Murray v. State*, 25 Fla. 528, 6 So. 498; *Porter v. State*, 55 Ala. 95; *Com. v. Howe*, 132 Mass. 250; *Ward v. State*, 50 Ala. 120; *Com. v. Harman*, 4 Pa. St. 269; *Walker v. State*, 7 Tex. App. 245; *Daniels v. State*, 78

**E. SELF SERVING INADMISSIBLE.** — Declarations of the accused in his own favor are inadmissible.<sup>16</sup>

a. *Exception — When Part of Res Gestae.* — To this rule, however, there is the exception that declarations, when part of *res gestae*, are competent although favorable to the accused.<sup>17</sup>

**4. Judicial Confessions.** — **A. PLEA OF GUILTY.** — The plea of guilty made by the accused in another action is competent as a confession.<sup>18</sup>

**B. AT PRELIMINARY EXAMINATION.** — So a plea of guilty before an examining magistrate is competent to be proved on the final trial as a confession.<sup>19</sup>

**5. Made Under Oath.** — **A. GENERALLY.** — The fact that the confession was made under oath, as a witness or otherwise, does not of itself render it incompetent.<sup>20</sup> But a distinction is made in this respect between a statement made under oath, when charged with, or suspected of, the crime, and in other cases, it being held that in

Ga. 98, 6 Am. St. Rep. 238; U. S. v. Cooper, 3 Quart. Law J. 12, 25 Fed. Cas. No. 14,864; State v. Drake, 82 N. C. 592; Owen v. State, 78 Ala. 425, 56 Am. Rep. 40.

**Competent if Impressions Removed.** If it appears that the impressions caused by the inducements resulting in the first confession have ceased, or been removed when the second confession is made, the latter is competent. Com. v. Howe, 132 Mass. 250; Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238.

**Ten Months Intervening.** — In State v. Chambers, 39 Iowa 179, where the first confession was induced by threats and fear of mob violence, the second one, made ten months later, was held under the circumstances of that case to be inadmissible.

16. State v. Ware, 62 Mo. 597; State v. Carrington, 15 Utah 480, 50 Pac. 526; Crooms v. State, 40 Tex. Crim. App. 672, 51 S. W. 924; Douglass v. State, 18 Ind. App. 289, 48 N. E. 9; Eastland v. State, (Tex. Crim. App.), 59 S. W. 267; State v. Green, 61 S. C. 12, 39 S. W. 185; Harkness v. State, 129 Ala. 71, 30 So. 73; Colquit v. State, 107 Tenn. 381, 64 S. W. 713; Bennett v. State, 70 Ark. 43, 66 S. W. 198.

17. Ray v. State, 50 Ala. 104; State v. Ware, 62 Mo. 597; Sullivan v. State, 101 Ga. 800, 29 S. E. 16; State v. Gillespie, 62 Kan. 460, 63 Pac. 742, 84 Am. St. Rep. 411.

**Explanatory of Possession of Property** alleged to have been stolen when admissible. Eastland v. State, (Tex. Crim. App.), 59 S. W. 267.

18. Beason v. State, (Tex. Crim. App.), 67 S. W. 96; State v. LaRose, 71 N. H. 435, 52 Atl. 943.

19. Com. v. Brown, 150 Mass. 330, 23 N. E. 49; Rice v. State, 22 Tex. App. 654, 3 S. W. 791; Alston v. State, 41 Tex. 39; State v. Briggs, 68 Iowa 416, 27 N. W. 358; Rector v. Com., 80 Ky. 468; Green v. State, 40 Fla. 474, 24 So. 537.

**Although Plea is Not Required.** In State v. Briggs, 68 Iowa 416, 27 N. W. 358, it was held that although no plea of guilty or not guilty was required, or contemplated, in a preliminary examination, such a plea was competent to be proved, if made voluntarily, as a confession.

**Plea of Not Guilty** in higher court does not render plea of guilty at the preliminary hearing incompetent. Green v. State, 40 Fla. 474, 24 So. 537.

20. *England.* — Rex v. Tubby, 5 Car. & P. 530, 24 Eng. C. L. 441.

*United States.* — U. S. v. Charles, 2 Cranch C. C. 76, 25 Fed. Cas. No. 14,786; U. S. v. Graff, 14 Blatchf. 381, 26 Fed. Cas. No. 15,244; U. S. v. Brown, 40 Fed. 457.

*California.* — People v. Mitchell, 94 Cal. 550, 29 Pac. 1,106.

*Florida.* — Newton v. State, 21 Fla. 53; Jenkins v. State, 35 Fla. 737, 18 So. 182.

the former case his statement is incompetent, but not in the latter.<sup>21</sup> And in either case the statement must have been voluntary, as in other cases.<sup>22</sup> But some cases hold, generally, that statements made

*Georgia*.—*Dumas v. State*, 63 Ga. 600; *Burnett v. State*, 87 Ga. 622, 13 S. E. 552.

*Massachusetts*.—*Com. v. Wesley*, 166 Mass. 248, 44 N. E. 228; *Com. v. Bradford*, 126 Mass. 42; *Com. v. King*, 8 Gray 501.

*Michigan*.—*People v. Butler*, 111 Mich. 483, 69 N. W. 734.

*New York*.—*People v. Hendrickson*, 8 How. Pr. 404; *People v. McMahon*, 15 N. Y. 384; *People v. Wentz*, 37 N. Y. 303; *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721; *Teachout v. People*, 41 N. Y. 7; *People v. McGloin*, 91 N. Y. 241; *People v. Burt*, 51 App. Div. 106, 64 N. Y. Supp. 417; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

*Pennsylvania*.—*Com. v. Clark*, 131 Pa. St. 641, 18 Atl. 988.

*Texas*.—*Kirby v. State*, 23 Tex. App. 13, 5 S. W. 165; *Bailey v. State*, (Tex. Crim. App.), 59 S. W. 900; *Greer v. State*, (Tex. Crim. App.), 45 S. W. 12.

*Wisconsin*.—*Dickerson v. State*, 48 Wis. 288, 4 N. W. 321; *Schoeffler v. State*, 3 Wis. 823.

21. *England*.—*Rex v. Tubby*, 5 Car. & P. 530, 24 Eng. C. L. 441; *Rex v. Haworth*, 4 Car. & P. 254, 19 Eng. C. L. 370; *Reg. v. Owen*, 9 Car. & P. 238, 38 Eng. C. L. 99; *Reg. v. Wheeley*, 8 Car. & P. 250, 34 Eng. C. L. 375.

*Georgia*.—*Dumas v. State*, 63 Ga. 600.

*Florida*.—*Newton v. State*, 21 Fla. 53.

*Louisiana*.—*State v. Garvey*, 25 La. Ann. 191.

*Massachusetts*.—*Com. v. Bradford*, 126 Mass. 42.

*Nebraska*.—*Clough v. State*, 7 Neb. 320.

*New York*.—*People v. Hendrickson*, 8 How. Pr. 404; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557; *People v. Burt*, 51 App. Div. 106, 64 N. Y. Supp. 417; *Hendrickson v. People*, 10 N. Y. 13; *People v. McGloin*, 28 Hun 150.

*North Carolina*.—*State v. Young*, 60 N. C. 126.

*South Carolina*.—*State v. Vaignur*, 5 Rich. L. 391.

*Texas*.—*Gilder v. State*, 35 Tex. Crim. App. 360, 33 S. W. 867; *Bailly v. State*, (Tex. Crim. App.), 59 S. W. 900.

*Wisconsin*.—*Schoeffler v. State*, 3 Wis. 823.

**On Oath, Charged With the Crime.** This distinction turning upon the question as to whether the oath was taken in the case where the party was charged with the crime or not, is thus made in *Schoeffler v. State*, 3 Wis. 823:

"The objection to it, that it was on oath, does not apply, unless the defendant at the time was charged with crime. The general rule is, that what a party says in relation to the offense is admissible in evidence against him, whether on oath or not. To this general rule there are some exceptions. One exception, and the only one with which we now have to do, is that the declarations, or admissions, or statements of the defendant shall not have been made when he is on oath, and charged with the offense; or, in other words, if his statements be made on oath, while he is charged with the crime, they cannot be used in evidence against him."

**Suspected of the Crime.**—Again a distinction is made between being merely suspected of the crime and being charged with its commission, as affecting the admissibility of the sworn statement. *Teachout v. People*, 41 N. Y. 7.

22. *Schoeffler v. State*, 3 Wis. 823; *People v. Butler*, 111 Mich. 483, 69 N. W. 734.

**Confession Competent Although Accused Under Suspicion.**—In *U. S. v. Graff*, 14 Blatchf. 381, 26 Fed. Cas. No. 15,244, it is said:

"To the admission of this statement, as evidence against Owen, objection was made upon the ground that, having been sworn to, it must be deemed involuntary; and the case of *People v. McMahon*, 15 N. Y. 384, is referred to as authority for the proposition of law that any declara-

under oath are inadmissible.<sup>23</sup>

B. AT CORONER'S INQUEST. — A confession or statement as a witness made at a coroner's inquest, if made voluntarily, is admissible.<sup>24</sup> So if made on oath at a time when he was not charged with

tion made by an accused party, when under oath, and conscious of being charged with crime, is to be deemed involuntary and therefore inadmissible. The case cited must be considered as modified by the subsequent decision of the same court, in the case of *Teachout v. People*, 41 N. Y. 7, where the reasoning of *McMahon's Case* is criticised, and so far overthrown as to forbid its being relied upon to furnish the rule applicable here. I am aware of no authority binding on this court that forbids the admission of a statement like the one under consideration, nor does reason forbid. Certainly, the fact that a confession is made when under suspicion does not render it involuntary. The contrary has been often decided. Nor can a confession be excluded by reason of the fact that the party making it was, at the time, under arrest upon a charge of having committed the offense. So it has often been ruled. It seems equally clear that the fact of a statement being made under oath does not prevent its being taken to be true. The reason why a sworn witness is permitted to decline answering is because his answers under oath can be used as evidence against him; and to say that the administering of an oath to one under suspicion of crime will, of necessity, cause a mental disturbance that must render unreliable the sworn admission of the crime, and raise the legal presumption that the statement is untrue, is going further than I can go, unless compelled by authority. I know of no authority binding upon the courts of the United States which compels the holding that an arrest, or a charge of crime, or being sworn, or all three combined, are sufficient to exclude a confession that otherwise appears to have been freely made, without the influence of threat or promise."

23. *People v. McMahon*, 15 N. Y. 384; *Reg. v. Wheeley*, 8 Car. & P. 250, 34 Eng. C. L. 375; *Rex v. Lewis*,

6 Car. & P. 161, 25 Eng. C. L. 333; *Rex v. Davis*, 6 Car. & P. 177, 25 Eng. C. L. 341; *U. S. v. Bascadore*, 2 Cranch C. C. 30, 24 Fed. Cas. No. 14,536.

**Under Oath Inadmissible.** — In *Reg. v. Wheeley*, 8 Car. & P. 250, 34 Eng. C. L. 375, it is held that a statement under oath before the coroner's jury was inadmissible, and that as it purported on its face to be under oath, it was held that parol evidence could not be heard to show that it was not.

24. *England.* — *Rex v. Clewes*, 4 Car. & P. 221, 19 Eng. C. L. 354; *Reg. v. Owen*, 9 Car. & P. 82, 38 Eng. C. L. 44.

*California.* — *People v. Taylor*, 59 Cal. 640.

*Florida.* — *Newton v. State*, 21 Fla. 53.

*Iowa.* — *State v. Van Tassel*, 103 Iowa 6, 72 N. W. 497.

*Mississippi.* — *Steeley v. State*, 76 Miss. 387, 24 So. 910.

*Nebraska.* — *Clough v. State*, 7 Neb. 320.

*New York.* — *People v. Hendrickson*, 8 How. Pr. 404; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

*North Carolina.* — *State v. Vaigneur*, 5 Rich. L. 391.

*Texas.* — *Kirby v. State*, 23 Tex. App. 13, 5 S. W. 165; *State v. David*, (Tex. Crim. App.), 33 S. W. 28.

*Wisconsin.* — *Dickerson v. State*, 48 Wis. 288, 4 N. W. 321; *Emery v. State*, 92 Wis. 146, 65 N. W. 848.

But see as to the necessity of cautioning the witness and advising him of his rights, *State v. Young*, 119 Mo. 495, 24 S. W. 1,038.

**Presumed to Be Voluntary.** — In *State v. David*, 131 Mo. 380, 33 S. W. 28, it is held that testimony of the defendant at a coroner's inquest will be presumed to have been voluntary.

**When Not Judicial.** — Statement made at coroner's inquest held not to be a judicial confession. *State v. Coffee*, 56 Conn. 390, 16 Atl. 151.



the crime under investigation.<sup>25</sup> But in some instances the cases turn upon the form of the confession, whether under oath or not, some holding to the rule, without limitation, that a statement made under oath before the coroner's jury, by one charged or suspected of being the perpetrator of the crime, is incompetent as a confession.<sup>26</sup>

25. *Schoeffler v. State*, 3 Wis. 823; *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721; *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; *Teachout v. People*, 41 N. Y. 7; *People v. Kief*, 58 Hun 337, 11 N. Y. Supp. 926; *State v. Coffee*, 56 Conn. 399, 16 Atl. 151; *State v. Taylor*, 36 Kan. 329, 13 Pac. 550; *State v. Senn*, 32 S. C. 392, 11 S. E. 292; *Clough v. State*, 7 Neb. 320; *People v. Hendrickson*, 8 How. Pr. 404; *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

**Admissible Whether Charged With the Crime or Not.**—Under the statute of New York, the confession of the accused is held to be admissible, if voluntary, whether he was accused or suspected of the crime or not. *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469; *Dickerson v. State*, 48 Wis. 288, 4 N. W. 321.

So also in Texas, if taken in the manner provided by the code. *Kirby v. State*, 23 Tex. App. 13, 5 S. W. 165.

See also for an interesting review of the cases on the subject, *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

26. *People v. McMahon*, 15 N. Y. 384; *Reg. v. Wheeley*, 8 Car. & P. 250, 34 Eng. C. L. 375; *Reg. v. Owen*, 9 Car. & P. 238, 38 Eng. C. L. 99; *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; *State v. Coffee*, 56 Conn. 399, 16 Atl. 151; *Farkas v. State*, 60 Miss. 847; *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1,091.

**When Statement Before Coroner's Inquest Admissible.**—In *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709, the rule is thus stated:

"The three cases which have been cited, the *Hendrickson Case*, the *McMahon Case*, and the *Teachout Case*, draw the line sharply, and define clearly in what cases the testimony of a witness examined before a coroner's inquest can be used on his subse-

quent trial, and in what cases it cannot. When a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is called and sworn before the coroner's jury, the testimony of that witness, should he afterwards be charged with the crime, may be used against him on his trial: and the mere fact that, at the time of his examination, he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness whose testimony may be afterwards given in evidence against himself. If he desires to protect himself, he must claim his privilege. But if, at the time of his examination, it appears that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded merely as a witness, but as a party accused, called before a tribunal vested with power to investigate preliminarily the question of his guilt, and he is to be treated in the same manner as if brought before a committing magistrate, and an examination not taken in conformity with the statute cannot be used against him on his trial for the offense."

See also *People v. Kennedy*, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557.

**Under Oath Inadmissible.**—In *Farkas v. State*, 60 Miss. 847, it is said:

"It was erroneous to admit in evidence the testimony given by the appellant as a witness before the coroner's inquest. He was then a prisoner charged, not formally, but in fact, with the crime of the murder of his wife, whose death was the subject of inquisition, and it is deducible from all the authorities that it was not admissible, afterwards, to give in evidence against him, on his trial for the crime, the evidence given by him

**C. PRELIMINARY EXAMINATION.**—And so if he becomes a witness, or makes a statement at a preliminary examination,<sup>27</sup> if not then charged with the crime.<sup>28</sup> But the magistrate holding the examination is one in authority, and any threats made or inducements held out by him will vitiate the confession.<sup>29</sup> In some States, in order to render a confession admissible, if made before the examining magistrate, it must be in writing.<sup>30</sup> But if not in writing, it is held to be admissible as an extra judicial confession, if voluntarily made.<sup>31</sup> But it is held in some cases, and under some statutes, that testimony before the examining magistrate, under oath, cannot be given in evidence against the accused as a confession.<sup>32</sup> And that

as a witness sworn before the inquest engaged in the investigation of that very crime."

**27.** *Alabama.*—*Ann v. State*, 134 Ala. 1, 32 So. 704; *Hall v. State*, 134 Ala. 90, 32 So. 750.

*California.*—*People v. Chrisman*, 135 Cal. 282, 67 Pac. 136; *People v. Kelley*, 47 Cal. 125.

*Kansas.*—*State v. Sorter*, 52 Kan. 531, 34 Pac. 1,036.

*Louisiana.*—*State v. Havelin*, 6 La. Ann. 167.

*Michigan.*—*People v. Butler*, 111 Mich. 483, 69 N. W. 734.

*Mississippi.*—*Steele v. State*, 76 Miss. 387, 24 So. 910.

*North Carolina.*—*State v. Howard*, 92 N. C. 772; *State v. Patterson*, 68 N. C. 292.

*Ohio.*—*Jackson v. State*, 30 Ohio St. 37.

*Texas.*—*Dill v. State*, 35 Tex. Crim. App. 240, 33 S. W. 126, 60 Am. St. Rep. 37; *Shaw v. State*, 32 Tex. Crim. App. 155, 22 S. W. 588; *Bailey v. State*, 26 Tex. App. 706, 9 S. W. 270; *Salas v. State*, 31 Tex. Crim. App. 485, 21 S. W. 44; *Grammer v. State*, (Tex. Crim. App.), 61 S. W. 402; *Aiken v. State*, (Tex. Crim. App.), 64 S. W. 57.

*Washington.*—*State v. Lyts*, 25 Wash. 347, 65 Pac. 530.

*Wisconsin.*—*Rounds v. State*, 57 Wis. 45, 14 N. W. 865; *State v. Glass*, 50 Wis. 218, 6 N. W. 500, 36 Am. Rep. 845.

**28.** *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721; *People v. Burt*, 51 App. Div. 106, 64 N. Y. Supp. 417.

**As Witness in Preliminary Examination of Another.**—So if the accused is called as a witness at the preliminary examination of another,

charged with the same crime, his statement, if voluntarily made, is admissible against him. *State v. Lewis*, 39 La. Ann. 1,110, 3 So. 343; *State v. Garvey*, 25 La. Ann. 191.

**29.** *U. S. v. Cooper*, 3 Quart. Law J. 42, 25 Fed. Cas. No. 14,864; *U. S. v. Pocklington*, 2 Cranch C. C. 293, 27 Fed. Cas. No. 16,060.

**30.** *Rice v. State*, 22 Tex. App. 654, 3 S. W. 791.

**To Be Competent Must Be Taken as Required by Statute.**—And it is held that the statement made is not competent as evidence unless taken in the manner and under the restrictions provided by the statute. *State v. Hatcher*, 29 Or. 309, 44 Pac. 584; *People v. Gibbons*, 45 Cal. 557.

**Must Be Cautioned as to His Rights.**—*State v. Andrews*, 35 Or. 388, 58 Pac. 765.

**31.** *Rice v. State*, 22 Tex. App. 654, 3 S. W. 791; *Alfred v. State*, 2 Swan (Tenn.) 581; *Alston v. State*, 41 Tex. 39; *Rector v. Com.*, 80 Ky. 468.

**32.** *Rex v. Davis*, 6 Car. & P. 177, 25 Eng. C. L. 341; *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; *People v. Gibbons*, 43 Cal. 557; *State v. Clifford*, 86 Iowa 550, 53 N. W. 299, 41 Am. St. Rep. 518; *U. S. v. Brown*, 40 Fed. 457.

**Statutory Requirements.**—If the statute provides how the statement must be made, the requirements must be complied with to render the same competent as evidence. *People v. McGloin*, 91 N. Y. 241.

**Where the Accused is Properly Cautioned.**—It is held that where the accused is properly cautioned as to the use that may be made of his statements, and informed of his rights, his statement made volun-

the practice of examining the accused by the magistrate is unwarranted, and the statements made in response thereto inadmissible.<sup>33</sup>

D. ON ARRAIGNMENT FOR FINAL TRIAL. — If the accused has become a witness in his own behalf, or voluntarily becomes a witness and gives testimony in his final trial, his statements are competent to be proved against him as a confession.<sup>34</sup>

E. AS A WITNESS. — a. *Generally.* — The competency of statements of the accused, when testifying as a witness, depends in some of the states upon the question whether he was then accused of the crime confessed.<sup>35</sup>

tarily thereafter is competent. *Alfred v. State*, 2 Swan (Tenn.) 581.

Where no One Is Charged With the Crime. — In *Rex v. Lewis*, 6 Car. & P. 161, 25 Eng. C. L. 333, there was no specific charge made against any one at the time the examination was had, but the testimony was excluded.

Requiring Accused to Take Oath Condemned. — In *Com. v. Harman*, 4 Pa. St. 269, the administering of an oath by the magistrate to the accused, when he had previously said, "If you do not tell the truth, I will commit you," was denounced as an outrage.

33. The Rule Stated. — In *Kelly v. State*, 72 Ala. 244, after a somewhat extended discussion of the subject, the court says:

"This subject is discussed at some length in the learned work of Mr. Best on Evidence, and he severely condemns the practice of judicial interrogation, prevailing under the continental systems of jurisprudence, as being entirely unauthorized by the common law, and contrary to the maxim that no person is bound to criminate himself, now imbedded, perhaps, in the Bill of Rights of every American Constitution. 'What our law prohibits,' says Mr. Best, 'is the special interrogation of the accused — the converting him, whether willing or not, into a witness against himself; assuming his guilt before proof, and subjecting him to an interrogation on that hypothesis.'—2 Best Ev. § 557. It is manifest to our view, that such a power, once admitted, is liable to unlimited abuse. Though it might serve, in some cases, to extract the truth, it might be exercised with great harshness, so as to wring out of a prisoner evidence of his own accusation, of the truth

of which, to say the least, there would exist a serious doubt. It is a power not judicial, but essentially inquisitorial, and, on the whole, prejudicial to the administration of justice. It is justly observed by the same author from whom we have quoted, that, 'in short, *judicial interrogation*, however plausible in theory, would be found in practice a moral torture; scarcely less dangerous than physical torture of former times, and, like it, unworthy of a place in the jurisprudence of an enlightened country.—2 Best Ev. § 558. It is enough to say that the practice is unwarranted, in our opinion, by the principles of the common law, and unauthorized by any existing statute in this state. It is, furthermore, contrary to the spirit of our Declaration of Rights, providing that the accused shall not be 'compelled to give evidence against himself'—itself a mere embodiment of a principle of the common law.—Const. 1875, Art. 1, § 7. 'Confessions' elicited by such a censurable practice are to be taken as involuntary, and should be excluded as criminative evidence against the person making them."

34. *Dickerson v. State*, 48 Wis. 288, 4 N. W. 321; *Wooley v. State*, (Tex. Crim. App.), 64 S. W. 1,054; *Hall v. State*, 134 Ala. 90, 32 So. 750.

35. *People v. McMahon*, 15 N. Y. 384; *People v. Hendrickson*, 8 How. Pr. 404; *State v. Garvey*, 25 La. Ann. 191.

Under Oath Competent. — In *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721, it is said:

"Independent of any supposed authority, I do not see how, upon principle, the evidence of a witness, not in custody and not charged with crime, taken either on a coroner's in-

b. *In His Trial for the Crime Confessed.*—If made when on oath, charged with the crime, they are held to be inadmissible.<sup>36</sup>

c. *In the Trial of Another Action.*—But if made as a witness when not under the charge, and voluntarily made, they may be proved against him.<sup>37</sup>

quest or before a committing magistrate or a grand jury, could be rejected. It ought not to be excluded on the ground that it was taken on oath. That reason would exclude also the statements of witnesses on the trials of issues. The evidence is certainly none the less reliable because taken under the solemnity of an oath. No injustice is done to the witness, for he was not bound to criminate himself, nor to answer in regard to any circumstance tending to do so. If it is a good ground of exclusion that the statement was made as a witness on oath, then the rule of law that protects a witness from criminating himself is of no value, and may at once be abrogated. The rule was adopted upon the supposition that the answer might be introduced in evidence against the witness. If it cannot be, the witness has no longer any reason for claiming his privilege. Nor can the exclusion of the evidence depend on the question whether there was any suspicion of the guilt of the witness lurking in the heart of any person at the time the testimony was taken. That would be the most dangerous of all tests, as well because of the readiness with which proof of such suspicion might be procured, as of the impossibility of refuting it."

36. *Schoeffler v. State*, 3 Wis. 823; *Rex v. Tubby*, 5 Car. & P. 530, 24 Eng. C. L. 441.

*In Affidavit for Continuance.*—And the rule has been extended to matters contained in an affidavit of the accused for a continuance. *Wimberly v. State*, 22 Tex. App. 506, 3 S. W. 717.

*Admission by His Attorneys* to avoid the necessity of making proof of a material fact is incompetent. *Murmurt v. State*, (Tex. Crim. App.), 63 S. W. 634.

37. *England.*—*Rex v. Haworth*, 4 Car. & P. 254, 19 Eng. C. L. 370; *Rex v. Mercer*, 2 Stark. 366, 3 Eng. C. L. 385.

*United States.*—*U. S. v. Charles*, 2 Cranch C. C. 76, 25 Fed. Cas. No. 14,786.

*California.*—*People v. Mitchell*, 94 Cal. 550, 29 Pac. 1,106.

*Georgia.*—*Burnett v. State*, 87 Ga. 622, 13 S. E. 552.

*Louisiana.*—*State v. Lewis*, 39 La. Ann. 1,110, 3 So. 343; *State v. Garvey*, 25 La. Ann. 191.

*Massachusetts.*—*Com. v. Bradford*, 126 Mass. 42.

*New York.*—*Hendrickson v. People*, 10 N. Y. 13; *People v. Hendrickson*, 8 How. Pr. 404.

*South Carolina.*—*State v. Vaigneur*, 5 Rich. L. 391; *State v. Senn*, 32 S. C. 392, 11 S. E. 292.

*Texas.*—*Alston v. State*, 41 Tex. 39; *Harris v. State*, (Tex. Crim. App.), 36 S. W. 88; *Robinson v. State*, (Tex. Crim. App.), 63 S. W. 869; *Bailey v. State*, (Tex. Crim. App.), 59 S. W. 900.

*Washington.*—*State v. Hopkins*, 13 Wash. 5, 42 Pac. 627.

*Wisconsin.*—*Schoeffler v. State*, 3 Wis. 823.

**Testimony Before Grand Jury.**  
In *U. S. v. Charles*, 2 Cranch C. C. 76, 25 Fed. Cas. No. 14,786, it is held that grand jurors may testify to confessions made by the prisoner before them, upon oath, when under examination as a witness against another person.

See on this subject *State v. Coffee*, 56 Conn. 399, 16 Atl. 151; *State v. Carroll*, 85 Iowa 1, 51 N. W. 1,159; *State v. Clifford*, 86 Iowa 550, 53 N. W. 299, 41 Am. St. Rep. 518; *Jenkins v. State*, 35 Fla. 737, 18 So. 182; *Greer v. State*, (Tex. Crim. App.), 45 S. W. 12.

**To Grand Jury Not Privileged.**  
Confession before grand jury under oath may be proved by the jurors. *U. S. v. Kirkwood*, 5 Utah 123, 13 Pac. 234.

**Caution Required by Statute.**  
But in some of the states, the witness must have been cautioned as to the use that might be made of his

**F. CAUTION WHEN NECESSARY.** — If the fact appears, or is known, that either the influence of hope or fear existed, superinducing the confession, explicit warning must be given to the prisoner of the consequences of a confession.<sup>38</sup> But there are cases holding that no caution is necessary where the accused voluntarily becomes a witness.<sup>39</sup>

**6. Facts Disclosed by Incompetent Confession When Admissible.**  
**A. GENERALLY.** — If the confession, being inadmissible because improperly procured, brings to light facts or circumstances tending to show guilt, the prosecution is not precluded from proving the facts thus disclosed by other evidence, because they were brought to light by a confession which is itself incompetent.<sup>40</sup> Some cases have

statement, and informed of his rights to render the testimony competent as an admission. *Gilder v. State*, 39 Tex. Crim. App. 381, 33 S. W. 867.

Testimony of Defendant given on the trial of a co-defendant as a witness for the state inadmissible against him on his trial. *Powell v. State*, (Miss.), 23 So. 266.

38. *Van Buren v. State*, 24 Miss. 512; *Peter v. State*, 4 Smed. & M. (Miss.) 31; *Wimberly v. State*, 22 Tex. App. 506, 3 S. W. 717; *Maddox v. State*, 41 Tex. 205; *U. S. v. Charles*, 2 Cranch C. C. 76, 25 Fed. Cas. No. 14,786; *U. S. v. Cooper*, 3 Quart. Law J. 42, 25 Fed. Cas. No. 14,864; *Gilder v. State*, 35 Tex. Crim. App. 360, 33 S. W. 867.

39. *Texas*. — *Dill v. State*, 35 Tex. Crim. App. 240, 33 S. W. 126, 60 Am. St. Rep. 37.

40. *United States*. — *U. S. v. Hunter*, 1 Cranch C. C. 317, 26 Fed. Cas. No. 15,424.

*Alabama*. — *Spicer v. State*, 69 Ala. 159; *Brister v. State*, 26 Ala. 107; *Banks v. State*, 84 Ala. 430, 4 So. 382; *Anderson v. State*, 104 Ala. 83, 16 So. 108.

*Arkansas*. — *Yates v. State*, 47 Ark. 172, 1 S. W. 65.

*Colorado*. — *Beery v. U. S.*, 2 Colo. 186.

*Georgia*. — *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

*Kentucky*. — *Taylor v. Com.*, 19 Ky. L. Rep. 836, 42 S. W. 1,125; *Rector v. Com.*, 80 Ky. 468.

*Louisiana*. — *State v. Jones*, 46 La. Ann. 1,395, 16 So. 369.

*Mississippi*. — *Garrard v. State*, 50 Miss. 147.

*Nebraska*. — *Walrath v. State*, 8

Neb. 80; *Taylor v. State*, 37 Neb. 788, 56 N. W. 623.

*New Jersey*. — *State v. Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592.

*New York*. — *Duffy v. People*, 26 N. Y. 588.

*North Carolina*. — *State v. Drake*, 82 N. C. 592.

*Texas*. — *Scott v. State*, (Tex. Crim. App.), 43 S. W. 336; *Fielder v. State*, 40 Tex. Crim. App. 184, 49 S. W. 376; *Elizabeth v. State*, 27 Tex. 329; *Davis v. State*, (Tex. Crim. App.), 23 S. W. 687; *Selvidge v. State*, 30 Tex. 60.

*West Virginia*. — *Fredrick v. State*, 3 W. Va. 695.

But See on This Subject *Whitley v. State*, 78 Miss. 255, 28 So. 852.

**Facts Disclosed by Confession.**  
 "In such cases it is not the confession of the party that is received in evidence against him, but the facts which are brought to light by his acts, and in consequence of his confessions. It will not do to say that the acts having been brought about by improper means, are of the same character as confessions produced by the same means; that the influence which produced groundless confessions might also produce groundless conduct; for when the acts of the accused point out and produce the stolen property in its place of concealment, that fact speaks for itself, and is inconsistent alike with the idea of falsehood and of innocence." *Belote v. State*, 36 Miss. 96, 72 Am. Dec. 163.

**Extraneous Facts Disclosed.**  
 "And, though a confession may be obtained by the influence of threats

gone further and held that not only may the fact disclosed be proved, but that portion of the confession disclosing it.<sup>41</sup> But other cases

or promises, if they disclose extraneous facts, which show their truth and tend to prove the commission of the crime, so much of the confession as relates strictly to the facts discovered, and such facts, are admissible in evidence, but not the entire confession." *Banks v. State*, 84 Ala. 430, 4 So. 382.

**Defendant May Require Proof of What He Said** in connection with proof by the state of facts ascertained. *Duffy v. People*, 26 N. Y. 588.

**Facts or Property Must Be Discovered by Confession.** — But it is held that "To render the confession admissible under this exception, the facts or circumstances must be discovered by means of the statements made. If they have already been discovered when the accused made his statement, or were not discovered by means of the statement of the accused, they are not admissible." *Raines v. State*, 33 Tex. Crim. App. 294, 26 S. W. 398; *Neeley v. State*, 27 Tex. App. 315, 324, 11 S. W. 376; *Allison v. State*, 14 Tex. App. 122; *Kennon v. State*, 11 Tex. App. 356; *Crowder v. State*, 28 Tex. App. 51, 11 S. W. 835, 19 Am. St. Rep. 811; *State v. Due*, 27 N. H. 256; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238; *Williams v. Com.*, 27 Gratt. (Va.) 997.

41. *Alabama*. — *Brister v. State*, 26 Ala. 107; *Gregg v. State*, 106 Ala. 44, 17 So. 321; *Lowe v. State*, 88 Ala. 8, 7 So. 97; *Banks v. State*, 84 Ala. 430, 4 So. 382; *Sampson v. State*, 54 Ala. 241; *Murphy v. State*, 63 Ala. 1.

*California*. — *People v. Hoy Yen*, 34 Cal. 176; *People v. Ah Ki*, 20 Cal. 178.

*Connecticut*. — *State v. Willis*, 71 Conn. 293, 41 Atl. 820.

*Illinois*. — *Gates v. People*, 14 Ill. 433.

*Kansas*. — *State v. Mortimer*, 20 Kan. 93.

*Kentucky*. — *Rector v. Com.*, 80 Ky. 468.

*Mississippi*. — *Garrard v. State*, 50 Miss. 147.

*North Carolina*. — *State v. Win-*

*ston*, 116 N. C. 990, 21 S. E. 37.

*Pennsylvania*. — *Laros v. Com.*, 84 Pa. St. 200.

*South Carolina*. — *State v. Motley*, 7 Rich. L. 327; *State v. Crank*, 2 Bailey 66, 23 Am. Dec. 117.

*Tennessee*. — *McGlothlin v. State*, 2 Cold. 223; *White v. State*, 3 Heisk. 338; *Clemons v. State*, 4 Lea 23.

*Texas*. — *Smith v. State*, 34 Tex. Crim. App. 124, 29 S. W. 775; *Spearman v. State*, 34 Tex. Crim. App. 279, 30 S. W. 229; *Parker v. State*, 40 Tex. Crim. App. 119, 49 S. W. 80; *Binyon v. State*, (Tex. Crim. App.), 56 S. W. 339; *Campbell v. State*, (Tex. Crim. App.), 57 S. W. 288; *Bargna v. State*, (Tex. Crim. App.), 68 S. W. 997; *Allison v. State*, 14 Tex. App. 122; *Collins v. State*, 20 Tex. App. 399; *Prince v. State*, (Tex. Crim. App.), 20 S. W. 582; *Sands v. State*, 30 Tex. App. 578, 18 S. W. 86; *Strait v. State*, 43 Tex. 486; *Weller v. State*, 16 Tex. App. 200; *Brown v. State*, 26 Tex. App. 308, 9 S. W. 613.

*West Virginia*. — *Fredrick v. State*, 3 W. Va. 695.

**Rule Founded on Statutes.** — It should be noted that some of the cases cited to this point are founded on express statutory provisions — notably the Texas cases.

**That Part Relating to Facts Disclosed Competent.** — In holding that the portion of the confession relating to the facts disclosed thereby is competent, it is said by the supreme court of Mississippi, in *Garrard v. State*, 50 Miss. 147:

"And although the entire confession cannot be received in evidence, the weight of modern authority is that so much of the confession as relates strictly to the fact discovered by it may be given in evidence; for the reason, as before stated, of rejecting such confessions is the apprehension that the accused may have been induced to say what is false, but the fact discovered shows that so much of the confession as immediately relates to it is true. It is, therefore, well settled upon reason, principle and authority, that it is competent to show that the witness was directed by the accused where to

hold that while the fact may be proved, the declaration accompanying it must be excluded.<sup>42</sup>

**7. Admissibility, How and by Whom Determined.** — A. QUESTION FOR THE COURT. — The question whether the alleged confession is admissible or not must be determined by the court as a question of law.<sup>43</sup>

find the goods, and that they were found there accordingly."

See also *Jones v. State*, 75 Ga. 825.

**42.** *Beery v. U. S.*, 2 Colo. 186; *State v. Jones*, 46 La. Ann. 1,395, 16 So. 369; *State v. Garvey*, 28 La. Ann. 925, 26 Am. Rep. 123; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

**43.** *Alabama*. — *Young v. State*, 68 Ala. 569; *Redd v. State*, 69 Ala. 255; *Johnson v. State*, 59 Ala. 37; *Goodwin v. State*, 102 Ala. 87, 15 So. 571; *Jackson v. State*, 83 Ala. 76, 3 So. 847; *Brown v. State*, 124 Ala. 76, 27 So. 250; *McKinney v. State*, 134 Ala. 134, 32 So. 726.

*Arkansas*. — *Corley v. State*, 50 Ark. 305, 7 S. W. 255.

*California*. — *People v. Kamaunu*, 110 Cal. 609, 42 Pac. 1,090; *People v. Ah How*, 34 Cal. 218; *People v. Jim Ti*, 32 Cal. 60.

*Connecticut*. — *State v. Willis*, 71 Conn. 293, 41 Atl. 820.

*District of Columbia*. — *Hardy v. U. S.*, 3 D. C. 35; *U. S. v. Nardello*, 4 Mac. (D. C.) 503.

*Florida*. — *Murray v. State*, 25 Fla. 528, 6 So. 498; *Holland v. State*, 39 Fla. 178, 22 So. 298; *Gantling v. State*, 41 Fla. 587, 26 So. 737; *Simon v. State*, 5 Fla. 285; *Metzger v. State*, 18 Fla. 481.

*Georgia*. — *Boston v. State*, 94 Ga. 590, 20 S. E. 98; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

*Indiana*. — *Brown v. State*, 71 Ind. 470; *Hauk v. State*, 148 Ind. 238, 47 N. E. 465.

*Iowa*. — *State v. Fidment*, 35 Iowa 541; *State v. Storms*, 113 Iowa 385, 85 N. W. 610, 86 Am. St. Rep. 380.

*Kentucky*. — *Dugan v. Com.*, 19 Ky. L. Rep. 1,273, 43 S. W. 418; *Hudson v. Com.*, 2 Duv. 531.

*Maine*. — *State v. Grover*, 91 Me. 363, 52 Atl. 757.

*Maryland*. — *Biscoe v. State*, 67 Md. 6, 8 Atl. 571.

*Massachusetts*. — *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494; *Com. v.*

*Bond*, 170 Mass. 41, 48 N. E. 756; *Com. v. Culver*, 126 Mass. 464.

*Michigan*. — *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

*Minnesota*. — *State v. Staley*, 14 Minn. 105; *State v. Holden*, 42 Minn. 350, 44 N. W. 123.

*Mississippi*. — *Simmons v. State*, 61 Miss. 243; *Williams v. State*, 72 Miss. 117, 16 So. 296.

*Missouri*. — *Hawkins v. State*, 7 Mo. 190; *Hector v. State*, 2 Mo. 166, 22 Am. Dec. 454; *State v. Rush*, 95 Mo. 199, 8 S. W. 221; *Couley v. State*, 12 Mo. 462; *State v. Patterson*, 73 Mo. 695; *State v. Hopkirk*, 84 Mo. 278.

*New Hampshire*. — *State v. Squires*, 48 N. H. 364.

*New York*. — *People v. Mackinder*, 61 N. Y. St. 523, 29 N. Y. Supp. 842; *People v. Meyer*, 162 N. Y. 357, 56 N. E. 758; *People v. Fox*, 50 Hun 604, 3 N. Y. Supp. 359.

*New Jersey*. — *State v. Young*, 67 N. J. L. 223, 51 Atl. 939; *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Roesel v. State*, 62 N. J. L. 216, 41 Atl. 408.

*North Carolina*. — *State v. Crowson*, 98 N. C. 595, 4 S. E. 143; *State v. Andrew*, 61 N. C. 205; *State v. Vann*, 82 N. C. 631; *State v. Efler*, 85 N. C. 585.

*Ohio*. — *Spears v. State*, 2 Ohio St. 583; *Lefevre v. State*, 50 Ohio St. 584, 35 N. E. 52.

*Oklahoma*. — *Kirk v. Territory*, 10 Okla. 46, 60 Pac. 797.

*Oregon*. — *State v. Wintzingerode*, 9 Or. 153.

*Pennsylvania*. — *Com. v. Johnson*, 162 Pa. St. 63, 29 Atl. 280; *Fife v. Com.*, 29 Pa. St. 429.

*South Carolina*. — *State v. Branham*, 13 S. C. 389; *State v. Vaigneur*, 5 Rich. 391; *State v. Moorman*, (S. C.), 2 S. E. 62; *State v. Workman*, 15 S. C. 540.

*Tennessee*. — *Self v. State*, 6 Baxt.

**B. BURDEN OF PROOF.**—The burden of proving that the confession was so made as to render it competent evidence against the accused is on the state.<sup>44</sup> But the necessity of proof may depend upon the person to whom it is made.<sup>45</sup> And in some cases it is held

244; *Boyd v. State*, 2 Humph. 39; *Beggarly v. State*, 8 Baxt. 520; *Maples v. State*, 3 Heisk. 408.

*Texas*.—*Thomas v. State*, 35 Tex. Crim. App. 178, 32 S. W. 771; *Cain v. State*, 18 Tex. 387.

*Vermont*.—*State v. Gorham*, 67 Vt. 365, 31 Atl. 845; *State v. Carr*, 53 Vt. 37.

*Virginia*.—*Thompson v. Com.*, 20 Gratt. 724.

**Mixed Question of Law and Fact.** In *State v. Kirby*, 1 Strob. (S. C.) 155, it is said: "But in the case of confessions made on suggestion of benefits, by private persons having no authority, the difficulty of laying down a more specific rule than the general one that the confession must be voluntary, has suggested the idea that the question is a mixed one of law and fact, and that it must be left, in a great degree, to the judge to decide, under all the circumstances, whether the threats or inducements were such as to overcome the mind of the prisoner."

**Decision of Court** admitting not conclusive on jury. *Holsenbake v. State*, 45 Ga. 43.

44. *Alabama*.—*Meinaka v. State*, 55 Ala. 47; *Banks v. State*, 84 Ala. 430, 4 So. 382; *Bradford v. State*, 104 Ala. 68, 16 So. 107, 53 Am. St. Rep. 24; *Johnson v. State*, 59 Ala. 37; *Bonner v. State*, 55 Ala. 242; *Jackson v. State*, 83 Ala. 76, 3 So. 847.

*Mississippi*.—*Ellis v. State*, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; *Peter v. State*, 4 Smed. & M. (Miss.) 31.

*New Jersey*.—*State v. Young*, 67 N. J. L. 223, 51 Atl. 939.

*Oregon*.—*State v. Wintzingerode*, 9 Or. 153.

*Texas*.—*Walker v. State*, 7 Tex. App. 245; *Greer v. State*, 31 Tex. 129.

**How Proved to Be Voluntary.** *Johnson v. State*, 59 Ala. 37; *Gilmore v. State*, 126 Ala. 20, 28 So. 595.

**Prosecution Must Lay Foundation.**

"When such a confession is offered in a criminal case, it is incumbent on the prosecution to lay the foundation for its introduction by preliminary proof showing *prima facie* that it was freely and voluntarily made." *People v. Soto*, 49 Cal. 67.

**Preliminary Proof Necessary.**—As to the necessity of preliminary proof before admitting a confession in evidence, it is said, in *Ellis v. State*, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634:

"Before a confession can be received in evidence against a defendant in a criminal trial, it must be shown that it was voluntary; that is to say, made without the influence of hope or fear being exerted on the accused by any other person. Whether it was so made or not is a preliminary matter for the court and not for the jury, to determine. The jury have nothing to do with the competency of evidence; that is a question exclusively for the determination of the court. The court should decide in the first place, after investigation, whether a proposed confession shall be heard by the jury or not, and if it is deemed competent by the court, and is permitted to go to the jury, they are the exclusive judges of its weight and value as evidence. When it is proposed to introduce in evidence a confession of the accused against himself, the court should, upon a preliminary investigation, conducted out of the presence and hearing of the jury, if requested by the defendant, determine whether it is competent or not."

See also *Jackson v. State*, 83 Ala. 76, 3 So. 847.

**Reasonable Doubt Should Exclude.** It is held that if the evidence raises a reasonable doubt as to the competency of the evidence, it should be excluded. *Ellis v. State*, 65 Miss. 44, 3 So. 188; 7 Am. St. Rep. 634; *Williams v. State*, 72 Miss. 117, 16 So. 296.

45. *Com. v. Segó*, 125 Mass. 210; *Rex v. Gibbons*, 1 Car. & P. 97, 11 Eng. C. L. 327.



that the confession is presumed to have been voluntary and competent in all cases.<sup>46</sup> This rule extends to the voluntary character of the confession.<sup>47</sup> And also where caution is required that it was given.<sup>48</sup>

**C. RIGHT OF ACCUSED TO OFFER EVIDENCE.**—The accused is entitled to prove the facts and circumstances under which the confession was made, tending to show that it was involuntary or otherwise incompetent.<sup>49</sup>

46. *Indiana*.—*Hauk v. State*, 148 Ind. 238, 46 N. E. 127.

*Iowa*.—*State v. Storms*, 113 Iowa 385, 85 N. W. 610, 86 Am. St. Rep. 380.

*Louisiana*.—*State v. Washington*, 40 La. Ann. 669, 4 So. 864.

*Massachusetts*.—*Com. v. Bond*, 170 Mass. 41, 48 N. E. 756; *Com. v. Sego*, 125 Mass. 210; *Com. v. Culver*, 126 Mass. 464.

*Michigan*.—*People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

*Missouri*.—*State v. Myers*, 99 Mo. 107, 12 S. W. 516; *State v. Patterson*, 73 Mo. 695.

*Ohio*.—*Rufer v. State*, 25 Ohio St. 464.

*Texas*.—*Williams v. State*, 19 Tex. App. 276.

**Unless Appears on Its Face to Be Incompetent.**—*Williams v. State*, 19 Tex. App. 276.

**Presumed to Be Voluntary.**—In *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, it is said: "A confession by a person accused of a crime is presumed to be voluntarily made until the contrary is shown. The accused asserted that it was involuntary, being made under fear produced by threats. Under the circumstances the burden of proving this issue rested upon him."

47. *Meinaka v. State*, 55 Ala. 47; *Self v. State*, 6 Baxt. (Tenn.) 244; *Bonner v. State*, 55 Ala. 242; *Ellis v. State*, 65 Miss. 44, 3 So. 188; 7 Am. St. Rep. 634; *People v. Soto*, 49 Cal. 67.

48. *Ante* p. 325.

49. *England*.—*Rex v. Clewes*, 4 Car. & P. 221, 19 Eng. C. L. 354.

*Alabama*.—*Spence v. State*, 17 Ala. 192; *Williams v. State*, 103 Ala. 33, 15 So. 662; *Jackson v. State*, 83 Ala. 76, 3 So. 847.

*California*.—*People v. Soto*, 49 Cal. 67; *People v. Miller*, 135 Cal. 69, 67 Pac. 12.

*Indiana*.—*Palmer v. State*, 136 Ind. 393, 36 N. E. 130.

*Iowa*.—*State v. Fidment*, 35 Iowa 541.

*Louisiana*.—*State v. Platte*, 34 La. Ann. 1,061; *State v. Miller*, 42 La. Ann. 1,186, 8 So. 309, 21 Am. St. Rep. 418.

*Massachusetts*.—*Com. v. Culver*, 126 Mass. 464.

*Mississippi*.—*Serpentine v. State*, 1 How. 256.

*Missouri*.—*State v. Rush*, 95 Mo. 199, 8 S. W. 221; *State v. Kinder*, 96 Mo. 548, 10 S. W. 77.

*Nebraska*.—*Willis v. State*, 43 Neb. 102, 61 N. W. 254.

*New Jersey*.—*State v. Hill*, 65 N. J. L. 626, 47 Atl. 814; *State v. Young*, 67 N. J. L. 223, 51 Atl. 939.

*New York*.—*People v. Fox*, 50 Hun 604, 3 N. Y. Supp. 359.

*Ohio*.—*Lefevre v. State*, 50 Ohio St. 584, 35 N. E. 52; *Rufer v. State*, 25 Ohio St. 464.

*Tennessee*.—*Maples v. State*, 3 Heisk. 408.

**Inquiry Not Ex Parte.**—In *Jackson v. State*, 83 Ala. 76, 3 So. 847, it is said: "The inquiry, however, should not be determined on *ex parte* evidence. Whenever the admissibility of any evidence depends on extraneous facts, both parties should be allowed to introduce proof as to such facts. In determining whether the confession proceeded from the volition of the accused, or from an influence improperly exerted, the judge should hear and determine the question of admissibility, not merely upon such showing as the prosecutor may deem proper to make, but also upon the proof which the defendant may introduce, in order

D. WHEN MUST BE DETERMINED. — It is the duty of the court to determine, when it is offered, whether it was so made as to render it competent or not, and if not, to withhold it from the jury.<sup>50</sup> But if its involuntary character is discovered after its admission in evidence, it should then be withdrawn from the jury, with an instruction to disregard it.<sup>51</sup>

E. WHEN MAY BE LEFT TO THE JURY. — a. *Where Evidence is Conflicting.* — It is held in some cases that where there is a conflict of evidence as to the character of the confession, the whole matter may be left to the jury, with proper instructions to disregard it if found to have been improperly obtained.<sup>52</sup> And the ruling of the

that he may not be prejudiced by the admission of illegal evidence. After the prosecution has shown a *prima facie* case, it is the right of the accused to introduce testimony to rebut and to show that the confession was not voluntarily made, and in determining whether a *prima facie* showing of a voluntary confession is made, the court should consider the testimony introduced by both parties."

**Where Prior Confession Claimed to Have Been Improperly Procured.** In *Com. v. Van Horn*, 188 Pa. St. 143, 41 Atl. 469, a confession having been offered, and shown to have been voluntarily made, the defendant offered to make proof that a prior confession had been made, and that it was procured by undue means. It was held that the evidence was incompetent at that stage, but that he was entitled to testify fully to the jury as to the facts relating to such prior confession, leaving the jury to determine from the whole evidence whether the confession should be accepted or not.

50. *Alabama.* — *Bonner v. State*, 55 Ala. 242.

*California.* — *People v. Ah How*, 34 Cal. 218.

*Florida.* — *Holland v. State*, 39 Fla. 178, 22 So. 298; *Simon v. State*, 5 Fla. 285.

*Maryland.* — *Biscoe v. State*, 67 Md. 6, 8 Atl. 571.

*Massachusetts.* — *Com. v. Culver*, 126 Mass. 464.

*Mississippi.* — *Ellis v. State*, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; *Williams v. State*, 72 Miss. 117, 16 So. 296.

*Missouri.* — *State v. Rush*, 95 Mo. 199, 8 S. W. 221.

*New York.* — *People v. Fox*, 50 Hun. 604, 3 N. Y. Supp. 359.

51. *Cain v. State*, 18 Tex. 387; *Biscoe v. State*, 67 Md. 6, 8 Atl. 571; *Bonner v. State*, 55 Ala. 242; *Ellis v. State*, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; *Holland v. State*, 39 Fla. 178, 22 So. 298; *Simon v. State*, 5 Fla. 285.

**Right of Parties to Offer Evidence After Admission of Confession.** — In *Ellis v. State*, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634, it is said: "After a confession has been admitted by the court either party has the right to produce before the jury the same evidence which was submitted to the court when it was called upon to decide the question of competency, and all other facts and circumstances relevant to the confession, or affecting its weight or credit as evidence, and if it should be made to appear at this point, or any other, during the progress of the trial, that the confession was made under such circumstances as to render it incompetent as evidence, it should be excluded by the court."

**When Admitted Without Objection.** the proof may be made afterwards. *Smith v. State*, 88 Ga. 627, 15 S. E. 675.

52. *Georgia.* — *Willis v. State*, 93 Ga. 208, 19 S. E. 43; *Thomas v. State*, 84 Ga. 613, 10 S. E. 1,016; *Irby v. State*, 95 Ga. 467, 20 S. E. 218; *Bailey v. State*, 80 Ga. 359, 9 S. E. 1,072; *Carr v. State*, 84 Ga. 250, 10 S. E. 626.

*Iowa.* — *State v. Storms*, 113 Iowa 385, 85 N. W. 610, 86 Am. St. Rep. 380.

*Massachusetts.* — *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494; *Com. v. Piper*, 120 Mass. 185; *Com. v. Bond*,

court admitting it is held not to be conclusive, but the prisoner may submit evidence to the jury, after its admission, tending to show that it was improperly obtained, and should not, for that reason, have weight against him.<sup>53</sup> But this is only for the purpose of determining the weight to be given to the confession, and not its competency, where the court has determined that question in admitting it.<sup>54</sup>

### III. HOW PROVED.

**1. Generally.** — As a rule, confessions may be proved by any one by whom they were heard, the same as any other fact.<sup>55</sup> But the rules of evidence excluding privileged communications, as in case of admissions, for example, when made to an attorney, are applicable to confessions.<sup>56</sup>

170 Mass. 41, 48 N. E. 756; *Com. v. Smith*, 119 Mass. 305.

*Michigan*. — *People v. Flynn*, 96 Mich. 276, 55 N. W. 834; *People v. Howes*, 81 Mich. 396, 45 N. W. 961; *People v. Robinson*, 86 Mich. 415, 49 N. W. 260; *People v. Swetland*, 77 Mich. 53, 43 N. W. 779.

*Mississippi*. — *Garrard v. State*, 50 Miss. 147.

*New York*. — *People v. Cassidy*, 133 N. Y. 612, 30 N. E. 1,003; *People v. Meyer*, 162 N. Y. 357, 56 N. E. 758.

*Ohio*. — *Burdge v. State*, 53 Ohio St. 512, 42 N. E. 594.

*Pennsylvania*. — *Volkavitch v. Com.*, (Pa.), 12 Atl. 84; *Com. v. Epps*, 193 Pa. St. 512, 44 Atl. 570; *Com. v. Van Horn*, 188 Pa. St. 143, 41 Atl. 469; *Com. v. Shaffer*, 178 Pa. St. 409, 35 Atl. 924.

*South Carolina*. — *State v. Kirby*, 1 Strobo. 378.

*Texas*. — *Cortez v. State*, (Tex. Crim. App.), 66 S. W. 453; *Williams v. State*, (Tex. Crim. App.), 65 S. W. 1,059; *Dill v. State*, 35 Tex. Crim. App. 240, 33 S. W. 126, 60 Am. St. Rep. 37; *Rains v. State*, 33 Tex. Crim. App. 294, 26 S. W. 398; *Paris v. State*, 35 Tex. Crim. App. 82, 31 S. W. 855; *Morris v. State*, 39 Tex. Crim. App. 371, 46 S. W. 253.

*Vermont*. — *State v. Jenkins*, 2 Tyler 377.

**Case Overruled.** — The case of *Garrard v. State*, 50 Miss. 147, above cited, has been overruled in later Mississippi cases. *Ellis v. State*, 65 Miss.

44, 3 So. 188, 7 Am. St. Rep. 634; *Williams v. State*, 72 Miss. 117, 16 So. 296.

**53.** *Cain v. State*, 18 Tex. 387; *State v. Gorham*, 67 Vt. 365, 31 Atl. 845; *Brister v. State*, 26 Ala. 107; *Ellis v. State*, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; *Com. v. Culver*, 126 Mass. 464; *Holsenbake v. State*, 45 Ga. 43.

**54.** *Brister v. State*, 26 Ala. 107; *State v. Rush*, 95 Mo. 199, 8 S. W. 221; *Ellis v. State*, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; *Com. v. Culver*, 126 Mass. 464.

**55.** *Alston v. State*, 41 Tex. 39; *State v. Gossett*, 9 Rich. L. (S. C.) 428; *Coffman v. Com.*, 10 Bush (Ky.) 495; *Clough v. State*, 7 Neb. 320; *Stevens v. State*, (Tex. Crim. App.), 38 S. W. 167; *State v. Schmidt*, 136 Mo. 644, 38 S. W. 719; *People v. Cokahnour*, 120 Cal. 253, 52 Pac. 505; *Com. v. Epps*, 193 Pa. St. 512, 44 Atl. 570.

**Hearsay Incompetent.** — *State v. Green*, 48 S. C. 138, 26 S. E. 234.

**When Made Through An Interpreter** how proved. *Com. v. Storti*, 177 Mass. 339, 58 N. E. 1,021.

**56.** See articles "ADMISSIONS," "ATTORNEY AND CLIENT," "PRIVILEGED COMMUNICATIONS." *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *State v. Douglass*, 20 W. Va. 770; *Hills v. State*, 61 Neb. 589, 85 N. W. 836; *Rex v. Derrington*, 2 Car. & P. 418, 12 Eng. C. L. 199; *State v. Phelps*, *Kirby* (Conn.) 282.

**Must Be Made in Confidence.** — But

**2. Whole Statement Must be Given.**—The confession must be offered in its entirety and taken together, including all that was said at the time relating to the subject, and as a part of the confession, whether favorable or unfavorable to the accused.<sup>57</sup>

**A. SUBSTANCE SUFFICIENT.**—The exact words of the confession need not be proved. It is enough if the witness is able to give its substance;<sup>58</sup> and a witness hearing a part may testify to what he hears, although not able to give the whole.<sup>59</sup> So it has been held

it is held not to be enough to show that the statement was made to a lawyer or minister of the gospel. To render it inadmissible it must further appear to have been made to him in confidence, or made under such circumstances as to make it so. *Hills v. State*, 61 Neb. 589, 85 N. W. 836.

**Made to a Physician.**—In *Com. v. Flood*, 152 Mass. 529, 25 N. E. 971, a confession of the crime of adultery, made to a physician in attendance, was held to be admissible.

**57. England.**—*Rex v. Clewes*, 4 Car. & P. 221, 19 Eng. C. L. 354; *Rex v. Hearne*, 4 Car. & P. 215, 19 Eng. C. L. 350.

**United States.**—*U. S. v. Prior*, 5 Cranch C. C. 37, 27 Fed. Cas. No. 16,092; *U. S. v. Long*, 30 Fed. 678; *U. S. v. Smith*, 27 Fed. Cas. No. 16,342a.

**Alabama.**—*William v. State*, 39 Ala. 532; *Levison v. State*, 54 Ala. 520.

**Arkansas.**—*Frazier v. State*, 42 Ark. 70; *Williams v. State*, 69 Ark. 599, 65 S. W. 103.

**California.**—*People v. Gelabert*, 39 Cal. 663; *People v. Navis*, 3 Cal. 106.

**Delaware.**—*State v. Smith*, 9 Houst. 588, 33 Atl. 441; *State v. Miller*, 9 Houst. 564, 32 Atl. 137.

**Georgia.**—*Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814.

**Iowa.**—*State v. Novak*, 109 Iowa 717, 79 N. W. 465.

**Kentucky.**—*Hart v. Com.*, 22 Ky. L. Rep. 1,183, 60 S. W. 298; *Herron v. Com.*, 23 Ky. L. Rep. 782, 64 S. W. 432.

**Louisiana.**—*State v. Johnson*, 47 La. Ann. 1,225, 17 So. 789.

**Mississippi.**—*Coon v. State*, 13 Smed. & M. 246; *McCann v. State*, 13 Smed. & M. 471.

**Missouri.**—*State v. Hollenscheit*, 61 Mo. 302; *State v. McKenzie*, 144 Mo. 40, 45 S. W. 1,117.

**Nebraska.**—*Walrath v. State*, 8 Neb. 80.

**Nevada.**—*State v. Buster*, 23 Nev. 346, 47 Pac. 194.

**New York.**—*People v. Ruloff*, 3 Park. Crim. Rep. 401.

**Texas.**—*Powell v. State*, 37 Tex. 348; *Riley v. State*, 4 Tex. App. 538.

**Vermont.**—*State v. McDonnell*, 32 Vt. 491.

**Virginia.**—*Brown v. Com.*, 9 Leigh 633, 33 Am. Dec. 263.

**Wisconsin.**—*Fertig v. State*, 100 Wis. 301, 75 N. W. 960.

**Only so Much as Relates to the Subject.**—But the prosecution is only required to offer so much of the conversation or testimony of the accused as relates to and bears upon the subject or fact in dispute. *State v. Sorter*, 52 Kan. 531, 34 Pac. 1,036.

**Prosecution May Offer Part and the accused the remainder.** *Emery v. State*, 92 Wis. 146, 65 N. W. 848; *Rounds v. State*, 57 Wis. 45, 14 N. W. 865.

**Whole Conversation**, partly in presence of one person, and partly with another, when competent, as one conversation. *Waller v. People*, 175 Ill. 221, 51 N. E. 900.

**58. State v. Hopkirk, 84 Mo. 278; *State v. Madison*, 47 La. Ann. 30, 16 So. 566; *State v. Desroches*, 48 La. Ann. 428, 19 So. 250; *Brister v. State*, 26 Ala. 107; *Fertig v. State*, 100 Wis. 301, 75 N. W. 960.**

**59. Woolfolk v. State, 85 Ga. 69, 11 S. E. 814; *Eskridge v. State*, 25 Ala. 30; *State v. Gossett*, 9 Rich. L. (S. C.) 428; *Coffman v. Com.*, 10 Bush (Ky.) 495; *Clough v. State*, 7 Neb. 320; *Fertig v. State*, 100 Wis. 301, 75 N. W. 960.**

that he may give what he remembers;<sup>60</sup> but this has been denied,<sup>61</sup> and he cannot testify to what he understood, if he did not understand all that was said.<sup>62</sup>

**B. RIGHT OF ACCUSED TO EXPLAIN BY PROVING OTHER DECLARATIONS.** — a. *If Made at Same Time.* — The accused may prove in explanation or refutation of the confession proved against him the whole of what was said at the same time, and tending to explain, modify or refute it;<sup>63</sup> and in like manner he may prove anything

**Must Be Intelligible** and appear to relate to the crime charged. *State v. Millmeier*, 102 Iowa 692, 72 N. W. 275.

**Accused May Prove Balance of Conversation.** — When a witness testifies to a part of the conversation only, as heard by him, the accused is entitled to prove the balance of it, although it took place in the absence of the witness testifying to a part of it. *Diehl v. State*, 157 Ind. 549, 62 N. E. 51.

60. *Kendall v. State*, 65 Ala. 492; *State v. Madison*, 47 La. Ann. 30, 16 So. 566.

**The Rule and Its Exceptions.**

The rule and its exceptions are thus stated in *Fertig v. State*, 100 Wis. 301, 75 N. W. 960: "The rule that all parts of a conversation bearing on the subject in controversy must be taken together, and that if the whole of it, in substance at least, cannot be given so that its bearing on such controversy, from the standpoint of the party offering it, can be established, the whole shall be excluded, is familiar; but that does not require that the witness testifying to a conversation shall remember it all, either literally or in substance, but only that he shall remember that part relative to the controversy. If a witness can testify to a part of a conversation sufficiently complete of itself to show its bearing on the fact in issue, or some evidentiary fact in the case, that is sufficient, though other things were said, which the opposite party may call out on cross-examination, so far as they in any way explain or modify that part testified to in chief; and though the other party to the conversation may be called and his version of it be given. The rule does not go so far as to exclude dam-

aging admissions or declarations made in a conversation, because all said cannot be remembered. All the conversation, or the substance of it, which shows the bearing of the damaging statement as to the fact in issue, or the evidentiary fact sought to be established, must be given or all excluded; but that being satisfied, the evidence is admissible."

61. *Berry v. Com.*, 10 Bush (Ky.) 15.

62. *People v. Gelabert*, 39 Cal. 663.

**Where Part Was in Unknown Language.** — In *State v. Buster*, 23 Nev. 346, 47 Pac. 194, a part of what was said was in a language unknown to the witness, and it was held error to admit what was spoken in his own language and understood.

**Where Witness Does Not Understand the Language** in which the confession was made, and cannot repeat the words, his testimony is incompetent. *Cortez v. State*, (Tex. Crim. App.), 66 S. W. 453.

63. *Alabama.* — *Chambers v. State*, 26 Ala. 59; *Parke v. State*, 48 Ala. 266.

*California.* — *People v. Yeaton*, 75 Cal. 415, 17 Pac. 544.

*Georgia.* — *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814; *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

*Indiana.* — *Diehl v. State*, 157 Ind. 549, 62 N. E. 51.

*Kentucky.* — *Coffman v. Com.*, 10 Bush 495; *Berry v. Com.*, 10 Bush 15; *Hart v. Com.*, 22 Ky. L. Rep. 1, 183, 60 S. W. 298; *Herron v. Com.*, 23 Ky. L. Rep. 782, 64 S. W. 432.

*Louisiana.* — *State v. Johnson*, 47 La. Ann. 1,225, 17 So. 789.

*Missouri.* — *State v. McKenzie*, 144 Mo. 40, 45 S. W. 1,117.

*Nevada.* — *State v. Buster*, 23 Nev. 346, 47 Pac. 194.

relevant thereto.<sup>64</sup>

b. *Not if Made at Different Time.* — But declarations made at another time, tending to explain or contradict the confession proved, or tending to show that it was not made, are inadmissible.<sup>65</sup>

c. *Prosecution May Disprove Self-Serving Portion.* — The prosecution is not bound by any statements in the confession favorable to the accused, but may disprove them.<sup>66</sup>

d. *Jury May Believe Part and Disbelieve Part.* — The fact that all of the confession must be received does not bind the jury to accept as true such parts of it as make for the accused. The jury may believe a part and disbelieve a part.<sup>67</sup>

3. *Effect of Refusal to Hear Whole Statement.* — Where a confession was partially made, and the person to whom it was made refused to hear the balance of it, it was held that the portion given was incompetent.<sup>68</sup> It is held otherwise where the confession was

*Texas.* — *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550.

*Explaining Acts Done.* — So his declarations, made in connection with acts proved against him, and tending to explain the acts, may be proved by the accused for that purpose, but not where he has himself proved the acts. *Sullivan v. State*, 101 Ga. 800, 29 S. E. 16.

64. *Berry v. Com.*, 10 Bush (Ky.) 15.

65. *Alabama.* — *Ray v. State*, 50 Ala. 104; *Linnehan v. State*, 120 Ala. 293, 25 So. 6.

*Georgia.* — *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814.

*Iowa.* — *State v. McLaughlin*, 44 Iowa 82.

*Louisiana.* — *State v. Johnson*, 47 La. Ann. 1,225, 17 So. 789.

*Missouri.* — *State v. Ware*, 62 Mo. 597.

*New York.* — *People v. Green*, 1 Park. Crim. Rep. 11.

*Texas.* — *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Craig v. State*, (Tex. App.), 18 S. W. 297; *Cox v. State*, (Tex. Crim. App.), 69 S. W. 145; *Porter v. State*, (Tex. Crim. App.), 50 S. W. 380.

66. *People v. Ruloff*, 3 Park. Crim. Rep. (N. Y.) 401; *Riley v. State*, 4 Tex. App. 538; *U. S. v. Long*, 30 Fed. 678.

67. *England.* — *Rex v. Clewes*, 4 Car. & P. 221, 19 Eng. C. L. 354.

*United States.* — *U. S. v. Long*, 30 Fed. 678.

*Alabama.* — *Parke v. State*, 48 Ala. 266; *William v. State*, 39 Ala. 532; *Chambers v. State*, 26 Ala. 59; *Eiland v. State*, 52 Ala. 322.

*Delaware.* — *State v. Miller*, 9 Houst. 564, 32 Atl. 137; *State v. Smith*, 9 Houst. 588, 33 Atl. 441.

*Georgia.* — *Cook v. State*, 114 Ga. 523, 40 S. E. 703; *Hudgins v. State*, 26 Ga. 350; *Licett v. State*, 23 Ga. 57.

*Iowa.* — *State v. Novak*, 109 Iowa 717, 79 N. W. 465.

*Massachusetts.* — *Com. v. Hunton*, 168 Mass. 130, 46 N. E. 404.

*Mississippi.* — *Coon v. State*, 13 Smed. & M. 246; *McCann v. State*, 13 Smed. & M. 471.

*Missouri.* — *State v. McKenzie*, 144 Mo. 40, 45 S. W. 1,117; *State v. Hollenscheit*, 61 Mo. 302; *Bower v. State*, 5 Mo. 364, 32 Am. Dec. 325.

*Nebraska.* — *Furst v. State*, 31 Neb. 403, 47 N. W. 1,116.

*New York.* — *People v. Ruloff*, 3 Park. Crim. Rep. 401.

*New Jersey.* — *State v. Abbato*, 64 N. J. L. 658, 47 Atl. 10.

*Texas.* — *Carr v. State*, 24 Tex. App. 562, 7 S. W. 328, 5 Am. St. Rep. 905; *Riley v. State*, 4 Tex. App. 538; *McHenry v. State*, 40 Tex. 46.

*Virginia.* — *Brown v. Com.*, 9 Leigh 633, 33 Am. Dec. 263.

*Cannot Disbelieve Part Arbitrarily.* *Crawford v. State*, 4 Coldw. (Tenn.) 190; *Gantling v. State*, 40 Fla. 237, 23 So. 857.

68. *William v. State*, 39 Ala. 532.

interrupted, and therefore incomplete.<sup>69</sup>

**4. When Confession is in Writing.** — Where the confession is in writing it is proved by the production of the writing and proof of its execution, as in other cases.<sup>70</sup> If written by another and signed by the accused it is competent, as he adopts the language used, and waives any objection to its introduction as a confession on such ground.<sup>71</sup> But it must be either written or signed by him to make it his confession.<sup>72</sup>

**By Parol When Taken in Writing.** — And it is held that when a confession is taken in writing by a magistrate, it may be proved by parol testimony upon proof of the loss of the writing.<sup>73</sup> A copy

69. *Levison v. State*, 54 Ala. 520.

70. *Alabama*. — *Bracken v. State*, 111 Ala. 68, 20 So. 636, 56 Am. St. Rep. 53.

*California*. — *People v. Martinez*, 66 Cal. 278, 5 Pac. 261; *People v. Cokahnour*, 120 Cal. 253, 52 Pac. 505.

*Delaware*. — *State v. Vincent*, 1 Houst. Crim. Cas. 11.

*Louisiana*. — *State v. Demarest*, 41 La. Ann. 617, 6 So. 136.

*Massachusetts*. — *Com. v. King*, 8 Gray 501.

*Mississippi*. — *Peter v. State*, 4 Smed. & M. 31; *Hightower v. State*, 58 Miss. 636; *Wright v. State*, 50 Miss. 332; *Powell v. State*, (Miss.), 23 So. 266.

*South Carolina*. — *State v. Branham*, 13 S. C. 389.

*Texas*. — *Luera v. State*, (Tex. Crim. App.), 32 S. W. 898; *Hurst v. State*, (Tex. Crim. App.), 40 S. W. 264; *Williams v. State*, 38 Tex. Crim. App. 128, 41 S. W. 645.

**Taken in Language Unknown to Accused** and translated into his own language competent. *State v. Demarest*, 41 La. Ann. 617, 6 So. 136.

**Must Be Shown to Be Genuine.** *Powell v. State*, 37 Tex. 348.

**Magistrate's Certificate of Genuineness** is not sufficient. *Brez v. State*, 39 Tex. 95.

**Interlineations in Must Be Explained.** — *U. S. v. Williams*, 103 Fed. 938.

**Before Grand Jury.** — The fact that a confession made before a grand jury was taken down in writing does not render such writing the best evidence and exclude oral evidence of what was said. *Griminger v. State*, (Tex. Crim. App.), 69 S. W. 583.

71. *Com. v. Coy*, 157 Mass. 200, 32 N. E. 4.

**But Accused May Prove Its Inaccuracy.** — *State v. Brown*, 1 Mo. App. 86.

72. *Austine v. People*, 51 Ill. 236; *State v. Harman*, 3 Harr. (Del.) 567.

But see *State v. Haworth*, 24 Utah 398, 68 Pac. 155, in which it is held that a purported confession of a defendant taken down in writing by another and not signed by him was competent.

**In Pleadings in Civil Actions.** — As to when a pleading in a civil action is competent as an admission in a criminal case against the party filing it, see *Farmer v. State*, 100 Ga. 41, 28 S. E. 26; *Ante* Vol. 1, pp. 424-458.

73. *Peter v. State*, 4 Smed. & M. (Miss.) 31; *Guy v. State*, 9 Tex. App. 161; *Hightower v. State*, 58 Miss. 636; *Patton v. Freeman*, 1 N. J. L. 134; *State v. Matthews*, 66 N. C. 106.

**Presumed to Have Been Taken in Writing.** — Where the magistrate is required by law to take the confession in writing, he will be presumed to have done his duty, and, the writing not being produced, proof of its loss may be made, and oral proof made of its contents. *Hightower v. State*, 58 Miss. 636; *State v. Vincent*, 1 Houst. Crim. Cas. (Del.) 11.

**Parol Evidence of, When Competent.** — *Patton v. Freeman*, 1 N. J. L. 134; *Wright v. State*, 50 Miss. 332; *Williams v. State*, 38 Tex. Crim. App. 128, 41 S. W. 645.

**Loss or Destruction of Original Must Be Shown to authorize secondary proof of contents.** *Williams v. State*, 38 Tex. Crim. App. 128, 41 S. W. 645.

made from memory is inadmissible.<sup>74</sup>

#### IV. EFFECT OF WHEN PROVED.

**1. Judicial Confessions.** — A plea of guilty is a conclusive confession of guilt, for the purposes of the trial and on appeal.<sup>75</sup> But not upon a second trial of the same case, where a plea of not guilty has subsequently been interposed.<sup>76</sup>

**A. AT PRELIMINARY EXAMINATION.** — If a plea of guilty has been made at the preliminary examination, it is competent evidence of a confession, as we have seen;<sup>77</sup> but it is not conclusive,<sup>78</sup> although sufficient, standing alone, to warrant a conviction.<sup>79</sup>

**B. AT CORONER'S INQUEST.** — A confession made at a coroner's inquest, the accused having been properly cautioned, is competent, as we have seen, but it is not so as being a judicial confession.<sup>80</sup>

**C. AT FINAL HEARING.** — A plea of guilty at the final trial is the pleading of the accused, and as such, conclusive upon him for all the purposes of the case.<sup>81</sup>

**In Another Action.** — A plea of guilty in another action is not conclusive when offered in evidence.<sup>82</sup>

**D. SUFFICIENT TO CONVICT.** — a. *Generally.* — The question whether proof of a confession is sufficient, without other evidence,

**Written Confession Offered, parol testimony of same confession incompetent.** *Powell v. State*, (Miss.), 23 So. 266.

**But Other Oral Confessions** made may be proved by parol. *People v. Cokahnour*, 120 Cal. 253, 52 Pac. 505.

**Taken in Writing by Magistrate.** If taken by a magistrate as required by law and signed, parol evidence of the same confession is inadmissible. *State v. Harman*, 3 Harr. (Del.) 567.

74. *Austine v. People*, 51 Ill. 236.

75. *People v. Hennessey*, 15 Wend. (N. Y.) 147; *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; *Dantz v. State*, 87 Ind. 398; *Beason v. State*, (Tex. Crim. App.), 67 S. W. 96.

**Degrees of Weight to Be Given to Different Kinds of Confessions.** "Confessions voluntarily made, not induced by threats or by a promise or hope of favor, are admissible in evidence in criminal cases. They are usually divided into three classes: (1) Confessions made in open court, under a plea of guilty, which are conclusive, and render any proof unnecessary; (2) the next highest kind is

those made before a magistrate; and (3) those made to any other person, which is the lowest grade, and requires proof of corroborating circumstances to sustain them." *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

76. *Com. v. Ervine*, 8 Dana (Ky.) 30.

77. *Com. v. Brown*, 150 Mass. 330, 23 N. E. 49.

78. *Com. v. Brown*, 150 Mass. 330, 23 N. E. 49; *Com. v. Ervine*, 8 Dana (Ky.) 30.

79. *State v. Lamb*, 28 Mo. 218; *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698.

**But Not in Cases of Treason.** *Case of Fries, Whart. St. Tr.* 458, 9 Fed. Cas. No. 5,126.

80. *State v. Coffee*, 56 Conn. 399, 16 Atl. 151.

81. *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; *Dantz v. State*, 87 Ind. 398; *Beason v. State*, (Tex. Crim. App.), 67 S. W. 96.

82. *Beason v. State* (Tex. Crim. App.), 67 S. W. 96; *Murmurt v. State*, (Tex. Crim. App.), 67 S. W. 508.



to convict the accused depends upon the nature of the confession, whether judicial or extra judicial. As to the former, they are usually held to be sufficient without corroboration.<sup>83</sup>

b. *The Rule in Case of Treason.* — In cases of treason the confession of the prisoner, alone, is not sufficient to convict.<sup>84</sup> But it may be received in corroboration of matters already testified to by two witnesses.<sup>85</sup>

**2. Extra Judicial.** — A. GENERALLY. — The effect of extra judicial confessions rests upon different principles, and they are treated very much the same as admissions in civil cases made out of court.<sup>86</sup>

B. NOT CONCLUSIVE. — And they are uniformly held not to be conclusive, but open to explanation and to be disproved by other evidence.<sup>87</sup>

83. *People v. Hennessey*, 15 Wend. (N. Y.) 147; *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698; *State v. Lamb*, 28 Mo. 218; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516; *White v. State*, 49 Ala. 344.

**Effect of Judicial Confessions.** The effect of judicial confessions as contradistinguished from such as extra judicial, is thus stated in *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698: "Such confessions are, without doubt, sufficient of themselves, unaided by any corroboratory or confirmatory evidence of the *corpus delicti* to sustain a conviction. They are deliberately made, and being reduced to writing, subscribed by the prisoner, certified by a magistrate, or consisting of a solemn plea, made at the bar of the court, and entered of record, are precisely identified, and free from the inherent infirmity of all mere verbal confessions made out of court, resting in the memory of witnesses, and depending for their value upon the fidelity and accuracy of their repetition."

**Confession in Open Court.** — In *Dantz v. State*, 87 Ind. 398, it was held that "a confession of guilt in open court and in the presence of the jury," was sufficient to sustain a conviction. So of testimony given upon the trial of another cause. *Anderson v. State*, 26 Ind. 89.

**Effect of Confession at Second Trial.** In *Com. v. Irvine*, 8 Dana (Ky.) 30, the accused had been indicted and confessed his guilt in open court, and

judgment was rendered against him. The judgment was afterward reversed on appeal, and upon a second trial the defendant, without objection on the part of the prosecution, entered a plea of not guilty. It was held that the failure to object to the entering of a new plea was a waiver of the conclusive effect of the first plea, but that such confession was competent, though not conclusive evidence against the accused.

**Plea of Guilty Refused.** — Not competent as evidence on the trial. *State v. Meyers*, 99 Mo. 107, 12 S. W. 516.

84. *Case of Fries*, Whart. St. Tr. 458, 9 Fed. Cas. No. 5,126.

85. *Case of Fries*, Whart. St. Tr. 458, 9 Fed. Cas. No. 5,126.

86. *People v. Hennessey*, 15 Wend. (N. Y.) 147; *Young v. State*, 68 Ala. 569; *Com. v. Holt*, 121 Mass. 61; *Com. v. Smith*, 119 Mass. 305; *Sam v. State*, 33 Miss. 347; *Territory v. Farrell*, 6 Mont. 12, 9 Pac. 536; *State v. Welch*, 7 Port. (Ala.) 463.

87. *Young v. State*, 68 Ala. 569; *People v. Fox*, 50 Hun 604, 3 N. Y. Supp. 359; *Territory v. Farrell*, 6 Mont. 12, 9 Pac. 536; *Com. v. Howe*, 2 Allen (Mass.) 153; *State v. Welch*, 7 Port. (Ala.) 463.

**Defendant May Disprove.** — In *People v. Fox*, 50 Hun 604, 3 N. Y. Supp. 359, it is held that the defendant was entitled to disprove his confession made under oath in the form of an affidavit.

C. WHETHER SUFFICIENT TO CONVICT OR NOT. — A prisoner may be convicted on his own uncorroborated extra judicial confession, the *corpus delicti* being proved by other evidence,<sup>88</sup> but not otherwise.<sup>89</sup>

**88.** *Alabama*. — *Mose v. State*, 36 Ala. 211; *Young v. State*, 68 Ala. 569; *Martin v. State*, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; *White v. State*, 49 Ala. 344.

*Georgia*. — *Wimberley v. State*, 105 Ga. 188, 31 S. E. 162; *Schaefer v. State*, 93 Ga. 177, 18 S. E. 552; *Davis v. State*, 105 Ga. 808, 32 S. E. 158; *Williams v. State*, 69 Ga. 11.

*Illinois*. — *Bartley v. People*, 156 Ill. 234, 40 N. E. 831; *Andrews v. People*, 117 Ill. 195, 7 N. E. 265; *Gore v. People*, 162 Ill. 259, 44 N. E. 500; *South v. State*, 98 Ill. 261; *Bergen v. People*, 17 Ill. 425, 65 Am. Dec. 672.

*Kentucky*. — *Mullins v. Com.*, 14 Ky. L. Rep. 569, 20 S. W. 1,035; *Bush v. Com.*, 13 Ky. L. Rep. 425, 17 S. W. 330; *Dugan v. Com.*, 19 Ky. L. Rep. 1,273, 43 S. W. 418.

*Massachusetts*. — *Com. v. Smith*, 119 Mass. 305.

*Minnesota*. — *State v. Grear*, 29 Minn. 221, 13 N. W. 140.

*Mississippi*. — *Sam v. State*, 33 Miss. 347.

*Missouri*. — *State v. Patterson*, 73 Mo. 695.

*Nebraska*. — *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721.

*New Jersey*. — *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404.

*Tennessee*. — *Williams v. State*, 12 Lea 211.

*Texas*. — *Dunn v. State*, 34 Tex. Crim. App. 257, 30 S. W. 227, 53 Am. St. Rep. 714; *Attaway v. State*, 35 Tex. Crim. App. 403, 34 S. W. 112.

**As Proof of Marriage When Charged With Adultery or Bigamy.** It is held that the admissions of the accused, when charged with adultery or bigamy, are sufficient to prove his marriage. *Com. v. Holt*, 121 Mass. 61; *Wolverton v. State*, 16 Ohio 173, 47 Am. Dec. 373; *Squire v. State*, 46 Ind. 459; *State v. Libby*, 44 Me. 469, 69 Am. Dec. 115; *State v. Seals*, 16 Ind. 352; *Com. v. Jackson*, 11 Bush (Ky.) 679, 21 Am. Rep. 225; *State v. Wyld*, 110 N. C. 500, 15 S. E. 5;

*Miles v. U. S.*, 103 U. S. 304; *Cayford's Case*, 7 Greenl. (Me.) 57; *Ham's Case*, 11 Me. 391; *State v. McDonald*, 25 Mo. 176.

**But See to the Contrary.** — *Gahagan v. People*, 1 Park. Crim. Rep. (N. Y.) 378.

**89.** *United States*. — *U. S. v. Boese*, 46 Fed. 917; *U. S. v. Mayfield*, 59 Fed. 118.

*Alabama*. — *Johnson v. State*, 59 Ala. 37; *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698.

*California*. — *People v. Simonson*, 107 Cal. 345, 40 Pac. 440.

*Delaware*. — *State v. Miller*, 9 Houst. 564, 32 Atl. 137.

*Georgia*. — *Johnson v. State*, 86 Ga. 90, 13 S. E. 282; *Johnson v. State*, (Ga.), 12 S. E. 471.

*Illinois*. — *Gore v. People*, 162 Ill. 259, 44 N. E. 500; *South v. State*, 98 Ill. 261.

*Iowa*. — *State v. Knowles*, 48 Iowa 598.

*Kentucky*. — *Greenwade v. Com.*, 11 Ky. L. Rep. 340, 12 S. W. 131; *Dugan v. Com.*, 19 Ky. L. Rep. 1,273, 43 S. W. 418; *Collins v. Com.*, 15 Ky. L. Rep. 691, 25 S. W. 743.

*Minnesota*. — *State v. Laliyer*, 4 Minn. 368.

*Mississippi*. — *Stringfellow v. State*, 26 Miss. 157, 59 Am. Dec. 247; *Sam v. State*, 33 Miss. 347; *Jenkins v. State*, 41 Miss. 582.

*Missouri*. — *State v. German*, 54 Mo. 526, 14 Am. Rep. 481; *State v. Scott*, 39 Mo. 424; *Robinson v. State*, 12 Mo. 592.

*Montana*. — *Territory v. Farrell*, 6 Mont. 12, 9 Pac. 536.

*New York*. — *People v. Hennessey*, 15 Wend. 147; *People v. Badgley*, 16 Wend. 53; *People v. Kelly*, 37 Hun 160; *People v. Porter*, 2 Park. Crim. Rep. 14.

*Pennsylvania*. — *Gray v. Com.*, 101 Pa. St. 380.

*Texas*. — *Dunn v. State*, 34 Tex. Crim. App. 257, 30 S. W. 227, 53 Am. St. Rep. 714; *Attaway v. State*, 35 Tex. Crim. App. 403, 34 S. W. 112;

**3. Mental Condition as Affecting.** — A. GENERALLY. — The mental condition of the accused, from whatever cause resulting, is competent to be considered in determining the weight to be given to it when received.<sup>90</sup>

B. WEAKNESS OF MIND. — Weakness of mind, or want of understanding, from whatever cause, is proper to be considered by the jury in arriving at the weight to be given to the statements of the accused.<sup>91</sup>

C. INFANCY. — As we have seen, capacity to commit the crime supposes the capacity to confess it.<sup>92</sup> Nevertheless the age of the accused is proper to be considered in arriving at the weight to be given the confession, when proved, and calls for a greater degree of caution in accepting it.<sup>93</sup>

D. INTOXICATION. — The fact that the accused was intoxicated at the time of making it will not of itself exclude the confession.<sup>94</sup> But

*Gilbert v. State*, 37 Tex. Crim. App. 301, 39 S. W. 572.

But See to the Contrary. — *State v. Cowan*, 29 N. C. 239; *Smith v. Com.*, 21 Gratt (Va.) 809.

90. *Young v. State*, 68 Ala. 569; *Redd v. State*, 69 Ala. 255; *Miller v. State*, 40 Ala. 54; *Matthews v. State*, 55 Ala. 65; *Eskridge v. State*, 25 Ala. 30; *State v. Feltes*, 51 Iowa 133, 1 N. W. 755; *State v. Aaron*, 4 N. J. L. 231, 7 Am. Dec. 592; *State v. Berry*, 50 La. Ann. 1,309, 24 So. 329.

91. *Com. v. Howe*, 9 Gray (Mass.) 110.

92. *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Martin v. State*, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844.

**Confession by an Infant.** — The care proper to be taken by the jury in case of a confession by an infant is thus declared in the case of *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404: "In regard to a youth of the years of the prisoner, the law most wisely requires the utmost circumspection from the jurors; and it is satisfactory to find that in the present case the jury were distinctly reminded of their duty. 'This fact,' says the judge in his charge, 'should make you more cautious in admitting the confessions, and induce you to resolve your doubts in his favor.'" See also *Grayson v. State*, 40 Tex. Crim. App. 573, 51 S. W. 246.

93. *State v. Guild*, 10 N. J. L. 163,

18 Am. Dec. 404; *State v. Aaron*, 4 N. J. L. 263, 7 Am. Dec. 592; *State v. Potter*, 18 Conn. 166.

94. *England.* — *Rex v. Spilsbury*, 7. Car. & P. 187.

*Alabama.* — *Eskridge v. State*, 25 Ala. 30.

*Arkansas.* — *Lester v. State*, 32 Ark. 727.

*California.* — *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73.

*Georgia.* — *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

*Iowa.* — *State v. Feltes*, 51 Iowa 133, 1 N. W. 755.

*Louisiana.* — *State v. Berry*, 50 La. Ann. 1,309, 24 So. 329.

*Minnesota.* — *State v. Gear*, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296.

*Missouri.* — *Whitney v. State*, 8 Mo. 165.

*Tennessee.* — *Williams v. State*, 12 Lea 211; *Leach v. State*, 99 Tenn. 584, 42 S. W. 195.

*Texas.* — *White v. State*, 32 Tex. Crim. App. 625, 25 S. W. 784.

**Incompetent if so Intoxicated as Not to Understand.** — *Com. v. Howe*, 9 Gray (Mass.) 110. See also *McCabe v. Com.*, (Pa.), 8 Atl. 45; *Lienpo v. State*, 28 Tex. App. 179, 12 S. W. 588.

**Rule Stated.** — In *State v. Gear*, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296, It is said: "Upon the trial the state called a witness by whose testimony it was proposed to

the fact of such intoxication is proper to be taken into account by the jury in determining the weight to be given to the confession.<sup>95</sup>

**4. Corroboration** — **A. WHEN NECESSARY.** — Whether, aside from the proof of the *corpus delicti*, any corroborating evidence is necessary, has been a matter of dispute and disagreement.<sup>96</sup> But the weight of authority supports the rule that the *corpus delicti* being proved by independent evidence, the confession of the accused alone is sufficient to convict, as we have seen above.<sup>97</sup>

**B. WHAT WILL AMOUNT TO.** — Corroboration of a confession is such circumstances or other evidence as serve to strengthen it and render it more probable, and impress a jury with a belief of its truth.<sup>98</sup>

**C. WHAT SUFFICIENT.** — As to what will amount to a sufficient

prove statements of the defendant in the nature of a confession. Objection was made to this upon the ground that, as was claimed, the defendant was so intoxicated at the time of the alleged confession that he did not know what he was saying, and defendant's counsel claimed the right to examine the witness upon this point before his evidence of the confession should be received, and offered also to call other witnesses to the same fact at the same stage of the trial. This was refused by the court, and exception was taken. The court was right. Intoxication of the accused at the time when he may have made a confession would have affected the weight of the confession as evidence against himself, but would not go to exclude the confession from being put in evidence. *Com. v. Howe*, 9 Gray (Mass.) 110; *Whart. Crim. Ev.* 675-6. That degree of intoxication which leaves one capable of making a narration of past events, or of stating his own participation in a crime, is not sufficient to exclude the inculpatory statement from the consideration of the jury."

**95. Arkansas.** — *Lester v. State*, 32 Ark. 727.

*Connecticut.* — *State v. Willis*, 71 Conn. 293, 41 Atl. 820.

*Georgia.* — *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 234.

*Iowa.* — *State v. Feltes*, 51 Iowa 133, 1 N. W. 755.

*Louisiana.* — *State v. Berry*, 50 La. Ann. 1,309, 24 So. 329.

*Massachusetts.* — *Com. v. Howe*, 9 Gray 110.

*Minnesota.* — *State v. Grear*, 28

*Minn.*, 426, 10 N. W. 472, 41 Am. Rep. 296.

*Pennsylvania.* — *McCabe v. Com.*, (Pa.), 8 Atl. 45.

*Tennessee.* — *Williams v. State*, 12 Lea 211.

*Texas.* — *White v. State*, 32 Tex. Crim. App. 625, 25 S. W. 784; *Lienpo v. State*, 28 Tex. App. 179, 12 S. W. 588.

*Utah.* — *State v. Haworth*, 24 Utah 398, 68 Pac. 155.

**Accused Entitled to Prove His Intoxication.** — In *Lester v. State*, 32 Ark. 727, it was held error to refuse to allow the defendant to prove that at the time of making the alleged confession he was in a state of intoxication, as affecting the weight to be given to his statements.

**Question for the Jury.** — The question whether the statement is proper to be considered, in view of evidence that the accused was intoxicated at the time, is one for the jury. *Com. v. Howe*, 9 Gray (Mass.) 110.

**96.** *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Williams v. State*, 12 Lea (Tenn.) 211; *Bergen v. People*, 17 Ill. 425, 65 Am. Dec. 672; *White v. State*, 29 Ala. 344; *Anderson v. State*, 26 Ind. 89; *State v. Jenkins*, 2 Tyler (Vt.) 377; *State v. Branham*, 13 S. C. 389; *State v. Cowan*, 29 N. C. 239.

**97.** See note 88 *supra*.

**98.** *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Fields v. State*, 41 Tex. 25; *Wigginton v. Com.*, 13 Ky. L. Rep. 641, 17 S. W. 634; *Bergen v. People*, 17 Ill. 425, 65 Am. Dec. 672.

See article "CORROBORATION."

corroboration see the cases cited below.<sup>99</sup>

a. *Of Corpus Delicti*. — To warrant a conviction upon the uncorroborated extra judicial confession of the accused, there must be independent evidence to prove the *corpus delicti*.<sup>1</sup> But it need not be direct or positive evidence. It may be proved by circumstances

99. *Alabama*. — *White v. State*, 49 Ala. 344; *Hall v. State*, 134 Ala. 90, 32 So. 750; *Ryan v. State*, 100 Ala. 94, 14 So. 868.

*California*. — *People v. Jones*, 123 Cal. 65, 55 Pac. 698.

*Florida*. — *Simon v. State*, 5 Fla. 285.

*Georgia*. — *Johnson v. State*, (Ga.), 12 S. E. 471; *Johnson v. State*, 61 Ga. 305; *Murray v. State*, 43 Ga. 256; *Daniel v. State*, 63 Ga. 339; *Crowder v. State*, 56 Ga. 44; *Johnson v. State*, 86 Ga. 90, 13 S. E. 282; *Brown v. State*, 105 Ga. 90, 31 S. E. 557; *Westbrook v. State*, 91 Ga. 11, 16 S. E. 100.

*Illinois*. — *Bergen v. People*, 17 Ill. 425, 65 Am. Dec. 672; *Gore v. People*, 162 Ill. 259, 44 N. E. 500.

*Iowa*. — *State v. Dooley*, 89 Iowa 584, 57 N. W. 414.

*Kentucky*. — *Wigginton v. Com.*, 13 Ky. L. Rep. 641, 17 S. W. 634; *Mullins v. Com.*, 14 Ky. L. Rep. 569, 20 S. W. 1,035; *Greenwade v. Com.*, 11 Ky. L. Rep. 340, 12 S. W. 131.

*Minnesota*. — *State v. New*, 22 Minn. 76.

*Mississippi*. — *Heard v. State*, 59 Miss. 545.

*Missouri*. — *State v. Meyers*, 99 Mo. 107, 12 S. W. 516.

*Montana*. — *Territory v. Farrell*, 6 Mont. 12, 9 Pac. 536.

*Nebraska*. — *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721.

*New Jersey*. — *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404.

*New York*. — *Gahagan v. People*, 1 Park. Crim. Rep. 378; *People v. Ruloff*, 3 Park. Crim. Rep. 401.

*Pennsylvania*. — *Com. v. Shaffer*, 178 Pa. St. 409, 35 Atl. 924.

*Rhode Island*. — *State v. Jacobs*, 21 R. I. 259, 43 Atl. 31.

*Tennessee*. — *Williams v. State*, 12 Lea 211.

*Texas*. — *Fields v. State*, 41 Tex. 25; *Hill v. State*, 11 Tex. App. 132; *Gilbert v. State*, 37 Tex. Crim. App.

301, 39 S. W. 572; *Tidwell v. State*, 40 Tex. Crim. App. 38, 47 S. W. 466.

*Vermont*. — *State v. Jenkins*, 2 Tyler 377.

*Virginia*. — *Henderson v. Com.*, 98 Va. 794, 34 S. E. 881.

**Slight Corroboration Sufficient.**  
*Heard v. State*, 59 Miss. 545; *Laughlin v. Com.*, 18 Ky. L. Rep. 640, 37 S. W. 590; *State v. Jacobs*, 21 R. I. 259, 43 Atl. 31; *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721; *People v. Jones*, 123 Cal. 65, 55 Pac. 698.

**Proof of Corpus Delicti Is Sufficient Corroboration.** — *Davis v. State*, 105 Ga. 808, 32 S. E. 158.

1. *United States*. — *U. S. v. Boese*, 46 Fed. 917; *U. S. v. Mayfield*, 59 Fed. 118; *Flower v. U. S.*, 116 Fed. 241.

*Alabama*. — *White v. State*, 49 Ala. 344; *Harden v. State*, 109 Ala. 50, 19 So. 494; *Porter v. State*, 55 Ala. 95; *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698.

*California*. — *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Thrall*, 50 Cal. 415; *People v. Simonson*, 107 Cal. 305, 40 Pac. 440; *People v. Elliott*, 90 Cal. 586, 27 Pac. 433.

*Colorado*. — *Roberts v. People*, 11 Colo. 213, 17 Pac. 637.

*Connecticut*. — *State v. Willis*, 71 Conn. 293, 41 Atl. 820.

*Delaware*. — *State v. Miller*, 9 Houst. 564, 32 Atl. 137.

*Georgia*. — *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238; *Johnson v. State*, 86 Ga. 90, 13 S. E. 282; *Johnson v. State*, (Ga.), 12 S. E. 471.

*Illinois*. — *Gore v. People*, 162 Ill. 259, 44 N. E. 500; *South v. State*, 98 Ill. 261; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *Andrews v. People*, 117 Ill. 195, 7 N. E. 265; *Williams v. State*, 101 Ill. 382; *Bartley v. People*, 156 Ill. 234, 40 N. E. 831.

*Iowa*. — *State v. Knowles*, 48 Iowa 598; *State v. Dubois*, 54 Iowa 363, 6 N. W. 578, 37 Am. Rep. 209.

*Kentucky*. — *Collins v. Com.*, 15 Ky. I. Rep. 691, 25 S. W. 743; *Wigginton*

*v. Com.*, 13 Ky. L. Rep. 641, 17 S. W. 634; *Laughlin v. Com.*, 18 Ky. L. Rep. 640, 37 S. W. 590; *Dugan v. Com.*, 19 Ky. L. Rep. 1,273, 43 S. W. 418.

*Michigan*. — *People v. Lane*, 49 Mich. 340, 13 N. W. 622.

*Minnesota*. — *State v. Laliyer*, 4 Minn. 368.

*Mississippi*. — *Sam v. State*, 33 Miss. 347; *Stringfellow v. State*, 26 Miss. 157, 59 Am. Dec. 247; *Brown v. State*, 32 Miss. 433; *Jenkins v. State*, 41 Miss. 582; *Heard v. State*, 59 Miss. 545.

*Missouri*. — *State v. German*, 54 Mo. 526; *Robinson v. State*, 12 Mo. 592; *State v. Scott*, 39 Mo. 424.

*Montana*. — *Territory v. McClin*, 1 Mont. 394; *Territory v. Farrell*, 6 Mont. 12, 9 Pac. 536.

*Nebraska*. — *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721; *Chezem v. State*, 56 Neb. 496, 76 N. W. 1,056; *Davis v. State*, 51 Neb. 301, 70 N. W. 984.

*New Jersey*. — *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404.

*New York*. — *People v. Porter*, 2 Park. Crim. Rep. 14; *Bennac v. People*, 4 Barb. 164; *People v. Badgley*, 16 Wend. 53; *People v. Ruloff*, 3 Park. Crim. Rep. 401; *People v. Hennessey*, 15 Wend. 147.

*Pennsylvania*. — *Gray v. Com.*, 101 Pa. St. 380, 47 Am. Rep. 733.

*Rhode Island*. — *State v. Jacobs*, 21 R. I. 259, 43 Atl. 31.

*Tennessee*. — *Williams v. State*, 12 Lea 211.

*Texas*. — *Fields v. State*, 41 Tex. 25; *Dunn v. State*, 34 Tex. Crim. App. 257, 30 S. W. 227, 53 Am. St. Rep. 714; *Attaway v. State*, 35 Tex. Crim. App. 403, 34 S. W. 112.

**General Facts Must Be Proved by Independent Evidence.** — The rule was thus stated in a prosecution for arson, in the case of *Sam v. State*, 33 Miss. 347: "The main fact necessary to be established as the basis of the prosecution was that the house had been burned; for without that, there could be no guilt in any one. After proof of that fact, it was necessary to prove how it was done, and by whom; and these particulars could be established by any evidence which was

competent in law, and sufficient in its force to satisfy the mind. The rule with regard to proof of the *corpus delicti*, apart from the mere confessions of the accused, proceeds upon the reason that the general fact, without which there could be no guilt, either in the accused or in any one else, must be established before any one could be convicted of the perpetration of the alleged criminal act which caused it; as in cases of homicide, the death must be shown; in larceny, it must be proved that the goods were lost by the owner; and in arson, that the house had been burned; for otherwise the accused might be convicted of murder when the person alleged to be murdered was alive; or of larceny when the owner had not lost the goods; or of arson when the house was not burned. But when the general fact is proved, the foundation is laid, and it is competent to show by any legal and sufficient evidence how and by whom the act was committed, and that it was done criminally. Here the burning was proved apart from the prisoner's confessions, and the confessions were, therefore, properly admitted in evidence." See also *White v. State*, 49 Ala. 344.

**Corroborating Evidence Need Not Tend to Prove Corpus Delicti.** — In *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672, it is said: "It is the mere naked confession, uncorroborated by any circumstances inspiring belief in the truth of the confession, arising out of the conduct of the accused, or otherwise, we hold insufficient to convict; and the corroborating fact or facts in proof need not necessarily, independent of the confession, tend to prove the *corpus delicti*." See article "CORPUS DELICTI."

**Whether There is Such Other Evidence** is for the jury to determine. *Attaway v. State*, 35 Tex. Crim. App. 403, 34 S. W. 112.

**Confession Competent Evidence** that crime was committed. *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721; *Tidwell v. State*, 29 Tex. Crim. App. 458, 47 S. W. 466; *Flower v. U. S.*, 116 Fed. 241.

corroborating the confession.<sup>2</sup> And the confession itself may be considered, together with other evidence, as establishing the fact that a crime was committed.<sup>3</sup>

**5. Weight to Be Given To.** — A. GENERALLY NOT CONCLUSIVE. The general rule is that confessions are not conclusive but may be disproved by other evidence.<sup>4</sup> The weight to be given to them must depend upon the nature of the confession, whether written or oral, the condition of mind of the accused, the circumstances under which they were made, and the manner in which they are preserved and proved.<sup>5</sup>

B. JURY MUST DETERMINE. — The weight to be given to confessions, when admissible, is for the jury to determine.<sup>6</sup>

2. *Colorado.* — *Roberts v. People*, 11 Colo. 213, 17 Pac. 637.

*Florida.* — *Holland v. State*, 39 Fla. 178, 22 So. 298; *Gantling v. State*, 41 Fla. 587, 26 So. 737.

*Iowa.* — *State v. Minor*, 106 Iowa 642, 77 N. W. 330.

*Kentucky.* — *Laughlin v. Com.*, 18 Ky. L. Rep. 640, 37 S. W. 590.

*Missouri.* — *State v. Patterson*, 73 Mo. 695.

*New York.* — *People v. Ruloff*, 3 Park. Crim. Rep. 401.

*Pennsylvania.* — *Com. v. Johnson*, 162 Pa. St. 63, 29 Atl. 280; *Gray v. Com.*, 101 Pa. St. 380, 47 Am. Rep. 733.

*Rhode Island.* — *State v. Mowry*, 21 R. I. 376, 43 Atl. 871.

*Texas.* — *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247.

*Washington.* — *State v. Gates*, 28 Wash. 689, 69 Pac. 385.

3. *State v. Jacobs*, 21 R. I. 259, 43 Atl. 31. See article "CORPUS DELICTI."

4. *People v. Ruloff*, 3 Park. Crim. Rep. (N. Y.) 401; *Com. v. Howe*, 9 Gray (Mass.) 110.

5. *United States v. U. S. v. Stone*, 8 Fed. 232.

*Alabama.* — *Rice v. State*, 47 Ala. 38; *Porter v. State*, 55 Ala. 95; *Williams v. State*, 103 Ala. 33, 15 So. 662; *Eiland v. State*, 52 Ala. 322.

*Arkansas.* — *Corley v. State*, 50 Ark. 305, 7 S. W. 255.

*Connecticut.* — *State v. Willis*, 71 Conn. 293, 41 Atl. 820.

*Delaware.* — *State v. Miller*, 9 Houst. 564, 32 Atl. 137.

*Florida.* — *Gantling v. State*, 40 Fla. 237, 23 So. 857.

*Georgia.* — *Miller v. State*, 94 Ga. 1, 21 S. E. 128.

*Indiana.* — *Hauk v. State*, 148 Ind. 238, 47 N. E. 465.

*Massachusetts.* — *Com. v. Smith*, 119 Mass. 305.

*Missouri.* — *State v. Brennan*, 164 Mo. 487, 65 S. W. 325; *State v. Holsenscheit*, 61 Mo. 302.

*Nebraska.* — *Heldt v. State*, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835.

*New York.* — *People v. Thoms*, 3 Park. Crim. Rep. 256.

*Ohio.* — *Wolverton v. State*, 16 Ohio 173, 47 Am. Dec. 373; *Fouts v. State*, 8 Ohio St. 98.

*Texas.* — *Morrison v. State*, 41 Tex. 516.

*Vermont.* — *State v. Jenkins*, 2 Tyler 377; *State v. Gorham*, 67 Vt. 365, 31 Atl. 845.

**When Procured by Fraud and deceit.** *Heldt v. State*, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835.

**Entitled to But Little Weight.** *Keithler v. State*, 10 Smed. & M. (Miss.) 192.

**Collateral Inducements** not affecting the competency of the confession are competent to be proved, in connection with it, and should be considered by the jury in arriving at the weight that should be given it. *Com. v. Wilson*, 186 Pa. St. 1, 40 Atl. 283.

6. *Alabama.* — *Redd v. State*, 69 Ala. 255; *Porter v. State*, 55 Ala. 95; *Matthews v. State*, 55 Ala. 65; *McKinney v. State*, 134 Ala. 134, 32 So. 726.

*Arkansas.* — *Corley v. State*, 50 Ark. 305, 7 S. W. 255.

*Colorado.* — *Fincher v. People*, 26 Colo. 169, 56 Pac. 902.

C. SHOULD BE RECEIVED WITH CAUTION. — The rule is that confessions should be received with caution.<sup>7</sup> And this is particularly so in case of confessions implied from silence or acquiescence.<sup>8</sup> And also of verbal confessions.<sup>9</sup>

D. STRONG EVIDENCE WHEN FREELY AND DELIBERATELY MADE. But where the confession is freely and deliberately made it is strong and satisfactory evidence of guilt.<sup>10</sup>

6. Of Other Persons When Admissible. — A. GENERALLY. — The general rule is that confessions are only admissible against the

*Delaware.* — State v. Smith, 9 Houst. 588, 33 Atl. 441; State v. Miller, 9 Houst. 564, 32 Atl. 137.

*Florida.* — Gantling v. State, 40 Fla. 237, 23 So. 857.

*Indiana.* — Hawk v. State, 148 Ind. 238, 47 N. E. 465.

*Massachusetts.* — Com. v. Culver, 126 Mass. 464.

*Michigan.* — People v. Taylor, 93 Mich. 638, 53 N. W. 777.

*Mississippi.* — Ellis v. State, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; Williams v. State, 72 Miss. 117, 16 So. 296.

*Nevada.* — State v. Simas, 25 Nev. 432, 62 Pac. 242.

*Ohio.* — Wolverton v. State, 16 Ohio 173, 47 Am. Dec. 373.

*Texas.* — Morrison v. State, 41 Tex. 516.

*Washington.* — State v. Webster, 21 Wash. 63, 57 Pac. 361.

**Same Evidence May Affect Both Competency and Weight.** — The same evidence that would tend to show that the confession was involuntary or otherwise incompetent is proper to go to the jury as affecting the weight to be given it. Com. v. Culver, 126 Mass. 464.

7. *United States.* — U. S. v. Nott, 1 McLean 499, 27 Fed. Cas. No. 15,900; U. S. v. Mayfield, 59 Fed. 118; U. S. v. Coons, 1 Bond 1, 25 Fed. Cas. No. 14,860; U. S. v. Montgomery, 26 Fed. Cas. No. 15,800.

*Alabama.* — Aaron v. State, 37 Ala. 106.

*California.* — People v. Gelabert, 39 Cal. 663.

*Delaware.* — State v. Smith, 9 Houst. 588, 33 Atl. 441; State v. Miller, 9 Houst. 564, 32 Atl. 137.

*Florida.* — Green v. State, 40 Fla. 474, 24 So. 537.

*Georgia.* — Carr v. State, 84 Ga. 250, 10 S. E. 626; Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238.

*Illinois.* — Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672.

*Massachusetts.* — Com. v. Sanborn, 116 Mass. 61.

*Michigan.* — People v. McCarron, 121 Mich. 1, 79 N. W. 944; People v. Howes, 81 Mich. 396, 45 N. W. 961.

*Mississippi.* — Brown v. State, 32 Miss. 433.

*New Jersey.* — State v. Aaron, 4 N. J. L. 231, 7 Am. Dec. 592.

*New York.* — People v. Ruloff, 3 Park. Crim. Rep. 401.

*Tennessee.* — Williams v. State, 12 Lea 211; Wilson v. State, 3 Heisk. 232.

*Texas.* — Walker v. State, 2 Tex. App. 326; Gay v. State, 2 Tex. App. 127; Cain v. State, 18 Tex. 387; Riley v. State, 4 Tex. App. 538; Jones v. State, 13 Tex. 168, 62 Am. Dec. 550.

*Vermont.* — State v. Phelps, 11 Vt. 116, 34 Am. Dec. 672.

8. Campbell v. State, 55 Ala. 80.

9. Cain v. State, 18 Tex. 387; People v. Thoms, 3 Park. Crim. Rep. (N. Y.) 256; State v. Brister, 1 Houst. Crim. Cas. (Del.) 150.

10. *United States.* — U. S. v. Montgomery, 26 Fed. Cas. No. 15,800.

*Alabama.* — Aaron v. State, 37 Ala. 106; Porter v. State, 55 Ala. 95; State v. Welch, 7 Port. 463.

*Connecticut.* — State v. Potter, 18 Conn. 166.

*Georgia.* — Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238.

*Illinois.* — Miller v. People, 39 Ill. 457.

*Iowa.* — State v. Brown, 48 Iowa 382.



persons making them.<sup>11</sup> But there may be such a relation between the accused and another person as to render their confessions mutually competent one against the other; as for example, where the statement is part of the *res gestae*, or in case of co-conspirators under some circumstances.<sup>12</sup>

B. BY CO-CONSPIRATORS. — As a rule the confession of one co-conspirator, made after the commission of the crime charged, is not admissible against the other.<sup>13</sup> But it is otherwise if it is a con-

*Kentucky*. — *Laughlin v. Com.*, 18 Ky. L. Rep. 640, 37 S. W. 590.

*Missouri*. — *State v. McDonald*, 25 Mo. 176.

*New York*. — *People v. Bennett*, 4 Abb. Pr. (N. S.) 89.

*Ohio*. — *Fouts v. State*, 8 Ohio St. 98.

*Pennsylvania*. — *Com. v. Wilson*, 186 Pa. St. 1, 40 Atl. 283; *Com. v. Dillon*, 4 Dall. 116.

*South Carolina*. — *State v. Kirby*, 1 Strob. 155.

*Tennessee*. — *Deathridge v. State*, 1 Sneed 75; *Maples v. State*, 3 Heisk. 408; *Wiley v. State*, 3 Coldw. 362; *Wilson v. State*, 3 Heisk. 232.

**But Question Must Be Left to the Jury.** — In *Morrison v. State*, 41 Tex. 516, it was held to be error for the court to instruct the jury, as matter of law, that voluntary confessions "are to be regarded as the strongest proofs in the law."

11. *Alabama*. — *Levison v. State*, 54 Ala. 520; *Porter v. State*, 55 Ala. 95.

*California*. — *People v. Gonzales*, 136 Cal. 666, 69 Pac. 487.

*Georgia*. — *Daniels v. State*, 78 Ga. 98, 6 Am. St. Rep. 238.

*Kentucky*. — *Hudson v. Com.*, 2 Duv. 531; *Feltner v. Com.*, 23 Ky. L. Rep. 1,110; 64 S. W. 959; *Strange v. Com.*, 23 Ky. L. Rep. 1,234, 64 S. W. 980; *Hines v. Com.*, 23 Ky. L. Rep. 119, 62 S. W. 732.

*Louisiana*. — *State v. Johnson*, 47 La. Ann. 1,225, 17 So. 789; *State v. Sims*, 106 La. Ann. 453, 31 So. 71.

*Massachusetts*. — *Com. v. Hunton*, 168 Mass. 130, 46 N. E. 404.

*Mississippi*. — *Lynes v. State*, 36 Miss. 617.

*New York*. — *People v. Kief*, 58 Hun 337, 11 N. Y. Supp. 926; *People*

*v. Butler*, 62 App. Div. 508, 71 N. Y. Supp. 129.

*Ohio*. — *Morrison v. State*, 5 Ohio 438.

*South Carolina*. — *State v. Carson*, 36 S. C. 524, 15 S. E. 588.

*Texas*. — *Sessions v. State*, 37 Tex. Crim. App. 62, 38 S. W. 623; *Pryor v. State*, 40 Tex. Crim. App. 643, 51 S. W. 375; *Short v. State*, (Tex. Crim. App.), 61 S. W. 305; *Wooley v. State*, (Tex. Crim. App.), 64 S. W. 1,054.

**Confession of Another Incompetent.**

In *Morrison v. State*, 5 Ohio 438, a prosecution for concealing a horse thief, it was held incompetent to prove the confessions of the alleged thief in the presence of the defendant to establish the fact that the horse had in fact been stolen.

**With Several Persons Jointly Charged.** — If the conversation is

with several jointly charged, in which the accused took part, and statements made by others are not denied by him, the whole of what was said in his presence, whether by him or the others, is competent. *State v. Flowers*, 58 Kan. 702, 50 Pac. 938.

12. See article "ADMISSIONS," Vol. I, p. 589. *Lynes v. State*, 36 Miss. 617; *Thompson v. State*, 19 Tex. App. 593; *Taylor v. U. S.*, 89 Fed. 954; *Carter v. State*, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262; *Holt v. State*, 39 Tex. Crim. App. 282, 46 S. W. 829. See article "CONSPIRACY."

**Where One is on Trial as Accessory** the confession of the alleged principal, not made in the presence of the defendant, is competent to prove the guilt of the principal as against the accessory. *Givens v. State*, 103 Tenn. 648, 55 S. W. 1,107.

13. **Of One Accomplice.** — Incom-

fession made as a part of, or in furtherance of, the conspiracy.<sup>14</sup> And where several are charged, the confession of each is competent against him, but not against the others.<sup>15</sup>

C. BY AN ACCOMPLICE. — The relation of accomplices one toward another is not such as to render their confessions admissible against each other.<sup>16</sup>

petent as against the other. *Short v. State*, (Tex. Crim. App.), 61 S. W. 305; *People v. Butler*, 62 App. Div. 508, 71 N. Y. Supp. 129.

14. See article "CONSPIRACY."

15. "ADMISSIONS," Vol. I, p. 592.

*Alabama*. — *McAlpine v. State*, 117 Ala. 93, 23 So. 130.

*Georgia*. — *Nobles v. State*, 98 Ga. 73, 26 S. E. 64.

*Kentucky*. — *Richards v. Com.*, 24 Ky. L. Rep. 14, 67 S. W. 818.

*Louisiana*. — *State v. Sims*, 106 La. 453, 31 So. 71; *State v. Robinson*, 52 La. Ann. 616, 27 So. 124.

*Massachusetts*. — *Com. v. Hunton*,

168 Mass. 130, 46 N. E. 404; *Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421.

*Michigan*. — *People v. Arnold*, 46 Mich. 268; *People v. Butler*, 111 Mich. 483, 69 N. W. 734.

*Minnesota*. — *State v. Palmer*, 79 Minn. 362, 82 N. W. 685.

*North Carolina*. — *State v. Collins*, 121 N. C. 667, 28 S. E. 520.

16. *Morrison v. State*, 5 Ohio 438.

**Of Accessories.** — Where one is accused as an accessory, the confession of the principal is competent to prove his own guilt, as against the accessory, but not to prove the guilt of the latter. *Lynes v. State*, 36 Miss. 617.

---

## CONFIDENTIAL COMMUNICATIONS. — See Privileged Communications.

# CONFUSION OF GOODS.

BY CHARLES S. BURNELL.

## I. DEFINITION, 363

## II. PROOF ESSENTIAL TO APPLICATION OF DOCTRINE, 363

## III. EVIDENCE ADMISSIBLE, 364

1. *In General*, 364
2. *On the Part of the Defendant*, 364
3. *Burden of Proof*, 365

## IV. PRESUMPTIONS, 366

1. *Generally*, 366
2. *The Retention and Possession*, 366
3. *Portion Used*, 366
4. *Mortgaged Goods*, 367
5. *Both Owners Dead*, 367

## V. QUESTIONS FOR THE JURY, 367

### I. DEFINITION.

Such a mixture of the goods of two or more persons that they cannot be distinguished.<sup>1</sup>

### II. PROOF ESSENTIAL TO APPLICATION OF DOCTRINE.

Before the doctrine of confusion of goods can be invoked it must be proved that the goods of the plaintiff and the defendant have been so mingled that the property of each can no longer be distinguished.<sup>2</sup> But it is not necessary that the facts showing a mixture of goods be pleaded.<sup>3</sup>

1. "When there has been such an intermixture of goods owned by different persons that the property of each can no longer be distinguished, what is denominated a confusion of goods has taken place." *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627. See also *Hawkins v. Spokane Hyd. Min. Co.*, (Idaho), 33 Pac. 40.

2. *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627; *Claflin v. Beaver*, 55 Fed. 576.

3. **A Rule of Evidence.**—In the case of *Holloway Seed Co. v. City Nat. Bank*, 92 Tex. 187, 47 S. W. 95, it was contended that the facts showing an admixture of goods, where the whole was claimed under attachment, should have been alleged in the pleading to authorize a judgment. But the court held the contrary, saying: "The complaint here is that the court erred in its ruling, because the facts upon which it was based

## III. EVIDENCE ADMISSIBLE.

1. **In General** the same rules as to the admissibility of evidence apply in cases involving questions of confusion of goods as in other cases; however, when the fact of the confusion is once established, these rules are greatly relaxed, and evidence has been held admissible on the part of the party seeking to recover his goods which would not ordinarily be held admissible, and the courts have held that every reasonable inference will be deduced therefrom in favor of the innocent party and against the wrongdoer.<sup>4</sup>

2. **On the Part of the Defendant.** — Evidence is always admissible to prove that one who has mingled his goods with those of another did so innocently or in good faith,<sup>5</sup> and proof of this fact will prevent the application of the rule that one who mingles another's goods with his own must lose the latter;<sup>6</sup> evidence is also admissible to show that the plaintiff himself allowed or knowingly consented to the mingling of his goods with those of the defendant;<sup>7</sup> and such evidence is also admissible on behalf of an officer sued for levying an attachment or execution on the property of the plaintiff, the same having been mingled with the property of the defendant in attachment or execution.<sup>8</sup> The defendant may produce evidence to show that the mingling of the goods was in accordance with a well-established custom or usage, as where the grain of several cus-

were not pleaded. We are of the opinion, however, that it was not a matter necessary to be pleaded. The rule as to the confusion of goods is merely a rule of evidence. The wrongful mingling of one's own goods with those of another, when the question of identification of the property arises, throws upon the wrongdoer the burden of pointing out his own goods, and if this cannot be done, he must bear the loss which results from it. It is but an application of the principle that all things are presumed against the spoliator; that is to say, against one who wrongfully destroys or suppresses evidence. 1 Smith's Am. Lead. Cas. note to *Armory v. Delamirie*, p. 689. See also *Bethel v. Linn*, 63 Mich. 464, 30 N. W. 84. Clearly the evidence by which the property is to be identified need not be pleaded."

4. *Bethel v. Linn*, 63 Mich. 464, 30 N. W. 84; *Slight v. Henning*, 12 Mich. 371.

"The legitimate effect of the rule is to render evidence admissible which, under ordinary circumstances, could not be received, and every in-

ference will be deduced therefrom in favor of the innocent party and against the wrongdoer, and the burden of proof will be shifted to the spoliator." *Bethel v. Linn*, 63 Mich. 464, 30 N. W. 84.

5. *Wetherbee v. Green*, 22 Mich. 310, where logs were mingled; *Hart v. Morton*, 44 Ark. 447.

6. *Cheesman v. Shreeve*, 40 Fed. 787; *Hart v. Morton*, 44 Ark. 447; *Pickering v. Moore*, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698.

7. *Taylor v. Jones*, 42 N. H. 25.

8. *California*. — *Wellington v. Sedgwick*, 12 Cal. 469; *Griffith v. Bogardus*, 14 Cal. 410.

*Illinois*. — *Reiss v. Hanchett*, 141 Ill. 419, 31 N. E. 165.

*Iowa*. — *Allen v. Kirk*, 81 Iowa 658, 47 N. W. 906.

*Maine*. — *Tufts v. McClintock*, 28 Me. 424, 48 Am. Dec. 501.

*New Hampshire*. — *Taylor v. Jones*, 42 N. H. 25; *Robinson v. Holt*, 39 N. H. 557, 75 Am. Dec. 233.

*New York*. — *Parker v. Walrod*, 16 Wend. 514, 30 Am. Dec. 124.

tomers is mingled in a grain elevator, each being entitled to delivery of a quantity equal to that put in.<sup>9</sup>

**3. Burden of Proof.** — The burden of proving which are his goods is always upon the party through whose negligence or wrongful act the mingling or confusion was caused, or upon his privies;<sup>10</sup> if he fails in this proof and is unable to identify his specific goods, he

9. *Erwin v. Clark*, 13 Mich. 10; *Goodenow v. Snyder*, 3 Greene (Iowa) 599.

10. *England*. — *Lupton v. White*, 15 Vesey 432.

*United States*. — *Norris v. U. S.*, 44 Fed. 735.

*California*. — *Gunter v. Janes*, 9 Cal. 643.

*Colorado*. — *Little Pittsburgh Con. Min. Co. v. Little Chief Con. Min. Co.*, 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226.

*Indiana*. — *Brackenridge v. Holland*, 2 Blackf. 377.

*Kentucky*. — *Weil v. Silverstone*, 6 Bush 698.

*New York*. — *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 513; *Johnson v. Hocker*, (Tex. Civ. App.), 39 S. W. 406.

**Agents.** — An agent or factor who mixes his own funds or goods with those of his principal must show the amount of, or identify, his own, or his principal will be held entitled to the whole. *Atkinson v. Ward*, 47 Ark. 533; *First Nat. Bank of Elgin v. Schween*, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 74; *Yates v. Arden*, 5 Cranch C. C. 526. An agent who in a suit by his principal for money collected, claims that such money was stolen while mingled with his own, must show that the identical money which belonged to his principal was stolen. *Bartlett v. Hamilton*, 46 Me. 435; *Butte Canal & I. Co. v. Vaughn*, 11 Cal. 143, 10 Am. Dec. 769.

**Attachment.** — On attachment of the whole stock of an insolvent debtor the burden is upon a purchaser from such debtor who has mixed the latter's goods with those purchased, to identify his own. *Lehman v. Kelly*, 68 Ala. 192. The same burden rests upon any third party who has allowed his own goods to become mingled with those of the attached debtor's. *Shumway v. Rut-*

*ter*, 8 Pick. (Mass.) 443, 19 Am. Dec. 340. Where an officer attaches goods of another, together with those of the defendant in attachment, and is sued by the owner for wrongful attachment, the burden is on him to show that the goods which he attached belonged to the defendant in attachment. *Daves v. Stone*, 117 Mass. 486.

**Mortgagors.** — A chattel mortgagor who adds other goods to and mingles them with those covered by the mortgagee has the burden of identifying the added goods upon the mortgagee's taking possession. *Stuart v. Phelps*, 39 Iowa 14; *Gibson v. McIntyre*, 110 Iowa 417, 81 N. W. 699. And where a mortgagor mixes the mortgaged goods purposely or carelessly with others not mortgaged, and sells the whole, the burden is on the purchaser sued by the mortgagee in replevin to distinguish the goods not mortgaged. *Adams v. Wildes*, 107 Mass. 123.

**Partners.** — Where a surviving partner confounds the liabilities of the firm with his own liabilities, the burden is upon him to show the proportions chargeable to each. *Diversey v. Johnson*, 93 Ill. 547.

**Trustees.** — A trustee who has purchased property with his own, mingled with trust funds, must show by the clearest proof what portion of the funds were his, otherwise the whole purchase accrues to the trust. *Jefferson v. Edrington*, 53 Ark. 545. The same rule was applied where one intrusted with the funds of another purchased stock with the same, mingled with his own funds. *Banks Bros. v. Rice*, 8 Colo. App. 217, 45 Pac. 515; and also where the trustee mingled the trust property with his own. *Diversey v. Johnson*, 93 Ill. 547.

See also *Seavy v. Dearborn*, 19 N. H. 351; *Jewett v. Dringer*, 30 N. J. Eq. 291, *Mayer v. Wilkins*, 37 Fla.

must lose them;<sup>11</sup> this is upon the ground that the circumstances are peculiarly within his knowledge.<sup>12</sup> Conversely, the burden is on the defendant who has mingled plaintiff's goods, for example, wheat with his own, to prove the quantity belonging to the plaintiff.<sup>13</sup> The general rule as to burden of proof and identification applies, of course, only where the plaintiff has shown such a mingling of goods as to render his property indistinguishable. Some of the earlier decisions seem to throw the burden on the plaintiff of proving that the mingling was done with unlawful intent,<sup>14</sup> but the rule now seems to be that all that it is necessary for the plaintiff to prove is that the defendant mingled the goods.<sup>15</sup>

#### IV. PRESUMPTIONS.

**1. Generally.** — When it is once proved that one person has willfully or negligently mingled his goods or funds with those of another, so that confusion thereof has taken place, every presumption is against the former and in favor of the innocent party.<sup>16</sup>

**2. The Retention and Possession** of the goods of another which the defendant has mixed with his own can never raise a presumption of ownership on the part of the latter.<sup>17</sup> On the other hand, it has been held that the fact that a decedent deposited in her own name and mingled with her own money the money of the plaintiff before her death raises no presumption that money on deposit at the time of her death, or any part thereof, belonged to the plaintiff.<sup>18</sup>

**3. Portion Used.** — Where one person after mingling the goods or funds of another with his own has used a portion of the whole mass

244, 19 So. 632; *Dillingham v. Smith*, 30 Me. 370; *Bryant v. Erskine*, 56 Me. 569; *Bethel v. Linn*, 63 Mich. 464, 30 N. W. 84.

11. *Weil v. Silverstone*, 6 Bush (Ky.) 698.

12. *Little Pittsburgh Min. Co. v. Little Chief Min. Co.*, 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226.

13. *Starr v. Winegar*, 3 Hun (N. Y.) 491. One who places his brand upon the cattle of another and mingles them with his own cattle has the burden of identifying such other's cattle. *Johnson v. Hocker*, (Tex. Civ. App.), 39 S. W. 406.

14. *Smith v. Sanborn*, 6 Gray (Mass.) 134, holding that where a furniture dealer had mingled goods sold to him with his own goods in fraud of the seller's creditors, the latter cannot attach the whole stock as the seller's property without proving an unlawful motive in the pur-

chaser; and *Weil v. Silverstone*, 6 Bush (Ky.) 698, holding the principle does not apply as against a debtor who has intermingled his goods with another's by accident, and without intent to conceal his own property.

15. *Seavy v. Dearborn*, 19 N. H. 351, *Diversey v. Johnson*, 93 Ill. 547; *Dillingham v. Smith*, 30 Me. 370; *Jefferson v. Edrington*, 53 Ark. 545, 14 S. W. 99; *Banks Bros. v. Rice*, 8 Colo. App. 217, 45 Pac. 515; *Jewett v. Dringer*, 30 N. J. Eq. 291; *Mayer v. Wilkins*, 37 Fla. 244, 19 So. 632; *Bryant v. Erskine*, 56 Me. 569.

16. *Bethel v. Linn*, 63 Mich. 464, 30 N. W. 84; *Little Pittsburgh Min. Co. v. Little Chief Min. Co.*, 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226.

17. *Capron v. Porter*, 43 Conn. 383; *Banks Bros. v. Rice*, 8 Colo. App. 217, 45 Pac. 515.

18. *Bagnell v. Roach*, 76 Cal. 106, 18 Pac. 137.

or total fund for his own purposes, it will be presumed that the portion so used by him was that which had belonged to him before the mingling, and that the other's portion has been left intact.<sup>19</sup>

**4. Mortgaged Goods.** — Where mortgaged goods are mingled with goods subsequently acquired by the mortgagor, the presumption is that the mingling was done by the mortgagor or by his permission.<sup>20</sup>

**5. Both Owners Dead.** — Where, however, the funds of two persons are mingled without fraud and both are dead, and there is no evidence as to what proportion of the total fund belonged to each, it will be presumed that each owned one half.<sup>21</sup>

## V. QUESTIONS FOR THE JURY.

Whether or not there was an intermingling of goods, and whether such intermingling was by the fault or negligence of the defendant,<sup>22</sup> and whether or not it was by mistake, are all questions of fact.<sup>23</sup>

19. *Banks Bros. v. Rice*, 8 Colo. App. 217, 45 Pac. 515.

20. *Hamilton v. Rogers*, 8 Md. 301.

21. *Van Liew v. Van Liew*, 36 N. J. Eq. 637, where the mingling was by consent, the presumption is that the parties intended to hold the mass as tenants in common. *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 397.

"The goods being, before they are mixed, the separate property of the several owners, unless, which is absurd, they cease to be property by reason of the accidental mixture, where they would not so cease if the mixture were designed, must continue to be the property of the original owners; and as there would be no means of distinguishing the goods of each, the several owners seem necessarily to become jointly interested, as tenants in common in the bulk." *Spence v. Union Ins. Co.*, L. R. 3 C. P. 427.

22. *Johnson v. Ballou*, 25 Mich. 460; *Taylor v. Jones*, 42 N. H. 25; *Wood v. Hewitt*, 10 Jur. (N. S.) 390; *Clafin v. Continental Jersey Wks.*, 85 Ga. 27, 11 S. E. 721.

23. *Johnson v. Ballou*, 25 Mich. 460; *Taylor v. Jones*, 42 N. H. 25; *Cadwell v. Pray*, 41 Mich. 307.

In *Clafin v. Continental Jersey Wks.*, 85 Ga. 27, 11 S. E. 721, the court said: "It will be seen from these authorities that if one fraudulently, willfully or wrongfully mixes or confuses his goods with those of another, and cannot distinguish his own, he will lose them. If, however, he does it innocently or by mistake, the rule is different. If in such case he can distinguish them, or can show their value, or their proportion of value to the whole, he ought in equity to be allowed to do so. We think, therefore, that the court erred in not submitting to the jury whether these goods were mixed willfully, fraudulently or wrongfully."

---

## CONSENT.—See Assent.

# CONSIDERATION.

By CLARK ROSS MAHAN.

## I. THE FACT OR WANT OF CONSIDERATION, 370

1. *Presumption and Burden of Proof*, 370
  - A. *Sealed Instruments*, 370
    - a. *In General*, 370
    - b. *Release Under Seal*, 370
  - B. *Instruments Not Under Seal*, 371
    - a. *Rule at Common Law*, 371
    - b. *Statutory Rule*, 371
      - (1.) *Generally*, 371
      - (2.) *Writing Showing Absence of Lawful Consideration*, 371
      - (3.) *Rule Limited to Contracts to Pay Money*, 372
2. *Parol Evidence*, 372
  - A. *Instruments Not Under Seal*, 372
    - a. *In General*, 372
    - b. *Contemporaneous Oral Agreement Inducing Writing*, 373
    - c. *Written Instrument as Consideration for Contemporaneous Oral Agreement*, 374
    - d. *The Consideration for a Unilateral Written Promise*, 374
  - B. *Instruments Under Seal, Deeds, etc.*, 374
    - a. *The Fact of Consideration*, 374
    - b. *Want of Consideration*, 374
3. *Circumstantial Evidence*, 376

## II. NATURE AND EXTENT OF CONSIDERATION, 376

1. *In General*, 376
2. *Instrument Not Expressing Entire Consideration*, 376
3. *Instrument Expressing Consideration as Doubtful Terms*, 377
4. *Contractual Consideration*, 377
5. *Instrument Purporting to Express Entire Consideration*, 379
  - A. *Parol Evidence of Consideration Differing in Quality or Amount*, 380
    - a. *In General*, 380
    - b. *Fraud or Mistake*, 380
  - c. *Additional Consideration Consistent With That Expressed*, 381
  - d. *Action to Recover Consideration*, 384
  - e. *Action on Covenant of Seizin*, 384
  - f. *Nominal Consideration Recited*, 385
  - g. *Consideration Less Than Recited*, 385



- h. *Assumption or Extinguishment of Debt*, 385
- i. *Mortgages*, 387
- B. *Parol Evidence of Consideration Differing in Character or Species*, 387
  - a. *In General*, 387
  - b. *Application of Rule to Particular Instruments*, 390
    - (1.) *Generally*, 390
- C. *Deeds*, 390
  - (A.) *Generally*, 390
  - (B.) *Nominal Consideration Recited*, 392
  - (C.) *Action for Breach of Covenant*, 392
  - (D.) *Exchange of Lands*, 392
  - (E.) *Advancement, Gift, etc.*, 392
  - (F.) *Natural Love and Affection*, 393
  - (G.) *Contemplation of Marriage*, 393
  - (H.) *Support of Grantor*, 394
- 7. *Legal Operation of Instrument Not to Be Defeated*, 394
- 8. *Mode of Inquiry*, 395
  - a. *Direct Testimony of Witness*, 395
  - b. *First and Secondary Evidence*, 395
  - c. *Value*, 396
  - d. *Reasonableness of Testimony*, 396
- III. **LEGALITY OF CONSIDERATION**, 396
  - 1. *In General*, 396
  - 2. *Agreement in Furtherance of Unlawful Objects*, 396
  - 3. *Fraudulent Conveyances*, 399
  - 4. *Champertous Contract*, 399
  - 5. *Burden of Proof*, 399
- IV. **PAYMENT OF CONSIDERATION**, 399
  - 1. *In General*, 399
  - 2. *Time and Manner of Payment*, 399
  - 3. *To Whom Paid*, 400
  - 4. *Disposition of Consideration*, 400
- V. **NON-PAYMENT OF CONSIDERATION**, 400
- VI. **FAILURE OF CONSIDERATION**, 401
  - 1. *Presumptions and Burden of Proof*, 401
  - 2. *Parol Evidence*, 401
    - A. *In General*, 401
    - B. *Simple Contracts*, 403
    - C. *Specialties, Deeds, etc.*, 403
    - D. *Consideration Expressed in Separate Instrument*, 404
    - E. *Partial Failure of Consideration*, 404

## CROSS-REFERENCES.

Contracts;  
 Deeds;  
 Fraud; Fraudulent Conveyances;  
 Mortgages;  
 Parol Evidence.

## I. THE FACT OR WANT OF CONSIDERATION.

## 1. Presumptions and Burden of Proof. — A. SEALED INSTRUMENTS.

a. *In General.* — The rule has always been recognized as to sealed instruments that the seal imports a consideration.<sup>1</sup> And under the old common law rule this presumption was a conclusive one.<sup>2</sup>

The burden of proof is on the defendant who claims title by virtue of priority of record, as against a prior, but unrecorded, deed, to show affirmatively the payment of a valuable consideration, and that by some other evidence than the mere recital of it in the deed.<sup>3</sup>

b. *Release Under Seal.* — Where the instrument is a release under seal, the presumption of consideration is a conclusive one.<sup>4</sup>

**But Where Forgery or Fraud in the Execution of the Instrument is Charged,** the consideration of the instrument may be inquired into in a court of law.<sup>5</sup>

1. *Seal Imports Consideration.*  
*Arkansas.* — Patton v. Ashley, 8 Ark. 290; Cross v. State Bank, 5 Ark. 525.  
*California.* — Wills v. Kempt, 17 Cal. 98; McCarty v. Beach, 10 Cal. 462.

*Georgia.* — Rutherford v. Executive Com. Baptist Conv., 9 Ga. 54.

*Illinois.* — Consolidated Rapid Tr. Co. v. O'Neill, 25 Ill. App. 313; Evans v. Edwards, 26 Ill. 279.

*Indiana.* — Hardesty v. Smith, 3 Ind. 39.

*Iowa.* — Mansfield v. Watson, 2 Iowa 111.

*Kansas.* — Northern Kan. Town Co. v. Oswald, 18 Kan. 336.

*Maine.* — Wing v. Chase, 35 Me. 260.

*Maryland.* — Key v. Knott, 9 Gill & J. 342; Ingersoll v. Martin, 58 Md. 67, 42 Am. Rep. 322.

*Massachusetts.* — Taft v. Church, 162 Mass. 527, 39 N. E. 283; Page v. Trufant, 2 Mass. 159, 3 Am. Dec. 41; Hayes v. Kyle, 8 Allen 300.

*Michigan.* — Dye v. Mann, 10 Mich. 290; Robson v. Dayton, 111 Mich. 440, 69 N. W. 834.

*Minnesota.* — Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62.

*Mississippi.* — Brewer v. Bessinger, 3 Cushm. 86.

*Nevada.* — Hyman v. Kelly, 1 Nev. 179.

*New Jersey.* — Farnum v. Burnett, 21 N. J. Eq. 87.

*New York.* — Durland v. Durland, 153 N. Y. 67, 47 N. E. 42; Dunham v. Countryman, 66 Barb. 268; Home Ins. Co. v. Watson, 59 N. Y. 390.

*North Carolina.* — Angier v. Howard, 94 N. C. 27.

*Ohio.* — Reddish v. Harrison, Wright 221.

*Oregon.* — Paddock v. Hume, 6 Or. 82.

*Pennsylvania.* — Schuylkill Nav. Co. v. Harris, 5 Watts & S. 28.

*South Carolina.* — Matlock v. Gibson, 8 Rich. L. 437.

*Vermont.* — Barrett v. Carden, 65 Vt. 431, 26 Atl. 530, 36 Am. St. Rep. 876.

*Virginia.* — Harris v. Harris, 23 Gratt. 737.

*Wisconsin.* — Carey v. Dyer, 97 Wis. 554, 73 N. W. 29.

2. Mather v. Corliss, 103 Mass. 568.

3. Shotwell v. Harrison, 22 Mich. 410. See also Nolan v. Gwyn, 16 Ala. 725.

And see further the article "FRAUDULENT CONVEYANCES."

**A Conveyance Made to Defraud Creditors Is Good as Against the Grantor and his heirs, and if they subsequently convey the same land to a grantee, who has constructive or actual notice of the prior conveyance, the burden is on such grantee in order to avoid the prior conveyance, to show that he was the purchaser for a valuable consideration.** Clapp v. Tirrell, 20 Pick. (Mass.) 247.

4. *Release Under Seal.* — Waln v. Waln, 58 N. J. L. 640, 34 Atl. 1,068.

5. Waln v. Waln, 53 N. J. L. 429, 22 Atl. 203, where the court said

**B. INSTRUMENTS NOT UNDER SEAL. — a. Rule at Common Law.** At common law where a contract is not under seal and hence does not of itself import a consideration, the burden is on the party demanding thereunder to prove a consideration,<sup>6</sup> except in the case of mercantile and negotiable paper.<sup>7</sup>

**b. Statutory Rule. — (1.) Generally.** — But by express statute in most of the states a contract in writing, duly executed, imports a consideration in the same manner as sealed instruments did at common law;<sup>8</sup> except the presumption is not a conclusive one.<sup>9</sup> Accordingly, where a want of consideration is set up against the enforcement of the instrument the burden of proof to show such want of consideration is on the party asserting that fact.<sup>10</sup>

**(2.) Writing Showing Absence of Lawful Consideration.** — This rule, however, importing a consideration in the case of written contracts,

that the rule is that want of consideration cannot be shown for the purpose of destroying the legal effect or specialty, but that it can be shown to prove that it has no legal existence.

**6. Burden of Showing Consideration.** — Greer v. Latimer, 47 S. C. 176, 25 S. E. 136.

And see Linder v. Lake, 6 Iowa 164; Dodge v. Burdell, 13 Conn. 170; Cutler v. Everett, 33 Me. 201; Denison v. Tyson, 17 Vt. 549.

**7.** See article "BILLS AND NOTES," Vol. II.

**8. Presumption of Consideration.** *Alabama.* — Cowan v. Cooper, 41 Ala. 187; *Alabama & M. R. Co. v. Sanford*, 36 Ala. 703.

*Arkansas.* — Woodruff v. McDonald, 33 Ark. 97; Richardson v. Comstock, 21 Ark. 69; Dickson v. Burks, 11 Ark. 307.

*Iowa.* — Byers v. Harris, 67 Iowa 685, 25 N. W. 879; Beatty v. Carr, 109 Iowa 183, 80 N. W. 326.

*Kansas.* — Roller v. Ott, 14 Kan. 609; Warren v. Johnson, 38 Kan. 768, 17 Pac. 592; Waynick v. Richmond, 11 Kan. 488.

*Louisiana.* — Marigny v. Union Bank, 12 Rob. 283.

*Texas.* — Howard v. Zimpelman, (Tex.), 14 S. W. 59.

Under a Florida Statute passed in 1828, a plea of want of consideration, in an action at law upon a written contract put in under oath, throws the burden of proof of consideration on the plaintiff; and such by analogy is the rule also in equity. *Southern*

*Life Ins. & Trust Co. v. Cole*, 4 Fla. 359.

**Where the Consideration for a Contract Is Stated to Be Partly in Money** and partly the performance of certain acts within a specified time, proof of gross inadequacy of the cash consideration without any showing as to the extent and value of the acts to be performed raises no presumption of fraud or collusion. *Missouri R. Ft. S. & G. R. Co. v. Miami Co.*, 12 Kan. 482.

In *Alabama* under the code a writing itself imports a consideration, and if the consideration is impeached by plea the burden is on the defendant. *Cowan v. Cooper*, 41 Ala. 187, holding also that because the law presumed a consideration, evidence by the plaintiff of the consideration was clearly redundant, and that the court was not bound to receive it, and a refusal to receive would not be ground for reversal. But a contract which is not the foundation of the suit, but is set up in defense, does not import a consideration under the *Alabama* statute. *Keep v. Kelly*, 29 Ala. 322.

**9. Presumption of Consideration Not Conclusive.** — *Byers v. Harris*, 67 Iowa 685, 25 N. W. 879. And see cases cited in previous and succeeding notes.

**10. Burden of Showing Want of Consideration.** — *Woodruff v. McDonald*, 33 Ark. 97; *Watson v. Dunlap*, 2 Cranch C. C. 14, 20 Fed. Cas. No. 17,282; *Quimby v. Morrill*, 47 Me. 470.

does not apply to a written contract which shows upon its face that it was without any lawful consideration.<sup>11</sup>

(3.) **Rule Limited to Contracts to Pay Money.** — Sometimes these statutes, providing that written contracts import a consideration, are in express terms limited to contracts for the payment of money.<sup>12</sup>

**2. Parol Evidence.** — A. **INSTRUMENTS NOT UNDER SEAL.** — a. *In General.* — **The Fact of Consideration.** — Where no consideration is expressed in a written contract, parol evidence may be given of the actual consideration in order to give effect to the instrument, provided the instrument itself is not one which the statute of frauds requires to express the consideration therefor.<sup>13</sup> And this rule

**11. Writing Showing No Lawful Consideration.** — *Bender v. Been*, 78 Iowa 283, 43 N. W. 216, 5 L. R. A. 596.

**12.** *Wulze v. Schafer*, 37 Mo. App. 551; Mo. Rev. Stat. 1879, § 663.

In *Goodwin v. Goodwin*, 65 Ill. 497, the note in suit was for money to be paid after the decease of the maker, provided his assets were sufficient, and it was urged that this was not a promissory note, and hence proof of consideration was necessary, but it was held that judgment for the interest sued for was properly given without proof of consideration, because so far as the interest was concerned, it was an instrument in writing to pay money.

**13. Proof of Consideration Where None Expressed.** — *United States*. *Laffit v. Shawcross*, 12 Fed. 519.

*Alabama.* — *Foster v. Napier*, 74 Ala. 393.

*Arkansas.* — *Fitzpatrick v. Moore*, 53 Ark. 4.

*California.* — *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786.

*Connecticut.* — *Kinney v. Whiton*, 44 Conn. 262, 26 Am. Rep. 462; *King v. Woodruff*, 23 Conn. 56, 60 Am. Dec. 625.

*Georgia.* — *Harriman v. First Baptist Church*, 63 Ga. 186, 36 Am. Rep. 117.

*Indiana.* — *Jessup v. Trout*, 77 Ind. 194; *Burk v. Mead*, (Ind.), 64 N. E. 880.

*Maine.* — *Warren v. Walker*, 23 Me. 453.

*Missouri.* — *Greer v. Nutt*, 54 Mo. App. 4; *Edwards v. Smith*, 63 Mo. App. 119 (*dictum*); *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212; *Bartlett v. Matson*, 1 Mo. App. 151.

*New York.* — *Frink v. Green*, 5 Barb. 455; *Hope v. Smith*, 3 Jones & S. 458.

*North Carolina.* — *Jones v. Sasser*, 1 Dev. & B. 452; *Springs v. Hanks*, 5 Ired. L. 30; *Jackson v. Hampton*, 8 Ired. L. 457; *Nichols v. Bell*, 1 Jones L. 32.

*Pennsylvania.* — *Bowser v. Cravener*, 56 Pa. St. 132; *Hartley v. McAnulty*, 4 Yeates 95; *Holmes' Appeal*, 79 Pa. St. 279.

*South Carolina.* — *Hatcher v. Hatcher*, McMull. Eq. 311; *Willis v. Hammond*, 41 S. C. 153, 19 S. E. 310.

*Texas.* — *Perry v. Smith*, 34 Tex. 277.

*Vermont.* — *Hall v. Mott*, *Brayt*. 81.

**The Consideration for a Guaranty** need not appear upon the face of the instrument itself, but may be shown by other evidence, and even by parol evidence. *Gregory v. Gleed*, 33 Vt. 405. See also *Dyer v. Gibson*, 16 Wis. 557.

**Ante-Nuptial Contract.** — Parol evidence is admissible to show that the consideration of an ante-nuptial contract was the waiver by the survivor of his or her right to any interest in the estate of the deceased spouse. *Moore v. Harrison*, 26 Ind. App. 408, 59 N. E. 1,077.

**Proof of the Fact of a Consideration Existing for the Execution of a Written Instrument** in which no consideration is expressed, but may be implied, does not contradict, add to, or vary the written contract, but tends to support it according to its legitimate and proper interpretation. See *Goward v. Waters*, 98 Mass. 596.

applies with equal force to bills and notes,<sup>14</sup> releases not under seal,<sup>15</sup> and all kinds of simple contracts.

**Want of Consideration.**—And the rule permitting parol evidence as to the consideration of the instrument also extends to evidence showing a want of consideration,<sup>16</sup> or that there was no consideration whatever.<sup>17</sup>

b. *Contemporaneous Oral Agreement Inducing Writing.*—So, also, the parol evidence rule has no application to evidence offered for the purpose of showing a contemporaneous oral agreement which induced the execution of the written contract,<sup>18</sup> although it may in

14. *Bennett v. Solomon*, 6 Cal. 134. See more fully on this question the article "BILLS AND NOTES," Vol. II, p. 421.

In *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325, the note in suit expressed the consideration as being "founding a college;" and it was held that the plaintiff might show by parol evidence that the plaintiff undertook to and did perform acts and services upon the invitation or request of the defendant for the purpose of showing a consideration for the note.

15. *Scott v. Bennett*, 6 Ill. 646. See also *Fry v. Prewett*, 56 Miss. 783.

16. **Parol Evidence of Want of Consideration.**—*Colorado.*—*Stewart v. Kendel*, 15 Colo. 539, 25 Pac. 990.

*Iowa.*—*Scott v. Sweet*, 2 Greene 224; *First Nat. Bank v. Huford*, 29 Iowa 579.

*Massachusetts.*—*Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150.

*Michigan.*—*Jennison v. Stone*, 33 Mich. 99; *Kelly v. Guy*, 116 Mich. 43, 74 N. W. 291.

*New Jersey.*—*Shotwell v. Shotwell*, 24 N. J. Eq. 378.

In *Iowa* a statute expressly provides that want or failure in whole or in part of the consideration of a written contract may be shown by parol evidence. *Beatty v. Carr*, 109 Iowa 183, 80 N. W. 326.

**Commercial Paper.**—Want of consideration is a perfect defense between the original parties to commercial paper, as it is to any other contract, and parol evidence is competent to prove a want of consideration. *Remington v. Detroit Dental Mfg. Co.*, 101 Wis. 307, 77 N. W.

178. See also *Broadwell v. Sander-son*, 29 Ill. App. 384. And see article "BILLS AND NOTES," Vol. II.

**An Indorser in Blank of a Promissory Note** may prove by parol evidence that his indorsement was without consideration. *Farmers' Sav. Bank v. Hansmann*, 114 Iowa 49, 86 N. W. 31.

17. **Parol Evidence of No Consideration.**—*Alabama.*—*Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665. *Arkansas.*—*Waymack v. Heilman*, 26 Ark. 445.

*Illinois.*—*Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Gage v. Lewis*, 68 Ill. 604.

*Indiana.*—*Collier v. Mahan*, 21 Ind. 110.

*Massachusetts.*—*Wallis v. Wallis*, 4 Mass. 135.

*Missouri.*—*Brown v. Brown*, 106 Mo. 611, 17 N. W. 640.

*Nebraska.*—*Luce v. Foster*, 42 Neb. 818, 60 N. W. 1,027.

*New Jersey.*—*Shotwell v. Shotwell*, 24 N. J. Eq. 378.

*New York.*—*Baird v. Baird*, 145 N. Y. 659, 40 N. E. 222, 28 L. R. A. 375.

*Ohio.*—*Carter v. Day*, 59 Ohio St. 96, 51 N. E. 967, 69 Am. St. Rep. 757.

*South Carolina.*—*Foster v. Calhoun*, Dudley L. 75.

18. **Contemporaneous Oral Agreement Inducing Writing.**—*Campbell v. McClenachan*, 6 Serg. & R., (Pa.), 171; *Ackerman v. Bunden*, 1 White & W. (Tex.) 767; *Bonney v. Morrill*, 57 Me. 368; *Quinn v. Roath*, 37 Conn. 16; *Cole v. Hadley*, 162 Mass. 579, 39 N. E. 279; *Wanner v. Landis*, 137 Pa. St. 61, 20 Atl. 950.

**Evidence of an Oral Agreement to Employ a Person Injured, which**

fact contradict the written instrument.<sup>19</sup>

c. *Written Instrument as Consideration for Contemporaneous Oral Agreement.* — So, also, where a written contract is executed for a consideration expressed, a party thereto is not precluded, in an action for breach of a parol agreement, from showing by parol that the agreement evidenced by the written instrument was the consideration for the contemporaneous parol agreement.<sup>20</sup>

d. *The consideration for a unilateral written promise* to pay for specified articles, in a case not within the statute of frauds, may be shown by parol.<sup>21</sup>

B. INSTRUMENTS UNDER SEAL, DEEDS, ETC. — a. *The Fact of Consideration.* — So, also, where a deed<sup>22</sup> or bond for title<sup>23</sup> to land expresses no consideration, it has been held permissible to show the consideration by parol evidence.

b. *Want of Consideration.* — As already stated, the rule at common law as to an instrument under seal was that the presumption of consideration was conclusive. But under the modern practice the fact that the instrument is under seal does not preclude inquiry into the existence of the consideration,<sup>24</sup> and accordingly parol evidence is admissible to show a want of consideration.<sup>25</sup> Thus, the

the latter alleges was made as a part of the consideration for his executing a release of all claims, growing out of a personal injury suffered by him while in the other party's employ, is not precluded by the fact that the release purports to be in consideration of a stated sum of money, nor does such evidence contradict the operative words of release. "The release is of rights given to the plaintiff by the law in consequence of the injury to him. Evidence went to prove new rights arising, not out of the injury, but out of a contract contemporaneous with the release." *Galvin v. Boston Elec. R. Co.*, 180 Mass. 587, 62 N. E. 961.

19. *Ferguson v. Rafferty*, 128 Pa. St. 327, 18 Atl. 484, 6 L. R. A. 33.

20. *Weaver v. Wood*, 9 Pa. St. 220.

21. *Horn v. Hansen*, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617. See also *Unger v. Jacobs*, 7 Hun (N. Y.) 220.

22. *Deeds.* — *Peacock v. Monk*, 1 Ves. Sr. 190; *De Merle v. Mathews*, 26 Cal. 455; *Conklin v. Hancock*, 67 Ohio St. 455, 66 N. E. 518; *Wood v. Beach*, 7 Vt. 522; *White v. Weeks*, 1 Pa. 486; *Davenport v. Mason*, 15 Mass. 85; *Powell v. Walker*, 24 Tex. Civ. App. 312, 58 S. W. 838; *Jackson*

*v. Fish*, 10 Johns. (N. Y.) 456, where the court said: "When the usual clause in relation to the consideration is altogether omitted, we think that the agreement of the parties in this respect may be shown by parol proof without violating any known rule of law."

23. *Bond for Title.* — *Wheeler v. Friend*, 22 Tex. 683. See also *Bowser v. Cravener*, 56 Pa. St. 132.

24. *Want of Consideration for Sealed Instrument.* — *Counts v. Harlan*, 78 Ala. 551; *Duttera v. Babylon*, 83 Md. 536, 35 Atl. 64; *Mansfield v. Watson*, 2 Iowa 111; *Linder v. Lake*, 6 Iowa 164; *Pray v. Rhodes*, 42 Minn. 93, 43 N. W. 838; *Averill v. Loucks*, 6 Barb. (N. Y.) 19; *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106.

25. In *Bell v. Utley*, 17 Mich. 508, the defendants had sold to the plaintiff all their logs in the custody of a boom company, "supposed to be one million feet," for a specified amount, which was received as agreed. Subsequently the plaintiff obtained from the defendants a paper in the form of a receipted bill of sale for one million feet at a certain price per thousand, for logs in the possession of the boom company, having thereunder a receipt for the

fact that there was no consideration for a deed may be shown;<sup>26</sup> but not by the grantor to defeat the operation of the deed.<sup>27</sup>

So, if a mortgage was executed without consideration, the mortgagor has the right to show by parol evidence that fact, notwithstanding that the mortgage itself recites a consideration.<sup>28</sup>

amount in full payment, guaranteeing title and directing the boom company to deliver the logs. And it was held in an action for an alleged deficiency in the quantity of logs, that parol evidence be properly received to show that the bill of sale was given without any new consideration of agreement, and was intended merely to aid the plaintiff in retaining possession of the logs.

In Missouri a statute provides that whenever a specialty or other written contract for the payment of money, the delivery of property or for the performance of a duty shall be the foundation of an action or defense in whole or in part, or shall be given in evidence in any court without being pleaded, the proper party may prove want or failure of the consideration in whole or in part of such specialty or other written contract. Rev. Stat. 1889, §645, where the fact of want or failure of consideration is asserted, the party asserting that fact has the burden of proof. *Holmes v. Farris*, (Mo. App.), 71 S. W. 116.

**26. Want of Consideration for Deed.**—*Renshaw v. First Nat. Bank*, (Tenn.), 63 S. W. 195; *Ewing v. Wilson*, 132 Ind. 223, 31 N. E. 64, 19 L. R. A. 767; *Kerr v. Calvit*, Walk. (Miss.) 115, 12 Am. Dec. 537; *Groesbeck v. Seeley*, 13 Mich. 329; *Lyford v. Thurston*, 16 N. H. 399.

*Compare McGee v. Allison*, 94 Iowa 527, 63 N. W. 322.

**27. Grantor Cannot Show Want of Consideration.**—*United States. Powell v. Monson & B. Mfg. Co.*, 3 Mason 347.

*Alabama.*—*Williams v. Higgins*, 69 Ala. 517.

*California.*—*Coles v. Soulsby*, 21 Cal. 47; *Feeney v. Howard*, 79 Cal. 525, 21 Pac. 984, 12 Am. St. Rep. 162, 4 L. R. A. 826.

*Missouri.*—*Bobb v. Bobb*, (Mo.), 4 S. W. 511.

*Oregon.*—*Finlayson v. Finlayson*,

17 Or. 347, 21 Pac. 57, 11 Am. St. Rep. 836, 3 L. R. A. 801.

*Texas.*—*Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825.

*Hebbard v. Haughian*, 70 N. Y. 54. *Contra.*—In an action by a grantor in a deed under seal, properly acknowledged and delivered, and reciting an adequate consideration and its receipt by the grantor, brought for the purpose of setting aside the deed, the grantor may give parol evidence to deny such consideration *in toto* for the purpose of rendering it void. *Eckler v. Alden*, 125 Mich. 215, 84 N. W. 141.

**28.** *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106.

**Although a Mortgage is Under Seal and Recites a Specific Consideration**, the mortgage is not an executed instrument such as a deed of real estate, but is an executory contract, so that the seal is only presumptive evidence, which may be rebutted by showing that it was without consideration. *Baird v. Baird*, 81 Hun (N. Y.) 300, 30 N. Y. Supp. 785. See also *Parkhurst v. Higgins*, 38 Hun (N. Y.) 113; *Davis v. Bechstein*, 69 N. Y. 440, 25 Am. Rep. 218.

In *Grindrod v. Wolf*, 38 Kan. 292, 16 Pac. 691, where a wife had executed to her husband an instrument in writing which purported to be a mortgage given for the purchase money of land, it was held proper to show that the instrument was in fact given without any consideration, and was intended simply to protect the interest which the husband might have in such land after the wife's death.

In *Hampden Cotton Mills v. Payson*, 130 Mass. 88, a mortgage of land provided that if the mortgagor should pay the mortgagee a certain sum of money in a time specified, the mortgage as well as the note and the accrued interest should be void. The note referred to made no men-

**3. Circumstantial Evidence.** — On an issue as to whether any real consideration for a written instrument passed between the parties, circumstantial evidence may be resorted to,<sup>29</sup> such as the relative condition and circumstances of the parties, their means and revenues, their subsequent conduct,<sup>30</sup> the influence of one over the other, the fact that the price was nominal, and generally such matters of fact as conduce to establish the charge of a want of consideration.<sup>31</sup>

## II. NATURE AND EXTENT OF CONSIDERATION.

**1. In General.** — Where the instrument does not correctly or accurately state the true consideration, it may be shown by parol evidence;<sup>32</sup> otherwise, however, where the consideration is expressed in such unmistakable language that parol evidence is not necessary to understand it.<sup>33</sup>

**2. Instrument not Expressing Entire Consideration.** — So, also, where it is obvious on the face of the instrument that the consideration as expressed is not the whole of the consideration agreed upon between the parties, parol evidence is admissible to show what the consideration is;<sup>34</sup> the only qualification of the rule being that the consideration so established shall not be inconsistent with that ex-

tion of interest. The mortgagor under threat of foreclosure paid both principal and interest; and it was held in an action by him to recover the interest so paid that the mortgagor might show by parol evidence that the note was the only debt secured by the mortgage. *Compare Farnum v. Burnett*, 21 N. J. Eq. 87, holding that a bond or mortgage or any instrument under seal implies a consideration, and none need be proved, and that the courts will not allow the consideration to be inquired into for the purpose of declaring the instrument void for want of consideration, although such inquiry may be permitted for the purpose of retaining what is due upon it.

**29.** On an issue as to whether or not a written instrument was without consideration, the fact that the identical money paid was used in another and contemporaneous transaction between the same parties is pertinent. *Montgomery v. Chaney*, 13 La. Ann. 207.

On an issue as to what consideration there was for a reconveyance from a grantee to his grantor, testimony of the latter that he was to "have back all the notes that were

executed for the land and the mortgages were to be satisfied" is not objectionable as being a mere conclusion. *Lozier v. Graves*, 91 Iowa 482, 59 N. W. 285.

**30. Where It Is in Issue Whether or Not a Mortgage Was Without Consideration,** it is proper to give evidence of the conduct and declarations of the parties forming part of the transactions between them and of the admissions of the mortgagee, he being dead. *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106.

**31.** *Montgomery v. Chaney*, 13 La. Ann. 207.

**32. Consideration Incorrectly Expressed.** — *Powell v. Walker*, 24 Tex. Civ. App. 312, 58 S. W. 838; *Wade v. Bent*, 24 Ky. L. Rep. 1,294, 71 S. W. 444; *Boren v. Boren*, (Tex. Civ. App.), 68 S. W. 184.

**A Discrepancy Between the Amount of the Debt and the Amount Stated** in the mortgage securing the debt may be explained by parol evidence. *Gunn v. Jones*, 67 Ga. 398.

**33.** *Maigley v. Hauer*, 7 Johns. (N. Y.) 341.

**34. Entire Consideration Not Expressed.** — *Cunningham v. Banta*, 2 Ind. 604; *Gulf C. & S. F. R. Co. v.*



pressed in the instrument.<sup>35</sup>

**3. Instrument Expressing Consideration in Doubtful Terms.** Again, where the consideration as stated is expressed in doubtful or ambiguous terms,<sup>36</sup> or is not particularly expressed,<sup>37</sup> parol evidence is admissible to show the true consideration.

**4. Contractual Consideration.** — But the rule permitting parol evidence of another consideration does not apply where the consideration as expressed is in fact a contract, and not a mere statement of fact,<sup>38</sup> as, for instance, where the consideration as expressed is an

Jones, 82 Tex. 156, 17 S. W. 534; Whitman v. Revels, 39 Ala. 121; Street v. Robertson, (Tex. Civ. App.), 66 S. W. 1,120.

**35.** Taylor v. Merrill, 64 Tex. 494. And see *infra* this section, CONSIDERATION DIFFERING IN AMOUNT OR QUANTITY; CONSIDERATION DIFFERING IN CHARACTER OR SPECIES.

**36.** Consideration Stated in Doubtful Terms. — Parol Evidence Admissible. — Edwards v. Smith, 63 Mo. 119; Willis v. Hammond, 41 S. C. 153, 19 S. E. 310; Beemer v. Packard, 92 Hun 546, 38 N. Y. Supp. 1,045; Mills v. Dow, 133 U. S. 423; Burk v. Mead, (Ind.), 64 N. E. 880.

Where several instruments constitute parts of one transaction and were to be considered together as such, and each instrument taken separately clearly expressed the consideration for which it was made, but when taken together as parts of the same transaction it did not clearly appear what the consideration was, parol evidence is admissible to show the real consideration. First Nat. Bank v. Snyder, 79 Iowa 191, 44 N. W. 356.

In Leonard v. Vredenburg, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317, a third person had applied to the plaintiff for goods on credit, which the latter refused without security, whereupon the applicant drew a promissory note under which the defendant wrote, "I guarantee the above," whereupon the goods were delivered. It was held that although there was no necessity for any distinct consideration passing directly between the plaintiff and defendant, because being all one entire transaction, the delivery of the goods to the principal debtor supported the promise of the defendant as well as

the promise of the plaintiff; that the words "value received" in the note were sufficient evidence of a consideration on the face of the writing, but that if any doubt existed parol evidence was admissible to show the consideration or that it was one original and entire transaction.

**37.** Consideration Not Particularly Expressed. — Cooper v. Bumpass, 1 White & W. (Tex.) 246; Davenport v. Mason, 15 Mass. 85; Wheeler v. Friend, 22 Tex. 683; Galway's Appeal, 34 Pa. St. 242 (where the instrument recited "for value received.") Boynton v. Twitty, 53 Ga. 214 ("when received"); Sullivan v. Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

Where a deed expresses no other consideration, except by the words "for good consideration," the jury, without any direct evidence on the subject, may, from other circumstances proved, presume a legal consideration. Stevens v. Griffith, 3 Vt. 448.

**Where a Deed Conveys or Assigns Property "for Value Received"** such recital is not inconsistent with, nor does it exclude, parol evidence that the consideration for which the deed was made was executory in its character. Sullivan v. Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

**38.** Contractual Consideration. *Alabama.* — Pique v. Arendale, 71 Ala. 91; Mead v. Steger, 5 Port. 498. *Indiana.* — Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943; Pickett v. Greene, 120 Ind. 584, 22 N. E. 737; Hilgeman v. Sholl, 22 Ind. App. 86, 51 N. E. 728; Henry v. Henry, 11 Ind. 236, 71 Am. Dec. 354.

*Kansas.* — Miller v. Edgerton, 38

Kan. 36, 15 Pac. 894; *Milch v. Armour Packing Co.*, 60 Kan. 229, 56 Pac. 1.

*Maine.*—*Hilton v. Homans*, 23 Me. 136.

*Massachusetts.*—*Stevens v. Wiley*, 165 Mass. 402, 43 N. E. 177.

*Mississippi.*—*Baum v. Lynn*, 72 Miss. 932, 18 So. 428, 30 L. R. A. 441.

*Missouri.*—*Davis v. Gann*, 63 Mo. App. 425; *Jackson v. Chicago & A. R. Co.*, 54 Mo. App. 636.

*Texas.*—*Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843.

*Wisconsin.*—*Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497.

**Release.**—In *St. Louis & S. F. R. Co. v. Dearborn*, 60 Fed. 880, 9 C. C. A. 286, an action by plaintiff against the defendant railroad company for personal injuries, to which the defendant pleaded a release by the plaintiff from liability which recited the consideration as being the sum of \$1.00 and the re-employment of the plaintiff by the defendant for such time as might be satisfactory to the railroad company; and it was held that the plaintiff could not, under his claim that the release was wholly without consideration, show by parol evidence that the railroad company had in addition to the promise of re-employment and the payment of \$1.00 promised payment for time lost on account of his injuries and the reimbursement for all expenses for medical care and attendance.

**Dissolution of Co-partnership.**—In *Cocks v. Barker*, 49 N. Y. 107, it was held that a recital in a bond given by one co-partner to another, upon the dissolution of the co-partnership, expressing as the consideration therefor the transfer and delivery by the obligee to his former partner all the assets of the firm, was a substantive part of the agreement, and that parol evidence was not admissible to show that the bond was given really upon the agreement of the obligee to deliver over to his partner the books of the firm.

**Sale of Medical Practice.**—In *Pickett v. Greene*, 120 Ind. 584, 22 N. E. 737, a written contract was executed by the terms of which Pickett,

in consideration of the after expressed covenants of Greene, sold his office furniture and the good will of his medical practice to Greene, and Greene in consideration of the sale and Pickett's covenants, agreed to pay Pickett a certain sum of money. Pickett set up in practice in violation of the contract, and in answer to Greene's complaint for injunction, sought to show that the real consideration for his covenants was Greene's undertaking to purchase certain real estate at a certain price and that Greene had repudiated his agreement, but the court refused to allow this proof, holding the stipulation of consideration to be contractual.

**Lease.**—In *Diven v. Johnson*, 117 Ind. 512, 20 N. E. 428, 3 L. R. A. 308, the contract in question was a lease of real estate complete within itself and defining fully and completely as a consideration for the lease and the use of the land, the tenant agreed to do and perform certain things and to deliver to the landlord a stipulated share of the crops; and it was held that the tenant could not prove by parol evidence that at the date of the execution of the written contract and as a part of the consideration therefor, and in addition to the consideration stated therein, the landlord had orally agreed to ditch the land for drainage purposes.

**A Recital in a Deed from a Husband to a Wife** that the consideration was paid out of her separate funds, and that the conveyance was for her separate use and benefit, is a contractual recital, and hence parol evidence is inadmissible to show a different consideration. *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825.

In covenant it is not competent for the defendant without any allegation of fraud or mistake to aver a different consideration for the covenant than that expressed therein. *Logan Turnpike Road Co. v. Pettit*, 2 B. Mon. (Ky.) 428.

**A Recital in a Deed** stating the consideration therefor as being in part an agreement by the grantor to pay to the grantee the annual rent and a portion of the crops raised on the land, and designating the time and manner of payment, is contractual in

agreement or covenant to pay a certain sum of money;<sup>39</sup> with this qualification, however, that even though the consideration as expressed be a contractual one, parol evidence is admissible to show the real consideration where it is apparent on the face of the instrument that it was executed in pursuance of a more comprehensive agreement which the parties did not undertake to express in writing.<sup>40</sup>

### 5. Instrument Purporting to Express Entire Consideration. — A.

its nature, so that parol evidence cannot be received to show that the deed was executed upon a different consideration. *Teague v. Teague*, (Tex. Civ. App.), 71 S. W. 555.

**Where the Consideration of a Deed Is Expressed as Being in Part the Assumption by the Grantee of Certain Specified Debts**, parol evidence is not admissible to show that in addition to the consideration specified the grantee had assumed to pay other debts. *Walter v. Dearing*, (Tex. Civ. App.), 65 S. W. 380.

In *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, it was held that a release executed by the plaintiff to the defendant, in consideration of the defendant's agreement to pay for medical care and attendance and expenses, and the amount therein mentioned as a cash payment expressed a contractual consideration which could not be contradicted by parol evidence.

**39. Promise to Pay Money.**—*Delmater v. Bush*, 45 How. Pr. (N. Y.) 382; *Beach v. Steele*, 12 N. H. 82; *Emmett v. Penoyer*, 76 Hun 551, 28 N. Y. Supp. 234.

**A Written Contract Containing an Unqualified Promise to make a payment of a certain sum of money cannot be varied by parol evidence of a promise to pay a less sum.** It is not competent to vary a contract by proving another and different contract by parol. *McLeod v. Hunt*, 128 Mich. 124, 87 N. W. 101.

**Where a Bond and Mortgage Contains an Absolute Promise to Pay to the obligee a certain sum of money, it cannot be shown in the absence of any suggestion of fraud, mistake or accident that the promise was not an absolute promise to pay a definite sum, or that it was agreed that the**

amount should include whatever should be found to be due on a settlement. *Moffitt v. Maness*, 102 N. C. 457, 9 S. E. 399. "What the defendants seek to prove," said the court, "is not something consistent with the terms of the bond, but is in conflict with the very matter which the bond itself determined."

**Sale to Pay Debts.**—In *Reisterer v. Carpenter*, 124 Ind. 30, 24 N. E. 371, certain personal property was sold by a written contract in which the purchaser agreed to pay therefor by taking up and canceling certain specified debts of the seller; and it was held that in the absence of any charge of fraud or mutual mistake the seller was not to be permitted to show that the consideration for the sale was other than that expressed in the written instrument.

Where a bill of sale recites as the consideration a sum in hand paid, and also contains a covenant on the part of the vendee to pay the partnership debts of himself and the vendor, it is not permissible to prove by parol evidence for the purpose of enforcing such parol promise that the vendee also, in consideration of the sale, promised by parol to pay individual debts of the vendor. *Sayre v. Burdick*, 47 Minn. 367, 50 N. W. 245.

**Bond for Title.**—In *Hilton v. Homans*, 23 Me. 136, the plaintiff had executed a written agreement to transfer to the defendant his interest in a parcel of land for a specified consideration, and it was held that the plaintiff could not show by parol evidence a promise by the defendant, before or at the time of making the contract, to pay an additional consideration.

**40. Street v. Robertson**, (Tex. Civ. App.), 66 S. W. 1,120.

**PAROL EVIDENCE OF CONSIDERATION DIFFERING IN QUANTITY OR AMOUNT.** — a. *In General.* — Formerly it was the rule generally that where the consideration was expressly stated in the instrument as being the entire consideration, and none other was referred to in general terms, the consideration so expressed was regarded as the whole consideration, and precluded parol evidence of a consideration differing in amount or quantity from that expressed;<sup>41</sup> but that where other considerations were referred to in general terms, then another consideration besides that which was expressed might be proved by parol evidence in order to give validity to the deed.<sup>42</sup>

b. *Fraud or Mistake.* — And there are still some courts holding to the effect that where an instrument plainly purports to set forth the entire consideration, parol evidence is not admissible to show a consideration not mentioned or referred to in it,<sup>43</sup> unless fraud or mistake is alleged,<sup>44</sup> and the purpose of showing another considera-

**41. Consideration Differing in Amount Not Provable.** — *Jones v. Sasser*, 1 Dev. & B. (N. C.) 452; *Hartley v. McAnulty*, 4 Yeates (Pa.) 95; *Miller v. Bagwell*, 3 McCord L. (S. C.) 562; *Garrett v. Stuart*, 1 McCord L. (S. C.) 514; *Schermerhorn v. Vanderheyden*, 1 Johns. (N. Y.) 139, 3 Am. Dec. 304 (formerly the leading case to this effect); *Howes v. Baker*, 3 Johns. (N. Y.) 506, 3 Am. Dec. 526; *Maigley v. Hauer*, 7 Johns. (N. Y.) 341.

Parol evidence that the sum specified in the condition of the mortgage exceeds the amount of the debt justly due to the mortgagee is not admissible in law. If a larger sum than is really due is inserted, the mistake can be corrected only in equity. *Patchin v. Pierce*, 12 Wend. (N. Y.) 61.

The words in a trust deed "to pay, satisfy and detain to themselves [a sum named] together with all costs which shall arise against them for their being security for a [person named] for several different sums of money, also being common and special bail in several suits" do not extend a securityship entered into subsequent to the execution of the deed, and parol evidence is not admissible to prove that the parties intended the deed to extend to subsequent securityship. *Miller v. Lucas*, 1 Murph. (N. C.) 228.

**42.** *Chesson v. Pettijohn*, 6 Ired. L. (N. C.) 121; *Hynes v. Campbell*, 6 T. B. Mon. (Ky.) 286.

**43.** *Freeman v. Freeman*, 68 Mich. 28, 35 N. W. 897; *Parker v. Morrill*, 98 N. C. 232, 3 S. E. 511; *Looney v. Rankin*, 15 Or. 617, 16 Pac. 660.

In Louisiana if the consideration be expressed in the written instrument, nothing can be added to the writing. *Lafitt v. Shawcross*, 12 Fed. 519; *Formento v. Robert*, 27 La. Ann. 489; *Berthole v. Mace*, 5 Mart. (O. S.) (La.) 576.

Under the Louisiana Code where a code of re-transfer of property expressly states that a certain sum was to be paid in consideration of the rescission of the sale, parol evidence cannot be received to show a different consideration. *Cook v. Parkarson*, 16 La. 129.

**Inquiry by One Not Party to Instrument.** — Under the Louisiana rule the true consideration of a contract may be questioned by one who was not a party to it, and who has an interest in showing that the consideration expressed was not a true one; and if he offered only as a witness one who was a party to the contract to make proof of such consideration, the objection that this witness was a party goes to his credibility and not to his competency. *Smith v. Conrad*, 15 La. Ann. 579.

**44.** Parol evidence is admissible to show that the true consideration of the deed was greater than the amount stated, and that the amount stated was inserted by mistake. *Boren v. Boren*, (Tex. Civ. App.) 68 S. W. 184.

tion is to rebut the charge of fraud or mistake.<sup>45</sup>

c. *Additional Consideration Consistent with That Expressed.* The former strict doctrine just stated, however, long ago underwent a marked change, and the doctrine was adopted allowing a much wider latitude of inquiry into the consideration of written instruments,<sup>46</sup> and the rule is now generally recognized that the true or

In *Alabama* it is a settled law that where a deed is attacked by creditors for fraud, actual or constructive, parol evidence is not admissible to show a consideration different from that expressed in the deed. *Potter v. Gracie*, 58 Ala. 303, 29 Am. Rep. 748, where the deed in question recited divers good considerations and for kindness the grantor felt towards the grantee, the court holding that the grantee could not support the deed as against the attacking creditors by evidence that the consideration was in fact a pre-existing debt.

In *Hildreth v. Sands*, 2 Johns. Ch. (N. Y.) 35, Chancellor Kent held that where a deed was attacked for fraud, the party was bound by the consideration alleged. In that case the consideration named was \$4500. It was held inadequate, and that the grantee could not be permitted to prove any additional, at least none of another kind.

45. In *Henderson v. Dodd*, 1 Bail. Eq. (S. C.) 138, as in *Hinde v. Longworth*, 11 Wheat. (U. S.) 198, 6 L. ed. 454, evidence of the relationship of the parties and of the actual consideration was admitted, not to vary the consideration expressed, but to rebut any inference of fraud upon a subsequent creditor.

Where a bill of sale expressing a money consideration is attacked as being in fraud of the vendor's creditors, parol evidence is admissible that the consideration was partly in money and partly in property. *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435, so holding under the rule that additional and consistent considerations may be shown.

In *Cunningham v. Dwyer*, 23 Md. 219, debtor having made a deed to his mother which was assailed for fraud, the consideration expressed therein being \$5.00, evidence was offered to show an adequate and pecuniary consideration.

On exception to this rule as being inadmissible it was held that, considered merely as a fact, the amount of the consideration expressed would be evidence of fraud, but considered as a pecuniary consideration it established the character of the deed as belonging to a class which would be preferred to volunteers, and the amount not being conclusive upon the grantee or those claiming under her, it was competent to prove a larger consideration of the same kind, but not a different consideration; and that for this purpose it was competent to prove the actual amount received by the grantor from the grantee in advance of money which he had agreed to secure by deed, and to secure which the deed in question was executed in pursuance of that agreement.

In *Hitz v. National Met. Bank*, 111 U. S. 722, where the trust deed sought to be set aside by a judgment creditor expressed the nominal consideration of \$1.00, it was held that the *cestui que trust* might show by parol evidence that a valuable consideration in fact passed from him to the grantor under the deed. See also *Mattoon v. McGrew*, 112 U. S. 713.

46. In *First Nat. Bank v. Flynn*, 117 Iowa 493, 91 N. W. 784, an action to recover rent alleged to be due under a lease and to enforce a landlord's lien therefor, it was held that parol evidence was properly admitted to show that the rent reserved in the lease exceeded the real rental value of the premises, but included additional indebtedness for arrearages of rent.

In an action on a note alleged to have been executed in payment of an interest in co-partnership property, oral evidence that at the time of the execution of the note the parties did not have in their possession the necessary data to effect a settle-

ment of their partnership affairs, but agreed to make such settlement at some future date, and that the payee of the note agreed to pay the maker what was found to be due upon such settlement, is not inadmissible as varying the terms of the note. *Peel v. Giessen*, 21 Tex. Civ. App. 334, 51 S. W. 44.

A bill of sale of a reversionary interest in funds belonging to an estate, which recites a consideration of \$1.00, does not prevent parol evidence that the real consideration was that the assignee should hold the funds on the same terms and for the same purposes as an executor had previously done. *Wolf v. Haslach*, (Neb.) 91 N. W. 283.

In *Pickman v. Trinity Church*, 123 Mass. 1, 25 Am. Rep. 1, an action for money had and received, to recover moneys alleged to have been paid by the plaintiff to the defendant by mistake in the purchase of certain lands, the plaintiff offered to prove that he agreed in writing to buy and the defendant to sell a certain estate lying between land which the defendant had previously sold to other parties and lands of a third party at a certain price per square foot; that the defendant caused the land to be surveyed, and the plaintiff, believing the survey to be correct, paid the price agreed for the number of square feet ascertained; that the deed to him purported to give with accuracy the length of all the lines with the contents of the lot; that one of the lines was in fact shorter and therefore the contents of the estate less than stated in the deed, and it was held that the evidence should have been admitted.

In *Worthington v. Bicknell*, 2 Har. & J. (Md.) 58, parol evidence was admitted to prove that a deed secured by a mortgage was continental money, although expressed to be a specie debt.

In the case of a mortgage executed by a married woman on her separate estate to secure a pre-existing debt of her husband, it is permissible to show by parol evidence that the consideration of the note was money loaned for the purpose of improving her individual property which was used for that purpose. *Caryl v. Williams*, 7 Lans. (N. Y.) 416.

In *Hill v. Whidden*, 158 Mass. 267, 33 N. E. 526, an action on promissory notes, it was held competent for the plaintiff to show that the notes were given as part of the consideration for a release to the defendant of certain claims in addition to the consideration mentioned therein.

In *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218, an action to restrain the defendant from using or allowing to be used for the sale of intoxicating liquors, premises which the plaintiff had conveyed to the defendant, it was held that the plaintiff might show by parol evidence that a part of the consideration of the sale was an agreement on the part of the defendant that he would not use the premises for the purposes sought to be retained. The court said: "It will be remembered that it is not the office of a deed to express the terms of the contract of sale, but to pass the title pursuant to the contract. Therefore a parol agreement, being a part of the consideration for this sale, restricting the use of the premises in one particular for a limited period, is not merged in the deed, and does not qualify or in any way affect the title to the land; and the admission of parol evidence to prove such an agreement is no infringement of the rule that parol evidence is not admissible to contradict, vary or explain a written instrument."

**Right of Way.**—In *Puttman v. Haltey*, 24 Iowa 425, it was held that although the deed made no mention of that fact, the grantee thereunder might show by parol evidence that the consideration of the conveyance was paid not only for land conveyed, but also for a right of way connecting the same with a certain public road.

It is proper both at law and in equity to receive parol evidence as to the actual consideration for a confession of judgment on bond and warranty of attorney. *Averill v. Loucks*, 6 Barb. (N. Y.) 19; *Wolf v. Kohr*, 133 Pa. St. 13, 19 Atl. 284.

In *Earle v. Crane*, 6 Duer (N. Y.) 564, it was held that the fact of execution of a bill of sale expressing a pecuniary consideration, and a delivery of it with the property, did

real consideration of the instrument may be shown by either party by any competent evidence, although the consideration so shown may be different in amount or quantity from the consideration expressed,<sup>47</sup> provided it is not inconsistent with it.<sup>48</sup>

not warrant the exclusion of parol evidence to show that such a consideration was not wholly pecuniary, but consisted in fact of a special agreement, in which the plaintiff was interested, and its non-performance to his damage.

In *Dakin v. Walton*, 85 Hun 561, 33 N. Y. Supp. 203, an action to recover for goods sold and delivered by the plaintiff's testator to the defendant in the former's lifetime, in which it appeared also that the testator's book-keeper and manager was also dead, it was held that the defendant should be allowed to show a conversation had by him with the testator's manager and book-keeper in regard to the purchase of the goods in question, and before their delivery, for the purpose of showing that a price for the goods was agreed upon between them, less than the price entered on the testator's books.

47. *United States*.—*Diggins v. Doherty*, 4 Mack. 172.

*Alabama*.—*Dixon v. Barclay*, 22 Ala. 370; *Thomas v. Barker*, 37 Ala. 392; *Mobile & M. R. Co. v. Wilkinson*, 72 Ala. 286; *Cowan v. Cooper*, 41 Ala. 187.

*Colorado*.—*Mulvaney v. Gross*, 1 Colo. App. 112, 27 Pac. 878.

*Dakota*.—*Fraley v. Bentley*, 1 Dak. 24, 40 N. W. 506.

*Florida*.—*Sullivan v. Lear*, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388.

*Indiana*.—*Citizens St. R. Co. v. Heath*, (Ind. App.), 62 N. E. 107; *Stewart v. Chicago R. Co.*, 140 Ind. 55, 40 N. E. 67.

*Kentucky*.—*Engleman v. Craig*, 2 Bush 424; *Gordon v. Gordon*, 1 Met. 285.

*Maine*.—*Brown v. Lunt*, 37 Me. 423.

*Massachusetts*.—*Clark v. Dashon*, 12 Cush. 589.

*Minnesota*.—*Jordan v. White*, 20 Minn. 91; *Jensen v. Crosby*, 80 Minn. 158, 83 N. W. 43; *Dole v. Wilson*, 20 Minn. 356; *Bolles v. Sachs*, 37 Minn. 318, 33 N. W. 862.

*Mississippi*.—*Baum v. Lynn*, 72

Miss. 932, 18 So. 428, 30 L. R. A. 441.

*Missouri*.—*Harrington v. Kansas City R. Co.*, 60 Mo. App. 223; *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212.

*New Jersey*.—*Hattersley v. Bissett*, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532.

*New York*.—*Bowen v. Bell*, 20 Johns. 338.

*Ohio*.—*Groves v. Groves*, 65 Ohio St. 442, 62 N. E. 1,044.

*Oregon*.—*Scoggin v. Schloath*, 15 Or. 380, 15 Pac. 635.

*Pennsylvania*.—*Jack v. Dougherty*, 3 Watts 151; *Strawbridge v. Cartledge*, 7 Watts & S. 394.

*Rhode Island*.—*Wood v. Moriarity*, 15 R. I. 518, 9 Atl. 427.

*South Carolina*.—*Curry v. Lyles*, 2 Hill L. 404; *Brice v. Miller*, 35 S. C. 537, 15 S. E. 272.

*Texas*.—*Taylor v. Merrill*, 64 Tex. 494; *Missouri, K. & T. R. Co. v. Doss*, (Tex. Civ. App.), 36 S. W. 497.

*Vermont*.—*Pierce v. Brew*, 43 Vt. 292.

*Washington*.—*Williams v. Blumenthal*, 27 Wash. 44, 67 Pac. 393.

*West Virginia*.—*Castro v. Fry*, 33 W. Va. 449, 10 S. E. 799.

*Wisconsin*.—*Perkins v. McAuliffe*, 105 Wis. 582, 81 N. W. 645.

To prove the true consideration as to the amount and manner of payment does not in any way affect the title conveyed by the deed, for that these may be according to the truth, the deed still stands as a valid conveyance. *Logan v. Miller*, 106 Iowa 511, 76 N. W. 1,005.

**Bills and Notes.**—*Adams v. Hull*, 2 Denio (N. Y.) 306. See further the article "BILLS AND NOTES," Vol. II.

48. "Consistent" Defined. — In *Jack v. Dougherty*, 3 Watts (Pa.) 151, the court in speaking of the rule excluding parol evidence of a consideration different from that expressed in the instrument, said: "It is plain from all the cases on this point,"

d. *Action to Recover Consideration.* — Thus, in an action to recover the consideration, a consideration different in quantity or amount from that expressed may be shown.<sup>49</sup>

e. *Action on Covenant of Seizin.* — Again, in an action on the covenant of seizin in a deed, parol evidence is admissible on the part of the plaintiff showing the actual consideration<sup>50</sup> to have been greater than that expressed in the deed for the purpose of increasing the damages.<sup>51</sup>

**Mitigation of Damages.** — And, on the other hand, in such an action the defendant may show the consideration to have been less than that expressed for the purpose of diminishing the damages.<sup>52</sup>

that any discrepancy which may appear to exist in the decision of them arose entirely from a difference of opinion among judges as to what was or was not inconsistent with the terms of the deed, some judges thinking that the insertion of any particular consideration in a deed, without more, expressly negatived the fact of its being founded upon any other or greater consideration; while others, conceiving that, as the law did not always require the true or the whole of the true consideration to be inserted in order to give the deed validity, and that therefore it frequently happened that but little regard was paid by the parties to the consideration set forth in the deed, whether it was the whole consideration or not, leaving it perhaps to the scrivener to put in such of it as in law he might deem sufficient to make the deed operative, thought it unreasonable to make the consideration so introduced into the deed conclusive upon the parties, so as to preclude them from showing the true, or the whole consideration, whenever the ends of justice might seem to require it. The consideration being thus inserted, rather to meet the exigency of the law than the whole truth of the case, it was held not to be inconsistent with the intention of the parties, which ought always to give force and meaning to the terms of the deed, to admit parol evidence to show what the true consideration of it was. No consideration being expressed in the deed has never been held to do more than to raise the presumption that none passed; and why should the circumstance of a particular consideration being ex-

pressed in it do more than raise a like presumption that no other or greater than that mentioned was given? I am inclined to believe that this is the point of view in which the law, as it was originally settled in that country whence we have derived our rules of jurisprudence, considered this matter; and being only ground for *presumption*, and not for *construction*, it was capable of being removed by parol evidence."

49. *Perry v. Central So. R. Co.*, 5 Coldw. (Tenn.) 138.

In *Rosboro v. Peck*, 48 Barb. (N. Y.) 92, an action by the plaintiff to recover of the defendant moneys claimed to have been paid to the latter by mistake, the money having been paid in consideration of a sale by the defendant to the plaintiff evidenced by a bill of sale, it was held proper for the plaintiff to show by parol evidence that the consideration for the sale as expressed in the bill of sale was greater than the consideration actually agreed upon.

In an action to recover the consideration for the conveyance of real estate, the defendant may show by parol evidence that the consideration was less than the sum expressed in the deed. *Miller v. Livingston*, 22 Utah 174, 61 Pac. 569.

50. *Cox v. Henry*, 32 Pa. St. 18; *Garrett v. Stuart*, 1 McCord L. (S. C.) 514; *Bingham v. Weiderwax*, 1 N. Y. 509.

51. *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Lawton v. Buckingham*, 15 Iowa 22; *Lloyd v. Sandusky*, 95 Ill. App. 593.

52. *Patrick v. Leach*, 2 Fed. 120; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Stark v. Olney*, 3 Or.



*f. Nominal Consideration Recited.* — So, where the consideration expressed in the instrument is merely nominal, evidence of the true or actual consideration is admissible.<sup>53</sup>

*g. Consideration Less than Recited.* — And it is also permissible to show by parol evidence a consideration less than that recited in the instrument.<sup>54</sup>

*Consideration Applying to Only Part of Land.* — And, again, it is competent to show by parol evidence that the consideration expressed in the deed applied to only a part of the land described in it.<sup>55</sup>

*h. Assumption or Extinguishment of Debt.* — Thus, it may be shown by parol evidence that the grantee of a deed agreed as part of the consideration to pay incumbrances existing on the lands conveyed,<sup>56</sup> or that as a part of such consideration he assumed

88; *Martin v. Gordon*, 24 Ga. 533; *Dayton v. Warren*, 10 Minn. 233; *Sachse v. Loeb*, (Tex. Civ. App.), 69 S. W. 460. See also *Lloyd v. Sandusky*, 95 Ill. App. 593.

53. *Hitz v. National Met. Bank*, 111 U. S. 722; *Struthers v. Drexel*, 122 U. S. 487; *Perry v. Central So. R. Co.*, 5 Coldw. (Tenn.) 138; *Harvey v. Alexander*, 1 Rand. (Va.) 219, 10 Am. Dec. 519; *Scott v. Watts*, 2 J. J. Marsh. (Ky.) 110; *Moore v. Ringo*, 82 Mo. 468.

In *Waterson v. Allegheny Val. R. Co.*, 74 Pa. St. 208, the plaintiff had released to the defendants for the nominal consideration of \$1.00 a right of way through certain of his lands and had sold to them certain other land on which to erect a depot; and it was held that in an action brought against the company for not erecting the depot as agreed, the plaintiff might show by parol evidence that the erection of the depot was the consideration for the release.

54. *Baker v. Connell*, 1 Daly (N. Y.) 469; *Rosboro v. Peck*, 48 Barb. (N. Y.) 92; *Morse v. Shattuck*, 4 N. H. 229, 17 Am. Dec. 419; *Howell v. Moores*, 127 Ill. 67, 19 N. E. 863; *Kumler v. Ferguson*, 7 Minn. 442.

55. *Sidders v. Riley*, 22 Ill. 110. See also *Kinzie v. Penrose*, 3 Ill. 515.

56. *California*. — *Adams v. Lombard*, 80 Cal. 426, 22 Pac. 180.

*Illinois*. — *Hart v. Emery*, 184 Ill. 560, 56 N. E. 865.

*Indiana*. — *Lowry v. Downey*, 150 Ind. 364, 50 N. E. 79; *McDill v. Gunn*, 43 Ind. 315; *Hays v. Peck*, 107

Ind. 389, 8 N. E. 274; *Allen v. Lee*, 1 Ind. 58.

*Maine*. — *Burnham v. Dorr*, 72 Me. 198.

*Massachusetts*. — *Leland v. Stone*, 10 Mass. 459.

*Michigan*. — *Strohauer v. Voltz*, 42 Mich. 444, 4 N. W. 161.

*Minnesota*. — *Langan v. Iverson*, 78 Minn. 299, 80 N. W. 1,051.

*Missouri*. — *Laudman v. Ingram*, 49 Mo. 212.

*Nebraska*. — *Fall v. Grover*, 34 Neb. 522, 52 N. W. 168.

*New York*. — *Bingham v. Weiderwax*, 1 N. Y. 509.

*Pennsylvania*. — *Buckley's Appeal*, 48 Pa. St. 491.

In *Fall v. Grover*, 34 Neb. 522, 52 N. W. 168, an action on a promissory note, the defendants attempted on execution of the note to offer to show that they had sold a farm to the plaintiff, who had assumed a mortgage thereon; that the loan secured by the mortgage included two notes given as commission for securing the loan, one of which was the note in suit, making the interest on the loan a certain per cent. in the aggregate which the plaintiff had assumed to pay; and it was held error for the court to reject this evidence.

As between the owner of an equity of redemption in land and a second mortgagee who has sold under a power of sale contained in his mortgage, parol evidence is admissible to show that the consideration named in the deed to the purchaser under the power of sale includes the amount due upon a prior mortgage, which the

a debt,<sup>57</sup> or extinguished a debt.<sup>58</sup>

Where the Deed Contains a Covenant Against Incumbrances, as to whether or not the assumption of the incumbrance may be shown, the authorities are conflicting.<sup>59</sup>

purchaser was to assume, and that the difference between these two sums was the amount the mortgagee actually received. *O'Connell v. Kelly*, 114 Mass. 97.

57. *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 18 Am. St. Rep. 137, 9 L. R. A. 645; *Booth v. Hynes*, 54 Ill. 363; *Brown v. Cahalin*, 3 Or. 45.

In *Mills v. Dow*, 133 U. S. 423, it was held that evidence of a promise by the defendants as a part of the consideration of the instrument in controversy to pay certain debts which the plaintiff owed to persons named in the instrument was admissible.

58. *Buford v. Shannon*, 95 Ala. 205, 10 So. 263; *Mason v. Buchanan*, 62 Ala. 110. See also *Booth v. Hynes*, 54 Ill. 363; *Brown v. Cahalin*, 3 Or. 45.

Although a deed recites that it was made in consideration of cash in hand paid, it is competent to show that the real consideration for the conveyance was a pre-existing debt due from the grantor to the grantee. The legal effect of such a transaction is the same as if the grantee had paid the grantor money, and the grantor had re-paid it to the grantee in discharge of the debts. *Poor v. Scott*, 24 Ky. L. Rep. 239, 68 S. W. 397.

In *Scoggin v. Schloath*, 15 Or. 380, 15 Pac. 635, where a small money consideration was recited in the deed, parol evidence tending to show any additional payment of a considerable pre-existing debt was held admissible as being of the same species as the recited consideration.

It is competent for a grantee under a deed to show that the real consideration of the conveyance was not money passing from him to the grantor, but was the payment of a debt on a legal liability due from or resting upon the grantor and the promise to pay the grantor a specified sum of money. *Pique v. Arendale*, 71 Ala. 91. The basis of the rule in this case was that such evidence did not tend to prove a con-

sideration different in kind, although the deed recited a money consideration.

59. *That It Cannot Be So Shown*, see *Simanovich v. Wood*, 145 Mass. 180, 13 N. E. 391; *Flynn v. Bourneouf*, 143 Mass. 277, 9 N. E. 650, 58 Am. Rep. 135; *Brown v. Morgan*, 56 Mo. App. 382. See also *Adams v. Hudson Co. Bank*, 10 N. J. Eq. 535, 64 Am. Dec. 469.

*That It Can Be So Shown*, see *Perkins v. McAuliffe*, 105 Wis. 582, 81 N. W. 645. And in *Johnson v. Ellmen*, 24 Tex. Civ. App. 43, 59 S. W. 605, affirmed 59 S. W. 253, the court said: "The agreement as to the consideration necessarily precedes the execution of the deed, and the fact that the consideration was agreed upon some time prior to the delivery of the deed does not preclude the grantor from showing what was the consideration of the deed. To hold otherwise would be to run counter to the elementary doctrine that it is always competent to prove the actual consideration yielded for the conveyance of land;" quoting with approval this language from *Hays v. Peck*, 107 Ind. 389, 8 N. E. 274.

In *Paget v. Cook*, 1 Allen (Mass.) 522, it was held that a vendor of his interest in a co-partnership, the bill of sale of which expressed the consideration as \$1.00, and other valuable considerations, might give evidence of a conversation between his vendee and himself before the transaction between them was completed, to show that he refused to execute the bill of sale until the vendee agreed that the vendor should be indemnified and saved harmless from the outstanding debts of the co-partnership, and that the vendee did so agree as a party of the consideration thereof.

In *Murray v. Smith*, 1 Duer (N. Y.) 412, it was held that the plaintiff might show by parol evidence that the defendant had, in consideration of a conveyance by the plaintiff to

i. *Mortgages*. — Again, parol evidence is admissible to show some other consideration besides that expressed in the mortgage, provided it is consistent with the consideration expressed,<sup>60</sup> as that the mortgage was merely one of indemnity,<sup>61</sup> or to secure advances to be thereafter made.<sup>62</sup>

B. PAROL EVIDENCE OF CONSIDERATION DIFFERING IN CHARACTER OR SPECIES. — a. *In General*. — The doctrine stated above as not permitting the introduction of parol evidence to show a consideration differing in amount or quantity,<sup>63</sup> was also held to apply with even greater force where the purpose of the evidence was to show a consideration differing in character or species from that recited in the

the defendant of a one-half interest in certain land, promised to keep the plaintiff harmless and indemnified from all loss or damage by reason of one-half of a certain mortgage then existing on the land, but that the mortgage had been foreclosed, the property sold and the plaintiff compelled to pay a deficiency judgment.

In *McMahan v. Stewart*, 23 Ind. 590, it was held that a vendor of a steamboat might show by parol evidence that in addition to the consideration expressed in the bill of sale for the boat, the vendee agreed to indemnify and save the vendor harmless from all payments and expenses, on account of the indebtedness of the boat, which he had failed to do, but had permitted suit to be brought against the vendor upon such indebtedness and judgment had been obtained.

60. *Mortgage*. — *Stribling v. Bank of Kentucky*, 48 Ala. 451; *Wilkerson v. Tillman*, 66 Ala. 532; *Abbott v. Marshall*, 48 Me. 44.

61. *McAteer v. McAteer*, 31 S. C. 313, 9 S. E. 966; *Foster v. Reynolds*, 38 Mo. 553.

Although a mortgage recites that it was given to secure a note made by the mortgagor to the mortgagee, parol evidence is admissible to show that the note and mortgage were in fact given to secure a contingent liability of the mortgagee as security for the mortgagor to an amount not greater than that of the note. *Sparks v. Brown*, 46 Mo. App. 529. See also *McKinster v. Babcock*, 26 N. Y. 378. Compare *Jackson v. Jackson*, 5 Cow. (N. Y.) 173, an ejectment by a mortgagee or one claiming under his

mortgage, which was expressly conditioned for the payment of money, holding that parol evidence that the mortgage was given to indemnify the mortgagee as special bail for the mortgagor and that no damage had followed his being bail, was inadmissible.

In *Harrington v. Samples*, 36 Minn. 200, 30 N. W. 671, it was held that a chattel mortgage in terms securing the temporary promissory note of the mortgagor, might, for the purpose of showing that it had been discharged, be shown by parol evidence to have been really given as collateral security for a pre-existing debt as indemnity for the making of an accommodation note with the mortgagor, and that the principal obligation of the mortgagor which the mortgage was intended to secure had been performed.

In the case of a mortgage given by a wife to secure the payment of a sum of money stated, parol evidence is admissible for the wife in an action to foreclose the mortgage to show that the consideration for the execution of the mortgage was the indebtedness then existing or subsequently to be incurred by her husband. *Ferris v. Hard*, 135 N. Y. 354, 32 N. E. 129.

62. *Huckaba v. Abbott*, 87 Ala. 409, 6 So. 48; *Tison v. People's Sav. & L. Ass'n*, 57 Ala. 323; *Louisville Bkg. Co. v. Leonard*, 90 Ky. 106, 13 S. W. 521; *Dicken v. Morgan*, 54 Iowa 684, 7 N. W. 145; *Groos v. First Nat. Bank*, (Tex. Civ. App.), 72 S. W. 402; *Moses v. Hatfield*, 27 S. C. 324, 3 S. E. 538.

63. See *supra* this section for this rule, text and cases cited in note 41 *et seq.*

instrument,<sup>64</sup> and this rule is still sometimes adhered to.<sup>65</sup>

**Doctrine Overruled.** — But, as with the other phase of this old rule, this rule not permitting evidence of a consideration differing in species was finally overruled,<sup>66</sup> and the great weight of authority is now to the effect that parol evidence is admissible to show a consideration of an entirely different character or species from that expressed in the instrument;<sup>67</sup> as, for example, although the instru-

64. *Schermerhorn v. Vanderheyden*, 1 Johns. (N. Y.) 139, 3 Am. Dec. 304; *Shephard v. Little*, 14 Johns. (N. Y.) 210; *Bowen v. Bell*, 20 Johns. (N. Y.) 338; *Mead v. Steger*, 5 Port. (Ala.) 498; *Kerr v. Calvit*, Walker (Miss.) 115, 12 Am. Dec. 537.

In *Buchtel v. Mason Lum. Co.*, 1 Flip. 640, 4 Fed. Cas. No. 2,077, affirmed 101 U. S. 633, there was a contract in writing to sell timber lands, but a prohibition of a removal of the timber. A third person guaranteed the payment stipulated in the contract, whereupon permission was given to cut and remove the timber. It was held that the license to cut and remove the timber was the consideration for the guaranty, and that it was improper to permit proof of a parol warranty of the amount of timber as the true consideration.

In *Miller v. Bagwell*, 3 McCord L. (S. C.) 562, a bond was given to the sheriff for the prison bounds stating the consideration to be the fact of the defendant's being in custody under a *ca. sa.*; it was held that parol evidence was not admissible to show that the defendant was confined in consequence of a surrender of bail after judgment, but that by an inadvertence the bond was drawn for prison bounds.

65. *Davidson v. Jones*, 4 Cushm. (Miss.) 56; *Follett v. Heath*, 15 Wis. 601.

In *Maryland* the rule is settled that it is not competent for the parties to prove another consideration, different in kind from that stated in the instrument. *Thompson v. Corrie*, 57 Md. 197. See also *Cunningham v. Dwyer*, 23 Md. 219; *Cole v. Albers*, 1 Gill (Md.) 412.

In *Alabama*, as to the question whether or not a consideration of a different kind from that expressed in the instrument may be shown by

parol evidence, the decisions are apparently in conflict. Thus, in *Troy Fertilizer Co. v. Norman*, 107 Ala. 667, 18 So. 201, the court holds that it cannot be done, and cited a number of cases to support its ruling. And in *Brooks v. Maltbie*, 4 Stew. & P. (Ala.) 96; and in *Murphy v. Branch Bank*, 16 Ala. 90, the court held to the same effect. See also *Pique v. Arendale*, 71 Ala. 91; *Potter v. Gracie*, 58 Ala. 303, 29 Am. Rep. 748. But in *Eckles v. Carter*, 26 Ala. 563, it was held that a consideration of a kind or species different from that expressed could be shown. See also *Hamaker v. Coons*, 117 Ala. 603, 23 So. 655.

66. See *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103, for a full discussion of this question, and one of the first American cases to adopt the rule as thus stated.

67. *California*. — *Adams v. Lam-bard*, 80 Cal. 426, 22 Pac. 180.

*Georgia*. — *Burke v. Napier*, 106 Ga. 327, 32 S. E. 134.

*Mississippi*. — *Millsaps v. Merchants' & P. Bank*, 71 Miss. 361, 13 So. 903.

*Missouri*. — *Henderson v. Henderson*, 13 Mo. 151.

*New York*. — *Frink v. Green*, 5 Barb. 455; *Miller v. McKenzie*, 95 N. Y. 575, 47 Am. Rep. 85.

*Pennsylvania*. — *Holmes' Appeal*, 79 Pa. St. 279.

*Texas*. — *Hicks v. Morris*, 57 Tex. 658.

*Washington*. — *Don Yook v. Washington Mill Co.*, 16 Wash. 459, 47 Pac. 964.

*Wisconsin*. — *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497.

The real consideration for a sealed note as distinguished from the expressed consideration may be shown by parol evidence in an action there-

ment recites a money consideration it may be shown that the true consideration was other than pecuniary,<sup>68</sup> as, for example, property.<sup>69</sup>

on. *Cocke v. Blackburn*, 57 Miss. 689, where the court said: "The question is, whether the consideration expressed in the bill single sued on precludes the obligor from showing by parol an additional and different consideration? We consider it well settled that the real consideration of a note may be shown by parol, whatever may be the statement of the note as to the consideration. If this were not so, all inquiry could be shut out by the easy process of stating the consideration in every note to be gold coin or other equally unassailable consideration, and then the defense of illegality, or want or failure of consideration, would be unknown, to the great relief of courts, but at the expense of justice between parties litigant."

Under a Kentucky Statute, § 472, the real consideration of a writing may be shown by parol evidence, and in *Price v. Price*, 23 Ky. L. Rep. 1,911, 66 S. W. 529, where the writing in question was an instrument reciting the receipt by a creditor of all demands except the interest on a debt to be paid quarterly by the debtor during the creditor's life, and a promise by the creditor to release the debt at his death, it was held that parol evidence might be received to show that the agreement was made in promise of matters of difference and dispute between the parties.

68. *Ferris v. Hard*, 135 N. Y. 354, 32 N. E. 129.

**Extension of Time.**—In *Taylor v. Wightman*, 51 Iowa 411, 1 N. W. 607, an action on a written guaranty of an account expressing a consideration of \$1.00, it was held proper to permit the plaintiff to show, as against the defendant's claim, that he had received no consideration; that the real consideration for the guaranty was an extension of time granted to the debtor.

In *Hodges v. Heal*, 80 Me. 281, 14 Atl. 11, 6 Am. St. Rep. 199, an action of trespass, it appeared that the defendants had committed a tres-

pass on the plaintiffs' land and afterwards purchased the interest of one of the plaintiffs in the land, giving, according to a receipt, a certain amount; and it was held that the defendants should be permitted to show that the consideration of the receipt not only paid for the interest in the land, but by contemporaneous verbal agreement also settled for the trespass previously committed by the defendants on the land.

69. *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Prim v. Legg*, 67 Ill. 500; *Miller v. McCoy*, 50 Mo. 214; *Altringer v. Capeheart*, 68 Mo. 441; *Bolles v. Sachs*, 37 Minn. 318, 33 N. W. 862; *Elysville Mfg. Co. v. Okisko*, 1 Md. Ch. 392.

In *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103, the doctrine of parol evidence to contradict or vary the consideration clause of a deed or other contract underwent a radical change; and the principle that where one species of consideration is expressed another of a different one cannot be proved was entirely and distinctly overruled, and the contrary rule was adopted allowing an unlimited latitude of inquiry into the consideration of deeds and other written contracts. In that case the deed stated a consideration of money in hand paid and the court received parol evidence to show that the consideration was iron and not money. Mr. Justice Cowan, who delivered the opinion, reviewed the English and American cases on the subject, and came to the conclusion that the consideration clause of a deed or other written contract could in all cases be explained or contradicted where the object was not to defeat the deed or contract, or to change its legal effect.

The consideration expressed in a deed as having been paid in cash, but shown by parol evidence to have been paid in property, is presumed to be the value in money of the property, although this presumption is not conclusive. *Clements v. Landrum*, 26 Ga. 401.

b. *Application of Rule to Particular Instruments.* — (1) **Generally.** Thus, the consideration of a bond differing in character or species from that expressed in the instrument may be shown by parol evidence.<sup>70</sup> So, also, of a contract of sale,<sup>71</sup> or a bill of sale,<sup>72</sup> or of the assignment of a chose in an action,<sup>73</sup> or of the terms of the release,<sup>74</sup> or in the case of mortgages.<sup>75</sup>

6. **Deeds.** — A. **GENERALLY.** — So, also, parol evidence is admissible for the purpose of showing the actual consideration of a deed, although such consideration may be different from that expressed in the deed,<sup>76</sup> although there is authority to the effect that when a

In *Pope v. Chaffee*, 14 Rich. Eq. (S. C.) 69, it was held that the ordinance of September, 1865, which permitted a party to show the true value and real character of the consideration for a contract of sale, did not apply where the proceeding was to set aside an executed contract, but only to a case where the aid of a court was sought to enforce the contract.

70. **Bonds.** — *Miller v. Fichthorn*, 31 Pa. St. 252; *Buckner v. Ruth*, 13 Rich. L. (S. C.) 157; *Wrightsmen v. Bowyer*, 24 Gratt. (Va.) 433. Compare *Miller v. Bagwell*, 3 McCord L. (S. C.) 562.

71. *Barker v. Bradley*, 42 N. Y. 316, 1 Am. Rep. 521.

72. *Halpin v. Stone*, 78 Wis. 183, 47 N. W. 177. *Contra.* — Under the Louisiana rule, *Berthole v. Mace*, 5 Mart. (O. S.) (La.) 576.

A bill of sale being an executed contract, the sufficiency of the consideration cannot be inquired into by those who claim to stand in the place of the vendor, except for the purpose of conducing to show that the instrument was procured by coercion and fraud. *Finn v. Hempstead*, 24 Ark. 111.

73. **Assignments of Choses in Action.** — *Bennett v. Solomon*, 6 Cal. 134; *Lockwood v. Canfield*, 20 Cal. 126; *Henderson v. Fullerton*, 54 How. Pr. (N. Y.) 422; *Wade v. Carter*, 76 N. C. 171; *Fechheimer v. Trounstone*, 15 Colo. 386, 24 Pac. 882. See also *Huebsch v. Scheel*, 81 Ill. 281.

74. **Release.** — *Stufflebeem v. Arnold*, 57 Cal. 11; *Andrews v. Brewster*, 124 N. Y. 433, 26 N. E. 1,024; *Williams v. Poppleton*, 3 Or. 139.

75. In *Kane v. Cortesy*, 100 N. Y. 132, 2 N. E. 874, it was held that a mortgagor of realty who had also

given a chattel mortgage to secure the same debt secured by the real estate mortgage, conditioned to be paid in installments, might show by parol evidence that the consideration of the chattel mortgage was an extension of time for the payment of the real estate mortgage.

In *Murdock v. Cox*, 118 Ind. 266, 20 N. E. 786, the mortgage in question was executed by the heirs of a decedent to his widow to secure the payment of a sum stated, with interest, to be paid annually and to be collected by the widow only; and it was held that the mortgagors might show by parol evidence that the mortgage was executed simply for the purpose of securing to the widow means of support during her lifetime, and that it was agreed and understood that so far as the widow did not in her lifetime call for and receive the sums secured by the mortgage the sums were to be void at her death.

In *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 19 Am. Dec. 292, a husband mortgaged his land, and in consideration of his wife's releasing her right of dower in the marriage, conveyed the equity of redemption for her benefit, but by a deed containing no declaration of the trust and reciting as a consideration a sum of money paid by the grantee, and it was held as against the husband's creditors that parol evidence was admissible to show that the release of the right of dower was the true consideration.

76. **Arkansas.** — *Hoover v. Binckley*, 66 Ark. 645, 51 S. W. 73.

**California.** — *Coles v. Soulsby*, 21 Cal. 47; *Carty v. Connolly*, 91 Cal. 15, 27 Pac. 599.

valuable consideration is expressed in a deed it is not permissible to show by parol that the deed is founded upon a good consideration, and that when a good consideration is expressed it cannot be shown by parol that the consideration is a valuable one.<sup>77</sup>

Sometimes the rule is recognized that as between the parties to the deed a consideration of a species different from that expressed cannot be shown by parol evidence, but that this rule does not apply to one who is not a party to the instrument.<sup>78</sup>

*Indiana*. — *Hamilton v. Barricklow*, 96 Ind. 398; *Moore v. Butler University*, 83 Ind. 376; *Wallace v. Goff*, 71 Ind. 292; *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

*Iowa*. — *Bristol Sav. Bank v. Stiger*, 86 Iowa 344, 53 N. W. 265; *Day v. Lown*, 51 Iowa 364, 1 N. W. 786.

*Maine*. — *Hodges v. Heal*, 80 Me. 281, 14 Atl. 11, 6 Am. St. Rep. 199.

*Massachusetts*. — *Cardinal v. Hadley*, 158 Mass. 352, 33 N. E. 575; 35 Am. St. Rep. 492; *Twomey v. Crowley*, 137 Mass. 184.

*Minnesota*. — *Kumler v. Ferguson*, 7 Minn. 442.

*Missouri*. — *McConnell v. Brayner*, 63 Mo. 461; *Hall v. Morgan*, 79 Mo. 47; *Dobyns v. Rice*, 22 Mo. App. 448.

*Nevada*. — *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74.

*New Jersey*. — *Silvers v. Potter*, 48 N. J. Eq. 539, 22 Atl. 584.

*New York*. — *Frink v. Green*, 5 Barb. 455.

*Pennsylvania*. — *Lewis v. Brewster*, 57 Pa. St. 410; *Graver v. Scott*, 80 Pa. St. 88.

*Rhode Island*. — *Hedley v. Briggs*, 2 R. I. 489.

*Texas*. — *Lanier v. Faust*, 81 Tex. 186, 16 S. W. 994.

*Vermont*. — *Holbrook v. Holbrook*, 30 Vt. 432.

*Wisconsin*. — *Reynolds v. Vilas*, 8 Wis. 471, 76 Am. Dec. 238.

Under a Kentucky Statute the true consideration of a deed may always be shown, although it may contradict the writing. *Neurenberger v. Lehenbauer*, 23 Ky. L. Rep. 1,753, 66 S. W. 15. In this case the grantee under a deed was allowed to show that although the deed recited a money consideration the real transaction was a gift.

In *Eystra v. Capelle*, 61 Mo. 578, in an effort to collect a part of the

consideration for a deed, parol evidence was admitted, but was held insufficient on the ground that to show that the consideration for a deed was other than that named in it the evidence must be of the most clear and satisfactory kind.

77. *Groves v. Groves*, 65 Ohio St. 442, 62 N. E. 1,044.

*Compare Conklin v. Hancock*, 67 Ohio St. 455, 66 N. E. 518; *Carter v. Day*, 59 Ohio St. 96, 61 N. E. 967, 69 Am. St. Rep. 757; *Harrison v. Castner*, 11 Ohio St. 339. And see cases in note 83 *infra*.

78. *Logan v. Miller*, 106 Iowa 511, 76 N. W. 1,005.

Where a deed is assailed by third parties as fraudulent, and proof by them introduced to impeach the recited consideration, the grantee may show by parol evidence the actual consideration, although different from that recited in the deed. *Columbia Nat. Bank v. Baldwin*, (Neb.), 90 N. W. 890. The deed in this case recited a money consideration, and it was held that the grantee might show that the conveyance was really made in discharge of a parol trust in his favor.

Where a deed is assailed by creditors as fraudulent, a person claiming under it may support it by proving any valuable consideration, though different from that expressed in the deed. *National Ex. Bank v. Watson*, 13 R. I. 91, 43 Am. Rep. 13.

In *Brown v. Lunt*, 37 Me. 423, a deed had been made to a merchant by his debtor to secure payment of the debt, and also advances to clear the land of incumbrances. Shortly after the merchant conveyed to his grantor's wife, taking notes signed by her and indorsed by the grantor and secured by a mortgage on the land. The land was worth several

B. NOMINAL CONSIDERATION RECITED. — And a consideration of a different kind may be shown, although the deed recite a nominal consideration.<sup>79</sup>

C. ACTION FOR BREACH OF COVENANT. — And in an action for the breach of covenant of a deed, the true consideration may be shown, though it differs from that expressed.<sup>80</sup>

D. EXCHANGE OF LANDS. — So, too, although the deed express a money consideration for the conveyance, the consideration may be shown to have been an exchange of land.<sup>81</sup>

E. ADVANCEMENT, GIFT, ETC. — Again, although a deed recites a money consideration, it may be shown that the real consideration of the deed was an advancement,<sup>82</sup> or that the real consideration of the

times the face of the notes secured by the mortgage, and the deed to the wife recited a money consideration. Later the merchant failed and his creditors attacked the deed, and the court not only permitted the parol trust on which he had obtained title to be shown, but found that the deed was upon sufficient consideration. This consideration was held not to be so inconsistent with the one named in the deed that it might not be proved. See also *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 19 Am. Dec. 292, where the court admitted evidence of the trust to rebut a claim of fraud. Compare *Smith v. Lane*, 3 Pick. (Mass.) 205, where a woman whose husband had conveyed his life estate in lands occupied by her to her father was refused permission to prove as against the father's creditors that a conveyance to her for an expressed small money consideration was really in discharge of a parol trust in her favor.

79. *Carty v. Connelly*, 91 Cal. 15, 27 Pac. 599; *Hattersley v. Bissett*, 51 N. J. Eq. 597, 29 Atl. 187, 40 Am. St. Rep. 532.

80. *Eckles v. Carter*, 26 Ala. 563; *Swafford v. Whipple*, 3 Greene (Iowa) 261, 54 Am. Dec. 498; *Dayton v. Warren*, 10 Minn. 233; *Donlon v. Evans*, 40 Minn. 501, 42 N. W. 472; *Miller v. McCoy*, 50 Mo. 214.

81. *Bristol Sav. Bank v. Stiger*, 86 Iowa 344, 53 N. W. 265; *Miller v. McCoy*, 50 Mo. 214.

In *Garrett v. Stuart*, 1 McCord L. (S. C.) 514, it was held that notwithstanding a money consideration was expressed in a deed it might be shown that the deed was in fact

executed on an exchange of property.

In *Logan v. Miller*, 106 Iowa 511, 76 N. W. 1,005, an action to charge the defendant with a certain indebtedness secured by a mortgage on lands conveyed to the defendant upon an alleged agreement expressed in the deed whereby the defendant assumed and agreed to pay the mortgage in question, it was shown that the conveyance in question had been executed but the name of the grantee left blank, and that after the sale of the property to the defendant, instead of making a new conveyance the holder thereof inserted the defendant's name as grantee in the original conveyance and delivered the same to the defendant; and it was held that the defendant might show by parol evidence that the consideration for the conveyance was in reality an exchange of lands, and that he had expressly refused to assume the mortgage indebtedness.

82. *California*. — *Peck v. Vandenberg*, 30 Cal. 11.

*Connecticut*. — *Meeker v. Meeker*, 16 Conn. 383.

*Indiana*. — *Rockhill v. Spraggs*, 9 Ind. 30.

*Kentucky*. — *Powell v. Powell*, 5 Dana 168, *Gordon v. Gordon*, 1 Met. 285.

*Maryland*. — *Parks v. Parks*, 19 Md. 323.

*New York*. — *Palmer v. Culbertson*, 143 N. Y. 213, 38 N. E. 199.

*North Carolina*. — *Barbee v. Barbee*, 108 N. C. 581, 13 S. E. 215; *Barbee v. Barbee*, 109 N. C. 299, 13 S. E. 792.

Compare *Wilkinson v. Wilkinson*, 17 N. C. 376; *Harper v. Harper*, 92 N. C. 300.



deed was a gift,<sup>83</sup> or that part of the consideration expressed was received, the balance being an advancement.<sup>84</sup>

F. NATURAL LOVE AND AFFECTION. — So, too, although the deed recites payment of the consideration, it may be shown that the consideration was in fact natural love and affection.<sup>85</sup> Conversely, it may be shown that there was in fact a valuable consideration for the deed, although it expresses natural love and affection.<sup>86</sup>

G. CONTEMPLATION OF MARRIAGE. — Although a deed expresses a money consideration, it is competent to show by parol evidence that the actual consideration of the deed was the contemplated marriage between the parties.<sup>87</sup>

*Vermont.* — *Adams v. Adams*, 22 Vt. 50.

*Virginia.* — *Bruce v. Slemph*, 82 Va. 352, 4 S. E. 692; *Marks v. Spencer*, 81 Va. 751.

83. *Jones v. Jones*, 12 Ind. 389; *Christopher v. Christopher*, 64 Md. 583, 3 Atl. 296; *Velten v. Carmack*, 23 Or. 282, 31 Pac. 658, 20 L. R. A. 101; *Levering v. Shockey*, 100 Ind. 558. See also *Andrews v. Andrews*, 12 Ind. 348.

In *Lewis v. Brewster*, 57 Pa. St. 410, an action of ejectment by a husband's creditors on an execution sale of land, the wife was permitted to show on an issue as to fraud that a deed to her by the husband's father was in reality a gift to provide a home for the family, though the deed recited a money consideration.

In *Patterson v. Lamson*, 45 Ohio St. 77, 12 N. E. 531, under a statute providing that a wife's lands should descend to the husband upon her death intestate, if it came out by devise, descent, deed or gift, it was held incompetent in an attempt to defeat the husband's right after the wife's death to show by parol that the lands conveyed to her for an expressed money consideration paid by her were in fact a gift from her father and that the latter paid the consideration.

84. *Barbee v. Barbee*, 108 N. C. 581, 13 S. E. 215; *Barbee v. Barbee*, 109 N. C. 299, 13 S. E. 792; *Hayden v. Mentzer*, 10 Serg. & R. (Pa.) 329; *Gordon v. Gordon*, 1 Met. (Ky.) 285.

85. *Dawson v. Briscoe*, 97 Ga. 409, 24 S. E. 157; *Jones v. Jones*, 12 Ind. 389; *Kenney v. Phillipy*, 91 Ind. 511; *Harrison v. Castner*, 11 Ohio St. 339. See also *Pomeroy v. Bailey*, 43 N. H. 118.

In *Carty v. Connelly*, 91 Cal. 15, 27 Pac. 599, where the deed in question recited the consideration as being \$5.00 and was attacked upon the ground of inadequacy of consideration, it was held that the grantee might, in support of the deed, show that the consideration therefor was natural love and affection and the assumption of an existing incumbrance on the land.

86. *Nichols, Shepherd & Co. v. Burch*, 128 Ind. 324, 27 N. E. 737. Compare *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756, wherein it was held that where a husband had made a deed to his wife reciting a consideration of love and affection, the parties thereto could not, when the deed was attacked as voluntary, defeat it as against interest when it was made by parol proof of a valuable consideration.

In *Banks v. Brown*, 2 Hill Ch. (S. C.) 558, 30 Am. Dec. 380, a deed of land by a husband to the use of his wife purporting to be in consideration of love and affection. In a proceeding by creditors to subject the land to payment of their debts, on the ground that the deed was fraudulent and against them, parol evidence was held admissible to show that the true consideration of the deed to the use of the wife was a conveyance by her, made after the deed, to her use, but in contemplation of it all lands and slaves of her separate estate.

87. *National Ex. Bank v. Watson*, 13 R. I. 91, 43 Am. Rep. 13; *Tolman v. Ward*, 86 Me. 303, 29 Atl. 1,081, 41 Am. St. Rep. 556. See also *Eppes v. Randolph*, 2 Call (Va.) 125. *Contra.* — *Betts v. Union Bank*, 1 Har. & G. (Md.) 175.

Compare *Galbreath v. Cook*, 30

H. SUPPORT OF GRANTOR. — So, also, although the deed expresses a money consideration, it may be shown by parol evidence that the consideration of the conveyance was the support of the grantor during his lifetime by the grantee.<sup>88</sup>

7. Legal Operation of Instrument not to be Defeated. — These rules, however, permitting inquiry into the true or real consideration of the instrument cannot be invoked, where the effect of the evidence would be to defeat the legal operation of the instrument to pass the entire interest according to the purpose therein des-

Ark. 417. This case not only seems to be authority for the rule that where a deed is attacked by creditors as being fraudulent, the grantee cannot show a consideration of a species different from that expressed in the deed, but it seems also to have turned on the fact that under the Arkansas statutes marriage contracts whereby any estate, real or personal, is intended to be secured or paid must be reduced to writing, acknowledged by the parties and made matter of record. The court, however, recognizes the rule that a party attacking a deed as being fraudulent against him may give evidence to show that the consideration is not such as is stated therefor in the deed.

In *Toulmin v. Austin*, 5 Stew. & P. (Ala.) 410, on a contest between a purchaser at an execution sale on a levy against the husband and the wife's trustee, the latter was allowed to support a deed reciting a money consideration by evidence that it was made in pursuance of a marriage settlement.

88. *Greedy v. McGee*, 55 Iowa 759, 8 N. W. 651; *Rankin v. Wallace*, 12 Ky. L. Rep. 97, 14 S. W. 79; *Tyler v. Carlton*, 7 Me. 175, 20 Am. Dec. 357; *Lamb v. Donovan*, 19 Ind. 40. See also *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730. Compare *Thompson v. Corrie*, 57 Md. 197.

In *Swisher v. Swisher*, Wright (Ohio) 755, assumpsit to recover for the use and occupation of certain premises, the defendants offered in evidence a deed from the plaintiff to a third person for the premises in question, reserving to the plaintiff's father, the defendant's intestate, the use of the house, free of rent, for his lifetime, and a prior deed for the same land from the father to the son; and it was held that under the

rule a consideration different from that expressed in the deed may be shown by parol, and it was competent for the defendant to show an oral agreement that his intestate should occupy free of rent.

Parol evidence is admissible to show that the consideration of a conveyance is an agreement to support the grantor for life, even although that agreement shall have been reduced to writing. *Coleman v. Gammon*, (Iowa), 83 N. W. 898.

In *Gale v. Williamson*, Mees. & W. 405, a father, by deed, assigned to his son in consideration of natural love and affection, his dwelling house and all his personal estate. In an action by the son against the sheriff for levying on goods belonging to the personal estate on execution against the father, it was held competent for the plaintiff to prove that by bond bearing the same date with the assignment he bound himself to maintain his father's wife and children.

In *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620, a deed of land expressed the consideration therefor as being \$1000, secured by a mortgage on the land, to be paid in installments, and in the body of the deed was the agreement of the grantee to furnish to the grantor certain provisions and the free use and occupancy of a house on the premises and a portion of the land; and it was held error to permit the grantee to show that certain personal property, the possession of which was sought to be recovered from him, after the grantor's death, was purchased by him at the time of the execution of the deed and that they were a part of the consideration of his agreement in the deed and of the bond and mortgage mentioned therein.

ignated.<sup>89</sup>

**Instrument Procured by Fraud.** — But even this limitation does not prevail where the object of the inquiry into the consideration is to show that the execution of the instrument was procured by fraud.<sup>90</sup>

**8. Mode of Inquiry.** — a. *Direct Testimony of Witness.* — The attorney who drew the mortgage and signed it as a witness is competent to testify as to the consideration on which the notes secured by the mortgage were based, and the circumstances attending the execution of the mortgage.<sup>91</sup>

b. *Best and Secondary Evidence.* — Parol evidence to show the real consideration of a deed is not inadmissible as against the objection that the written contract of purchase was the best evidence.<sup>92</sup>

**89. California.** — *Carty v. Connolly*, 91 Cal. 15, 27 Pac. 599; *Hendrick v. Crowley*, 31 Cal. 471; *Adams v. Lambard*, 80 Cal. 426, 22 Pac. 180; *Langan v. Langan*, 89 Cal. 186, 26 Pac. 764; *Arnold v. Arnold*, 137 Cal. 291, 70 Pac. 23. See also *Rhine v. Ellen*, 36 Cal. 362.

**Illinois.** — *Sterrick v. McBride*, 157 Ill. 70, 41 N. E. 744.

**Massachusetts.** — *Stillings v. Timmins*, 152 Mass. 147, 25 N. E. 50.

**Minnesota.** — *Bruns v. Schreiber*, 43 Minn. 468, 45 N. W. 861.

**Nebraska.** — *Kasernan v. Fries*, 33 Neb. 427, 50 N. W. 269.

In *Morris Canal & B. Co. v. Ryerson*, 27 N. J. L. 457, an action for damages for injuries to the plaintiff's land caused by the erection of the defendants' dams and their not being kept in proper repair, it was held that the defendants should be permitted to prove by parol evidence that the consideration of the deed from the plaintiff conveyed to the defendants the lands covered by the dams and flowed by the back water; was also for all damages the grantor might afterwards sustain to other lands from the erection of a dam and embankment, and that such was the agreement, although the deed itself expressed merely a money consideration.

In *Morris v. McCoy*, 7 Nev. 399, an action on a bond given by McCoy to Morris, conditioned to save and keep harmless Morris from the payment of a certain note and all actions for the recovery of any debts that might be brought against him as a member of a certain firm, created in the management of certain mining

property, for the faithful performance of which McCoy bound himself in a stated sum as "fixed, settled, and liquidated damages," it was held that parol evidence offered for the purpose of showing that the consideration for the agreement was in fact of greater value than the money to be paid by McCoy, was not admissible.

In *McCoy v. Moss*, 5 Port. (Ala.) 88, an action by a vendor to recover the amount of a note given for certain property sold, the bill of sale of which contained no words of delivery, it was held that the vendee could not show by parol that by the contract of sale the vendor was to deliver one of the pieces of property and that he failed to do so.

**Reservation.** — Evidence of an oral agreement by a railway company to construct an undercrossing as a part of the consideration for a deed to the railway company giving it a right of way through the land of the grantor, is not admissible, as it would vary the effect of the deed. *Schrimper v. Chicago, St. P. & M. R. Co.*, (Iowa), 82 N. W. 916.

In *Smith v. Price*, 39 Ill. 28, it was held that a parol reservation of fruit trees in a nursery on land sold by a written agreement was void and could not be shown as being a part of the consideration for the conveyance.

**90. Clinton v. Estes**, 20 Ark. 216.

**91. Monaghan Bay Co. v. Dickson**, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704.

**92. Lee May v. Brett**, 81 Minn. 506, 84 N. W. 339.

c. *Value*. — Upon an issue as to the actual consideration of a conveyance of real estate, evidence of the actual value of the real estate is material.<sup>93</sup>

d. *Reasonableness of Testimony*. — Where it is in issue what was the real consideration of an instrument, and there is no writing in regard to such consideration aside from the instrument itself, circumstantial evidence tending to show that the testimony of one party is more reasonable than that of the other is admissible.<sup>94</sup>

### III. LEGALITY OF CONSIDERATION.

1. *In General*. — Parol evidence is admitted to show an illegal consideration.<sup>95</sup> Nor does it affect the rule that the instrument is

93. *Kumler v. Ferguson*, 7 Minn. 442. See also *Dayton v. Warren*, 10 Minn. 233; *Miller v. Lamb*, 22 Minn. 43; *Schwerin v. De Graff*, 21 Minn. 354. Compare *Yenner v. Hammond*, 36 Wis. 277.

In *Porterfield v. Coiner*, 4 Gratt. (Va.) 55, the defendant had executed to the plaintiff his bond for \$500 payable in three years. The bond recited that it was not to bear interest during the three years, the defendant having that day paid the interest thereon in advance. In an action on the bond the defendant pleaded usury and relied on the recital in the bond to sustain his plea. It was held that the plaintiff might show that the interest was paid, not in money, but in land at an agreed price per acre, and that such price was not the estimated value of the land in cash but its estimated value in reference to the annual interest for three years as the same should accrue upon the principal debt, and that he might also prove that the actual value of the land at the time of the contract was less than the agreed price.

In *Bancroft v. Parker*, 13 Pick. (Mass.) 192, the defendant had executed a writing reciting that the plaintiff had delivered to him to keep "one horse of the value of \$100" which he promised to keep until called for and deliver to the plaintiff, and to save the plaintiff harmless from all costs and expenditures that might accrue in consequence of his entrusting the horse to the defendant. The plaintiff afterwards demanded the horse, which was delivered to him, but he gave the de-

fendant notice that he received it only in part satisfaction of the contract, because it had been injured. The plaintiff sold the horse for less than \$100, and in an action on the contract to recover for the alleged injury it was held that the writing was only *prima facie* evidence of the value of the horse at the time it was received by the defendant, and that for the purpose of ascertaining the damages sustained by the plaintiff parol evidence was admissible to show the true value of the horse at that time.

94. *Zelch v. Hirt*, 59 Minn. 360, 61 N. W. 20.

95. *Parol Evidence of Illegal Consideration*. — *England*. — *Greville v. Atkins*, 9 Barn. & C. 462, 17 Eng. C. L. 421.

*Alabama*. — *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665.

*Arkansas*. — *Waymack v. Heilman*, 26 Ark. 445; *Martin v. Tucker*, 35 Ark. 279.

*Colorado*. — *Jessup v. Whitehead*, (Colo. App.), 29 Pac. 916; *Hoyt v. Macon*, 2 Colo. 502.

*Georgia*. — *Southern Exp. Co. v. Duffey*, 48 Ga. 358.

*Illinois*. — *Wolf v. Fletemeyer*, 83 Ill. 418.

*Kentucky*. — *Gardner v. Maxey*, 9 B. Mon. 90; *Chiles v. Coleman*, 2 A. K. Marsh. 296; *Tribble v. Oldham*, 5 J. J. Marsh. 137.

*Maine*. — *Morrill v. Goodenow*, 65 Me. 178.

*Michigan*. — *Snyder v. Willey*, 33 Mich. 483; *Macomb v. Wilkinson*, 83 Mich. 486, 47 N. W. 336.

under seal.<sup>96</sup>

**2. Agreements in Furtherance of Unlawful Objects.** — Thus it may be shown that the agreements were made in furtherance of objects forbidden by statute or by common law or general policy of the law;<sup>97</sup> as, for example, it may be shown that it was a gambling

*New Jersey.* — *Wooden v. Shotwell*, 23 N. J. L. 465.

*Texas.* — *Goodman v. McGehee*, 31 Tex. 253.

On an issue as to whether or not a contract to pay money was given on a promise by the promisee not to prosecute the promisor, evidence of threats by such promisee to prosecute if the contract was not executed is admissible. *Wolf v. Troxell*, 94 Mich. 573, 54 N. W. 383. See also *Southern Exp. Co. v. Duffey*, 48 Ga. 358.

Where the defense to an action on a promissory note is that it was given in compromise of a criminal prosecution against the defendant's son-in-law, and was procured through entreaties of the daughter, whose fears had been played upon by the plaintiff with that purpose, evidence of what the daughter stated to her father, the defendant, for the purpose of inducing him to give the note is admissible as part of the *res gestae*. *Snyder v. Willey*, 33 Mich. 483.

In *Drake v. Bush*, 57 Ga. 180, the note in suit stated that the money was borrowed for the purpose of paying for certain land named. The defendant's wife claimed the land in question, which had been levied on by the plaintiff under execution, and introduced evidence showing that none of the money received by the defendant on the note was used in the purchase of the land in dispute, but that it was paid for sometime before the note was executed. It was held that by treating that part of the note as a representation it was open to contradiction even by parol evidence, unless it came with the force of an estoppel. And on the question in issue it did not have that force, for the reason that its truth or falsehood was wholly immaterial in reference to that question at the time the money was loaned.

<sup>96.</sup> *Morrill v. Goodenow*, 65 Me. 178.

<sup>97.</sup> *Benicia Agri. Wks. v. Estes*,

(Cal.), 32 Pac. 938; *Lime Rock Bank v. Hewett*, 50 Me. 267; *Succession of Fletcher*, 11 La. Ann. 59; *Freeman v. Rawson*, 5 Ohio St. 1; *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340, (citing *Martin v. Clark*, 8 R. I. 389, 5 Am. Rep. 586; *Peed v. McKee*, 42 Iowa 689, 20 Am. Rep. 631, this was the case of a note given in consideration of an agreement to compound a felony); *Wolf v. Fletemeyer*, 83 Ill. 418; *Waymack v. Heilman*, 26 Ark. 445; *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1,027.

"All contracts or agreements having for their object that which is repugnant to public justice, or violative of public policy, or offensive to good morals, or contrary to statutory provisions, or in derogation of the principles of the common law relating to the public peace or security, and injurious to the community, are void. . . . Whether this is the real character of the agreement (i. e., whether it violates any of the principles just stated) and, if it be, whether it is offensive to law, and violative of public policy, requires that the whole transaction should be inquired into and considered. The form of the agreement and the expressions embodied in the writing to which it was reduced are only matters of evidence not operating an estoppel upon the parties, and not embarrassing or hindering the court. If it were otherwise—if the manner of the transaction could gild over and conceal the truth, this great conservative principle of the law, essential to the purity of the administration of justice, of public morals and the general welfare, would be evaded at the pleasure of the designing, the wicked and the corrupt." *Robertson v. Robinson*, 65 Ala. 610, 39 Am. Rep. 17.

Evidence that the consideration for a note and mortgage consisted of the withdrawal of the mortgagee's opposition to the discharge in bankruptcy

transaction,<sup>98</sup> or it may be shown that the transaction was

of the mortgagor is admissible. *Benicia Agri. Wks. v. Estes*, (Cal.), 32 Pac. 938, citing *Buffendeau v. Brooks*, 28 Cal. 641.

It cannot be shown by parol evidence that at the time of the execution of a written contract it was agreed and understood between the parties that the writing was a sham and designed only to deceive the creditors of one of the parties. *Conner v. Carpenter*, 28 Vt. 237.

Where a bill of sale shows a valid consideration upon its face it is not error to reject evidence tending to establish other and illegal motives moving the maker to the act. *Patterson v. Fowler*, 22 Ark. 396. In this case the plaintiff had made to the defendant a bill of sale, reciting that the latter was the former's surety in a bond for his appearance at court, and transferred to the defendant the property sued for as an indemnity, providing that if he failed to appear at court the property was to be the defendant's, otherwise the instrument was to be void. The plaintiff duly appeared at court and pleaded guilty. The defendant offered to prove that the plaintiff intended leaving the country to avoid prosecution for an offense other than that in which the defendant stood surety for his appearance, and that with a view to this effect, and for the purpose of procuring defendant's approval of the plaintiff's act in leaving the country, the plaintiff made the bill of sale in question. The court said that it was not error to exclude this evidence. "The bill of sale shows upon its face that it was made for a valid and legal consideration—to indemnify defendant as the surety of plaintiff in the bail bond. The defendant did not offer to prove that such was not in fact the consideration of the instrument, but that the consideration was different and illegal. The intention of plaintiff in executing the bill of sale was one thing, and the consideration of the instrument was another. The defendant was the plaintiff's surety in the bail bond, and the plaintiff may have supposed that if he attempted to leave the country without indemnifying him, he would attempt to prevent his leaving, and this may

have been the motive which induced the plaintiff to execute to the defendant the bill of sale—but the instrument being founded on a sufficient legal consideration on the part of the defendant, the particular motive which may have induced plaintiff to execute it could not affect the validity of the instrument. If the plaintiff had offered to prove that he was about to leave the country to avoid a prosecution for felony, and that the defendant was taking steps to prevent his departure, and that the consideration of the bill of sale was that the defendant would desist and permit the plaintiff to leave, perhaps the evidence would have been admissible to prove that the instrument was executed upon an illegal consideration."

In *Donaldson v. Everhart*, 50 Kan. 718, 32 Pac. 405, an action to cancel a mortgage executed to the plaintiff and her husband to defendant upon a homestead owned by her, on the ground that the consideration stated had wholly failed in that the defendant had not paid any part thereof, the defendant admitted the execution and recording of the mortgage and denied generally the plaintiff's allegations; it was held that the defendant could not show by written contracts, letters and other testimony between himself and the plaintiff's husband, that the defendant had received the mortgage as collateral security for the payment of the husband's debts, because it appeared from the defendant's testimony that he never had any conversation with the plaintiff before or after the execution of the mortgage, and from the husband's testimony as defendant's witness that in making all his arrangements with the defendant he acted for himself alone.

98. *Peck v. Doran & Wright Co.*, 57 Hun 343, 10 N. Y. Supp. 401; *Kent v. Miltenberger*, 13 Mo. App. 503; *Platt v. Maples*, 19 La. Ann. 459; *Beadles v. McElrath*, 8 Ky. L. Rep. 848, 3 S. W. 152.

Compare *Porter v. Viets*, 1 Biss. (U. S.) 177, wherein it was held that a contract for the sale and delivery of grain by the defendant to the plaintiff which the defendant did not

usurious.<sup>99</sup>

**3. Fraudulent Conveyances.** — So, also, for the purpose of establishing the fraudulent character of a conveyance, parol evidence is admissible to show the actual consideration, or that the consideration expressed was not in fact paid.<sup>1</sup>

**4. Champertous Contract.** — It may be shown by parol evidence that a writing fair and legal upon its face was taken in the form in which it was written fraudulently for the purpose of evading the force of the law against champerty and maintenance.<sup>2</sup>

**5. Burden of Proof.** — Of course, on an issue as to the legality of the consideration of a contract, the burden of proof is upon the party asserting its illegality.<sup>3</sup>

#### IV. PAYMENT OF CONSIDERATION.

**1. In General.** — Parol evidence is always admissible to prove the actual payment of the consideration, although the instrument merely appears to have been executed for a valuable consideration.<sup>4</sup>

**2. Time and Manner of Payment.** — So, also, when the time and manner of paying the consideration are not particularly expressed,<sup>5</sup>

have or expect to have, was, notwithstanding, valid, and that hence the defendant could not be permitted to show by parol evidence that it was the intention of both parties that no grain should actually be delivered, but that the "difference" was to be settled in cash.

**99.** *Scott v. Lloyd*, 9 Pet. (U. S.) 418; *Austin v. Fuller*, 12 Barb. (N. Y.) 360; *Roe v. Kiser*, 62 Ark. 92, 34 S. W. 534, 54 Am. St. Rep. 288. See fully on this question the article "USURY."

An absolute deed of land, given to secure the repayment of money loaned on usurious interest, may, as between the parties thereto, be avoided by parol evidence of the usury. *Reading v. Weston*, 7 Conn. 409.

On an issue as to whether or not a contract is void for usury, evidence of other usurious contracts with other persons is not admissible. *Hartman v. Evans*, 38 W. Va. 669, 18 S. E. 810.

See further the article "USURY."

**1.** *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756; *Silvers v. Potter*, 48 N. J. Eq. 539, 22 Atl. 584; *Reynolds v. Vilas*, 8 Wis. 471, 76 Am. Dec. 238.

See more fully the article "FRAUDULENT CONVEYANCES."

**2.** *Wilhite v. Roberts*, 4 Dana (Ky.) 172.

**3. Burden of Proving Illegality of Consideration.** — *Trott v. Irish*, 1 Allen (Mass.) 481; *Anderson v. Carlson*, 99 Ill. App. 514.

**4.** *Splawn v. Martin*, 17 Ark. 146.

In an action on an account annexed for a balance due on the sale of property to the defendant, which was made by the plaintiff's bill of sale to them, the defendant may show by parol that the consideration for the sale was wholly or in part paid at the time. *Holden v. Parker*, 110 Mass. 324.

**5.** *Alabama.* — *Hair v. Little*, 28 Ala. 236.

*Illinois.* — *Ludeke v. Sutherland*, 87 Ill. 481, 29 Am. Rep. 66.

*Indiana.* — *Cunningham v. Banta*, 2 Ind. 604.

*Kentucky.* — *Carneal v. May*, 2 A. K. Marsh. 587, 12 Am. Dec. 453.

*New York.* — *Hebbard v. Haughian*, 70 N. Y. 54.

*South Carolina.* — *Calvert v. Nickles*, 26 S. C. 304, 2 S. E. 116.

*Wisconsin.* — *Becker v. Knudson*, 86 Wis. 14, 56 N. W. 192; *Beckman v. Beckman*, 86 Wis. 665, 57 N. W. 1,117; *Green v. Batson*, 71 Wis. 54, 36 N. W. 849; *Hannan v. Oxley*, 23 Wis. 519.

In *Stephens v. Winn*, 3 Brev. (S.

it may be shown that the consideration was to be paid in a particular manner,<sup>6</sup> or in specific proportions by the promisor,<sup>7</sup> or that it was paid by a third person.<sup>8</sup>

**3. To Whom Paid.** — So, also, parol evidence is admissible to show to whom the consideration was paid.<sup>9</sup>

**4. Disposition of Consideration.** — Parol evidence is admissible to show what the parties agreed might be done with the consideration.<sup>10</sup>

## V. NON-PAYMENT OF CONSIDERATION.

And the rule excluding parol evidence does not apply to such evidence offered for the purpose of showing the non-payment of the consideration stated and acknowledged as having been received,<sup>11</sup> or

C.) 17, it was held that a writing competent to bind one party to pay the debt of another must express the consideration and that parol evidence of such consideration is inadmissible.

**6.** *Holden v. Parker*, 110 Mass. 324.

It was held that where a deed was executed to several persons without designating in what proportion they are to hold, parol evidence is not admissible to show the considerations paid by the several grantees in order to show that they are entitled to different proportions. *Treadwell v. Bulkley*, 4 Day (Conn.) 395, 4 Am. Dec. 225.

**7.** *Robertson v. Maclin*, 3 Hayw. (Tenn.) 70; *Marks v. Spencer*, 81 Va. 751; *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889; *Depeyster v. Gould*, 3 N. J. Eq. 474; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690; *Scoby v. Blanchard*, 3 N. H. 170.

In *Peck v. Brummagim*, 31 Cal. 440, 89 Am. Dec. 195, it was held that if a deed to the wife recites a valuable consideration, which is not stated in the deed to have been the separate estate of the wife, the presumption of law is that the purchase money was paid out of the common property, and hence the land conveyed will be presumed to be common property; but that this presumption may be rebutted by parol evidence showing that the purchase money was paid out of the separate estate of the wife. See also *Ramsdell v. Fuller*, 28 Cal. 37, 87 Am. Dec. 103. And in *Ingersoll v. Truebody*, 40 Cal. 603, the court in applying this rule held that

if it was competent for the wife to make this proof, even after a conveyance to her husband, it must of necessity follow that it is competent for her grantee to make it in support of a conveyance to her of the legal title. See also *Terrell v. Cutrer*, 1 Rob. (La.) 367.

**8.** Where a written instrument is not signed and delivered by the person making the same to the beneficiary named therein for an expressed consideration, but is silent as to whether the consideration was paid, or as to the time when it was to be paid, it will be presumed that it was paid at the time of the delivery. *Solary v. Stultz*, 22 Fla. 263.

**9.** *Calvert v. Nickles*, 26 S. C. 304, 2 S. E. 116. See also *Hair v. Little*, 28 Ala. 236; *Vaugine v. Taylor*, 18 Ark. 65.

**10.** *Hall v. McNally*, 23 Utah 606, 65 Pac. 724.

In *Burbank v. Gould*, 15 Me. 118, it was held that the acknowledgment of payment of the consideration named in a deed of land does not preclude the grantor from showing by parol evidence that a part of the money was left in the hands of the grantee to be paid by him to a third person for the benefit of the grantor.

**11.** *United States*. — *Riddle v. Hudgins*, 58 Fed. 490.

*Arkansas*. — *Pate v. Johnson*, 15 Ark. 275; *Vaugine v. Taylor*, 18 Ark. 65.

*California*. — *Rhine v. Ellen*, 36 Cal. 362.

*Florida*. — *Solary v. Stultz*, 22 Fla. 263.

*Illinois*. — *Elder v. Hood*, 38 Ill. 533.



that in fact only a part thereof was paid,<sup>12</sup> or that it was paid in depreciated bank notes.<sup>13</sup> But when the conveyance was made under order of the court, parol evidence is inadmissible to impeach its judgment in a collateral proceeding.<sup>14</sup>

## VI. FAILURE OF CONSIDERATION.

**1. Presumptions and Burden of Proof.** — Where the defense to a promissory note is failure of consideration, the burden of proof lies on the defendant to show the failure, although it involves proof of a negative, and if the consideration consisted of covenants, the defendant must prove a breach.<sup>15</sup>

**2. Parol Evidence.** — **A. IN GENERAL.** — Again, the rule under discussion permitting parol evidence as to the consideration clause of a deed or other written contract permits parol evidence for the purpose of showing a failure of consideration<sup>16</sup> to show the true

*Kentucky.* — *Hickman v. McCurdy*, 7 J. J. Marsh. 555.

*Maine.* — *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Bassett v. Bassett*, 55 Me. 127.

*Maryland.* — *Bladen v. Wells*, 30 Md. 577.

*Massachusetts.* — *Clapp v. Tirrell*, 20 Pick. 247.

*Michigan.* — *McLouth v. Dibble*, 31 Mich. 68.

*Missouri.* — *Fontaine v. Boatman's Sav. Inst.*, 57 Mo. 552.

*New York.* — *Shepherd v. Little*, 14 Johns. 210; *Bowen v. Bell*, 20 Johns. 338. See also *Hebbard v. Haughian*, 70 N. Y. 54.

*Vermont.* — *White v. Miller*, 22 Vt. 380.

Where a written instrument, signed and delivered by the person making the same to the beneficiary mentioned therein, for an expressed consideration, is silent as to whether the consideration was paid, or as to the time when it was to be paid, the law will presume that it was paid at the time of the delivery of the instrument. *Solary v. Stultz*, 22 Fla. 263.

Although an instrument under seal acknowledges that the consideration expressed in it has been received, parol evidence is admissible to show that it has not been paid, so far as the question may affect the ultimate right of the parties, the only restriction imposed being that such evidence shall not have the effect of defeating the instrument so as to render it void for the want of entire consideration.

*Baker v. Connell*, 1 Daly (N. Y.) 469. See also *Shepherd v. Little*, 14 Johns. (N. Y.) 210; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Bingham v. Weiderwax*, 1 N. Y. 509.

In *Harper v. Pierce*, 13 La. Ann. 340, the vendor of the property, by a notarial act duly recorded, having subsequently sold the same property by an act under private signature to a second vendee, it was held in an action by the first vendee against the second vendee to recover possession of the property that evidence having been received without objection to show that the vendor had remained in possession of the property down to the date of the second sale, parol evidence was admissible to show that the consideration of the first sale had not in fact been paid, notwithstanding a recital in the writing to the effect that it had.

**12.** *Mills v. Dow*, 133 U. S. 423. See also *Hannah v. Wadsworth*, 1 Root (Conn.) 458.

**13.** *Swope v. Farney*, 17 Ind. 385.

**14.** *Dugger v. Tayloe*, 46 Ala. 320.

**15.** *Pryor v. Coulter*, 1 Bail. L. (S. C.) 517. See also *Reddick v. Mickler*, 23 Fla. 335, 2 So. 698, where it was held that a plea of failure of consideration sworn to throws the *onus* on the plaintiff, and that such burden is not met without other proof than the note itself. See further on this question the article "BILLS AND NOTES," Vol. II, p. 421.

**16.** *Meyer v. Casey*, 57 Miss. 615;

consideration,<sup>17</sup> although the consideration so shown may be different from,<sup>18</sup> or additional to,<sup>19</sup> that expressed in the instrument. So, also, when a written agreement states a consideration in general terms it is competent to show by parol the particulars included in the general description in order to show that there has been a failure of consideration, and the extent of it.<sup>20</sup>

*Reese v. Strickland*, 96 Ga. 784, 22 S. E. 323; *Ruff v. Jarrett*, 94 Ill. 475; *Gage v. Lewis*, 68 Ill. 604; *Stacy v. Kemp*, 97 Mass. 166; *Kip v. Munroe*, 18 How. Pr. (N. Y.) 383; *Compare Heath v. Locke*, 18 La. 68.

Parol evidence is admissible to show the actual consideration and its failure for a written promise to pay money. *Northwestern Creamery Co. v. Laning*, 83 Minn. 19, 85 N. W. 823.

In an action on a contract, the defense to which is in part failure of consideration, in support of which there has been some evidence, it is error for the court to charge that parol evidence cannot be received to attack the contract, unless it is first overthrown by proof of fraud, accident or mistake. "To vary the terms of the contract and to attack the plaintiff's cause of action thereon by proving failure of consideration are altogether different things." *Reese v. Strickland*, 96 Ga. 784, 22 S. E. 323.

17. *Stufflebeem v. Arnold*, 57 Cal. 11; *Gage v. Lewis*, 68 Ill. 604; *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730.

In *Montgomery v. Chaney*, 13 La. Ann. 207, parol evidence was received for the purpose of showing that a sale of chattels was simulated and fraudulent and that no price was in fact paid by the pretended purchaser.

18. *Pollen v. James*, 45 Miss. 129; *Great Western Ins. Co. v. Rees*, 29 Ill. 272.

**Sale by Sample.**—Where a written agreement for the sale of goods provides for the delivery of the goods of the quality as the sample exhibited by the seller, it may be shown by parol evidence on behalf of the purchaser that the goods offered for delivery were not of the same quality as the sample. *Maute v. Gross*, 56 Pa. St. 250, 94 Am. Dec. 62. And even where the articles named in the agreement are not such as would

be known and recognized by the description merely so as to enable the jury to determine what would be a sufficient performance of the contract without further evidence, and the writing itself does not state that the sale was by sample. That fact may be shown by parol evidence, and that the articles delivered did not correspond with the sample. *Pike v. Fay*, 101 Mass. 134.

19. *Wheeler v. Billings*, 38 N. Y. 263. See also *Taylor v. Merrill*, 64 Tex. 494.

20. *Lufburrow v. Henderson*, 30 Ga. 482.

In *Wood v. Young*, 5 Wend. (N. Y.) 620, an instrument of release contained mutual releases and a covenant by one party to the other to pay a certain proportion of what might be recovered in a suit then pending by the covenantor against a third person, and it was held that the accounts between the parties existing previous to the execution of the release would not be overhauled for the purpose of showing that the covenant was without consideration.

In *Goward v. Waters*, 98 Mass. 596, the defendant had agreed that the plaintiff "in consideration that [the plaintiff] shall procure a purchaser for a certain piece of land at a price [stipulated]" the defendant was to pay the plaintiff the excess received by him from the purchaser over the price agreed upon. And in case the defendant himself sold the land he further agreed to pay the plaintiff a certain per cent. of the price received. The plaintiff expended time and money in attempting to procure a purchaser but failed, and in the meantime the defendant sold the land himself. The court, holding that evidence of the services and expenditure was admissible in an action to recover on the agreement for the per cent. of the purchase price received by the defendant, said: "The principal difficulty in the case

B. SIMPLE CONTRACTS. — And the rule permitting proof of failure of consideration, by parol evidence applies to bills and notes,<sup>21</sup> bonds,<sup>22</sup> bills of sale,<sup>23</sup> assignments,<sup>24</sup> and the like.

C. SPECIALTIES, DEEDS, ETC. — So, also, failure of consideration for a contract for the exchange of lands,<sup>25</sup> deeds,<sup>26</sup> mortgages,<sup>27</sup> and

arises from the mention of a consideration in the writing itself. Can a different consideration be shown to support the contract, without violating the rules of evidence relating to contracts in writing? It might, indeed, be questioned whether the term 'in consideration' was not used to define the conditions upon which the first branch of the agreement should take effect, rather than to set forth its consideration in a legal sense. But whether it be the one or the other, the term has no application to the last branch of the agreement. It is obvious that this last clause could never be supported by it as a consideration. The very contingency upon which this clause was to become operative involves a defeat of that which is denominated the consideration in the first clause. Under the recital of the agreement, no legal consideration could be furnished, in accordance with its express terms, except by procuring a purchaser for the property. But there is a clear implication of another consideration, to-wit: the services in that behalf to be rendered by the plaintiffs. The last clause is intended solely to fix the compensation for such services, in case a sale by the defendant should deprive them of the opportunity to secure compensation under the provisions of the first clause. Considerations are often found by implication merely."

The breach of a verbal contract which constituted the consideration of a promissory note executed at the same time may be shown in defense of an action on the note as a failure of consideration, and evidence of such breach is not open to the objection that it varies the terms of the contract embodied in the note. *Dicken v. Morgan*, 54 Iowa 684, 7 N. W. 145.

21. *Smith v. Brooks*, 18 Ga. 440; *Hill v. Buckminster*, 5 Pick. (Mass.) 391; *Buckels v. Cunningham*, 6 Smed. & M. (Miss.) 358.

It is competent to show by parol evidence that subsequent to the giving of a note there was a total failure of the consideration for which it was given. *Warner v. Schulz*, 74 Minn. 252, 77 N. W. 25.

22. In *Miller v. Fichthorn*, 31 Pa. St. 252, an action on a bond given for the balance due for purchase money of a parcel of land, it was held that parol evidence was admissible to show the transaction out of which the bond arose so as to show its consideration and thus lay the foundation for the defense and for evidence that the consideration had failed. But in such case such evidence may be rebutted by evidence that the bond did not satisfy the whole consideration and that the unpaid balance was made up by the defendant having taken the land charged with a judgment lien.

23. *Ruff v. Jarrett*, 94 Ill. 475; *Meyer v. Casey*, 57 Miss. 615.

24. *Pettibone v. Roberts*, 2 Root (Conn.) 258.

25. *Beck v. Simmons*, 7 Ala. 71.

26. *Wooden v. Shotwell*, 23 N. J. L. 465.

27. It is competent to show by parol evidence that a mortgage given to secure a sum specified was in fact given to protect the mortgagee as surety for the mortgagor upon a promissory note for the same sum and made at the same time the mortgage was executed, and that the mortgage was satisfied by the payment of the note in question. *Kimball v. Myers*, 21 Mich. 276, 4 Am. Rep. 487.

On a proceeding to foreclose a mortgage conditioned for the payment of a certain sum of money, it is competent for the defendant to show by parol evidence that the mortgage was given to indemnify the mortgagees as sureties in a recognizance of bail, and that the sureties had been discharged from liability without damage. *Colman v. Post*, 10 Mich. 422, 82 Am. Dec. 49.

other specialties<sup>28</sup> may be shown by parol evidence.

D. CONSIDERATION EXPRESSED IN SEPARATE INSTRUMENT. — And the mere fact that the consideration, which was the basis upon which the promise sued upon rested, was expressed in a separate contract, cannot be regarded as sufficient ground for excluding the parol evidence.<sup>29</sup>

E. PARTIAL FAILURE OF CONSIDERATION. — So, also, it may be shown by parol evidence that there has been a partial failure of consideration.<sup>30</sup>

28. *Baker v. Connell*, 1 Daly (N. Y.) 469.

In *Adams v. Hull*, 2 Denio (N. Y.) 306, the plaintiff was the assignee of a lease and bound by covenant to pay the rents to the lessor, and assign the lease to the defendant by writing expressing a consideration of \$3,000, whereupon the defendant executed a covenant to pay the rents, and at the same time gave the plaintiff two notes under seal for the amounts respectively of \$2,000 and \$1,000; and in covenant upon the first note, it was

held that the defendant might show by parol that the second note was given as collateral security for the covenant to pay the rent; that he had paid it at maturity and had afterwards been compelled to pay the rent to a like amount to avoid a distress.

29. *Wolf v. Fletemeyer*, 83 Ill. 418.

30. *Spalding v. Vandercock*, 2 Wend. (N. Y.) 431; *Great Western Ins. Co. v. Rees*, 29 Ill. 272; *Fuller v. Atwood*, 13 R. I. 316; *Harper v. Columbus*, 35 Ala. 127.

# CONSPIRACY.

BY CLARK ROSS MAHAN.

## I AS A SUBSTANTIVE FACT OR OFFENSE, 407

1. *Presumptions and Burden of Proof*, 407
  - A. *In General*, 407
  - B. *Presumption of Innocence*, 407
  - C. *Overt Acts*, 407
  - D. *Personal Presence of Defendant at Commission of Crime*, 407
2. *Mode of Proof*, 408
  - A. *Direct Evidence*, 408
  - B. *Circumstantial Evidence*, 408
    - a. *In General*, 408
    - b. *Documents*, 409
    - c. *Acquaintance*, 410
    - d. *Overtures to Commit Crime*, 410
    - e. *Possession of Fruits of Crime*, 411
    - f. *Distribution of Spoils*, 411
    - g. *Report of Conspiracy*, 411
    - h. *Acts and Declarations of Parties*, 411
      - (1.) *Generally*, 411
      - (2.) *Other Similar Offenses*, 413
      - (3.) *Acts Occurring in Another State*, 414
      - (4.) *Acts Involving Proof of Other Offenses*, 414
  - C. *Conclusions of Witness*, 415
3. *Relation of Proof to Pleading*, 415
  - A. *In General*, 415
  - B. *Time*, 416
  - C. *Place*, 416
  - D. *Means*, 416
4. *Cogency of Proof*, 416
  - A. *Civil Actions*, 416
  - B. *Criminal Actions*, 417

## II. ACTS AND DECLARATIONS OF CONSPIRATORS IN FURTHERANCE OF CONSPIRACY, 417

1. *Rules as to Admissibility*, 417
  - A. *In General*, 417
  - B. *Basis of Doctrine*, 418
  - C. *Rule Applied*, 418
    - a. *Criminal Prosecutions*, 418

- b. *Fact of Conspiracy Not Averred*, 420
- c. *Identity of Conspiracy*, 420
- d. *Preparation of Means Not Used*, 421
- e. *Absence of Conspirator*, 421
- f. *Actor or Declarant Not Party to Record or Proceeding*, 421
- g. *Actor or Declarant Not Alleged to Be a conspirator*, 422
- h. *Acts and Declarations by Employees*, 422
- i. *Time of Joining Conspiracy*, 422
- j. *Duration of Conspiracy*, 423
- k. *Character of Acts and Declarations*, 423
  - (1.) *Documents*, 423
  - (2.) *Threats*, 423
- 2. *Requisites of Admissibility*, 424
  - A. *Proof of Conspiracy*, 424
    - a. *Necessity*, 424
    - b. *Mode of Proof*, 425
    - c. *Order of Proof*, 425
    - d. *Sufficiency of Proof*, 427
    - e. *Questions for Court and Jury*, 428
  - B. *Time of Acts or Declarations*, 429
    - a. *In General*, 429
    - b. *Acts and Declarations Prior to Conspiracy*, 430
    - c. *Acts and Declarations After Conspiracy Accomplished*, 430
      - (1.) *Generally*, 430
      - (2.) *Conspiracy Not Fully Accomplished*, 431
      - (3.) *Division of Fruits of Crime*, 432
      - (4.) *Acts to Escape Detection*, 432
      - (5.) *Physical Facts*, 433
      - (6.) *Fraudulent Conveyances*, 433
- 3. *Acquittal of Conspirator*, 434
- 4. *Statements in Entirety*, 434
- 5. *Mode of Proof*, 434
- 6. *Conclusiveness*, 434
- 7. *Admissibility for Co-Conspirator*, 434

### III. CONSPIRATORS AS WITNESSES, 435

#### CROSS-REFERENCES

Admissions;  
 Confessions;  
 Declarations;  
 Hearsay;  
 Res Gestae.

## I. AS A SUBSTANTIVE FACT OR OFFENSE.

**1. Presumptions and Burden of Proof.** — A. IN GENERAL. — On a prosecution for criminal conspiracy the burden of showing the conspiracy rests upon the prosecution.<sup>1</sup>

**Civil Actions.** — But in civil actions on the case in the nature of conspiracy, the gist of the action is not the conspiracy, as it is in indictment, and was in the old writ of conspiracy, but the damage done to the plaintiff, and hence proof of the conspiracy is not necessary to sustain the action.<sup>2</sup>

**B. PRESUMPTION OF INNOCENCE.** — In cases of conspiracy, as in other criminal cases, the accused is presumed to be innocent until the contrary is shown by competent proof.<sup>3</sup>

**C. OVERT ACTS.** — In the absence of statutory provision to the contrary,<sup>4</sup> proof of an overt act in prosecutions for conspiracy is not necessary.<sup>5</sup>

**D. PERSONAL PRESENCE OF DEFENDANT AT COMMISSION OF CRIME.** — If a defendant on trial was connected with the conspiracy to commit the substantive offense with which he stands charged, proof of his personal presence at the time of its commission is not

1. *Com. v. Spink*, 137 Pa. St. 255, 20 Atl. 680.

To establish the guilt of a party accused of a criminal conspiracy the burden is on the prosecution to show that the conspiracy was formed to commit the offense described in the indictment; that the accused were parties to the conspiracy, and that to effect the object of the conspiracy one or more of the parties thereto did one or more of the acts charged. *U. S. v. Goldberg*, 7 Biss. (U. S.) 175, 25 Fed. Cas. No. 15,223.

2. *Wellington v. Small*, 3 Cush. (Mass.) 145, 50 Am. Dec. 719; *Parker v. Huntington*, 2 Gray (Mass.) 124; *Jones v. Baker*, 7 Cow. (N. Y.) 445; *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104; *Laverty v. Vandersdale*, 65 Pa. St. 507. Compare *Newall v. Jenkins*, 26 Pa. St. 159; *Johnson v. Miller*, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 756.

In *Saville v. Roberts*, 1 Ld. Raym. 374, Holt, C. J., said: "An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie. From whence it follows that the damage is the ground of the action, which is as great, in the present case, as if there had been a conspiracy."

3. *U. S. v. Lancaster*, 44 Fed. 896, 10 L. R. A. 333.

4. On a Prosecution for Conspiracy Under the Federal Statutes (Act of March 2, 1867, § 30) to defraud the United States it has been held that there must be proof not only of the conspiracy charged, but of the overt act averred to carry into effect the objects of the conspiracy. *U. S. v. Smith*, 2 Bond (U. S.) 323, 27 Fed. Cas. No. 16,322. See also *U. S. v. Cole*, 5 McLean 513, 25 Fed. Cas. No. 14,832; *U. S. v. Thompson*, 12 Sawy. (U. S.) 151, 31 Fed. 331.

On a Prosecution for Conspiracy to Falsely Institute an Action of Slander under California Penal Code, § 182, Div. 3, it is necessary to prove upon the trial, in addition to the conspiracy, some overt act in furtherance or pursuance of the conspiracy, and accordingly the complaint in the slander action is competent evidence to prove the commencement of the action. *People v. Daniels*, 105 Cal. 262, 38 Pac. 720.

5. *People v. Arnold*, 46 Mich. 268, 9 N. W. 406. See also *Reg. v. Best*, 2 Ld. Raym. 1,167; *State v. Burnham*, 15 N. H. 396; *Com. v. Gillespie*, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475; *People v. Clark*, 10 Mich. 310.

necessary.<sup>6</sup>

**2. Mode of Proof.** — A. DIRECT EVIDENCE. — A conspiracy may be proved by direct or positive evidence.<sup>7</sup>

B. CIRCUMSTANTIAL EVIDENCE. — a. *In General.* — But evidence in proof of the fact of a conspiracy is generally circumstantial<sup>8</sup> and

6. *Crittenden v. State*, 134 Ala. 145, 32 So. 273.

7. *U. S. v. Smith*, 2 Bond (U. S.) 323, 27 Fed. Cas. No. 16,322.

It is rarely the case that one of the parties engaged in the conspiracy will consent to become a witness to the material fact of the crime. Whenever such person does consent, if his testimony is in itself reasonable and creditable and is corroborated by other evidence as to the material facts of the narration, his testimony may become of the most important and satisfactory character. *U. S. v. Lancaster*, 44 Fed. 896, 10 L. R. A. 333.

8. *United States*. — *U. S. v. Smith*, 2 Bond 323, 27 Fed. Cas. No. 16,322; *U. S. v. Goldberg*, 7 Biss. 175, 25 Fed. Cas. No. 15,223; *U. S. v. Cole*, 5 McLean, 513, 24 Fed. Cas. No. 14,832; *Rea v. Missouri*, 17 Wall. 532; *U. S. v. Babcock*, 3 Dill. 581.

*Alabama*. — *Ferguson v. State*, 134 Ala. 63, 32 So. 760; *Scott v. State*, 30 Ala. 503.

*Connecticut*. — *State v. Spaulding*, 19 Conn. 233, 48 Am. Dec. 158.

*Georgia*. — *Davis v. State*, 114 Ga. 104, 39 S. E. 906.

*Indiana*. — *Riehl v. Evansville Foundry Assoc.*, 104 Ind. 70, 3 N. E. 633.

*Iowa*. — *Taylor County v. Standley*, 79 Iowa 666, 44 N. W. 911; *Miller v. Dayton*, 57 Iowa 423, 10 N. W. 814; *State v. Grant*, 86 Iowa 216, 53 N. W. 120.

*Massachusetts*. — *Com. v. Waterman*, 122 Mass. 43; *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189.

*Missouri*. — *Hart v. Hicks*, 129 Mo. 99, 31 S. W. 351.

*New York*. — *People v. McKane*, 80 Hun 322, 30 N. Y. Supp. 95; *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342.

*Texas*. — *San Antonio Gas. Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 289; *Myers v. State*, 6 Tex. App. 1.

*Wisconsin*. — *Smith v. Nippert*, 79

Wis. 135, 48 N. W. 253; *Horton v. Lee*, 106 Wis. 439, 82 N. W. 360.

"A combination or conspiracy may be proved by evincing a concurrent knowledge and approbation, in the persons conspiring, of each other's acts; and it is most usually done by proof of the separate acts of several persons concentrating in the same purpose or particular object. The greater the secrecy that is observed relative to the object of such concurrence, and the more apparent the similarity of the means employed to effect it, the stronger is the evidence of conspiracy." *Gardner v. Preston*, 2 Day (Conn.) 205, 2 Am. Dec. 91.

**Securing Right to Vote Previously Denied.** — On a prosecution of the members of a legislative body for conspiracy to solicit bribes on matters coming before them, evidence that a former rule of that body, by which the defendants had not the right in the first instance to vote on such matters, was so modified as to give them such right, is competent against the members who took advantage of the right to vote on such matters as a circumstance to establish the conspiracy. *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189.

In *Smith v. Nippert*, 79 Wis. 135, 48 N. W. 253, an action for conspiracy in causing an inquest of lunacy to be instituted against the plaintiff in order to destroy and invalidate her testimony against one of the alleged conspirators on a charge of rape on the plaintiff, the plaintiff was allowed to show the fact of the rape alleged, and that the plaintiff swore out a warrant against him therefor, which could not be served because of his having left the state.

In *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997, a prosecution for conspiracy to obtain property from a certain corporation under color of a contract between it and one of the defendants, in which such defendant pretended to be another person, it



will be sufficient if it proves the fact that an agreement to do the unlawful act existed, although its terms, the time and place of forming may not be shown.<sup>9</sup> And such evidence is admissible in disproof of a conspiracy.<sup>10</sup>

**The Means Adopted by the Conspirators to accomplish their ends may be shown.**<sup>11</sup>

b. *Documents.* — Written correspondence between the different persons charged, entries made by them and other documents in their possession having reference to the main or common purpose may be received.<sup>12</sup>

was held competent to show that such defendant was married, shortly before the conspiracy charged, under the name by which he was prosecuted; that he usually went under that name or another name, not the one assumed by him, and also that his wife while living with him shortly before the time of the alleged conspiracy went under the other name. Such testimony, said the court, "would have some tendency to show that the assumption of the name of Brown was a mere pretense, and that the agreement that he should assume that name for the purpose of obtaining goods on credit was a conspiracy to cheat."

9. *U. S. v. Hutchins*, 1 Cin. Law Bul. 371, 26 Fed. Cas. No. 15,430.

10. In an action for conspiracy between the defendants to defraud the plaintiff by means of purchases on credit from the plaintiff by one of the defendants, and transfers by him to his co-defendant, in which the plaintiff has introduced evidence to show that the second purchasing defendant purchased from the first defendant at lower prices than the latter paid for the goods, it is proper to receive evidence on the part of the second defendant that he got the goods at prices greater than they would have cost him had he been able to import them. Such evidence tends "to prove that there was nothing in the price of the goods which would go to show that there was any fraudulent combination between (the defendants); but as the whole of the evidence by which this alleged conspiracy is sought to be supported is circumstantial, the defendant, Taylor, had a right to establish this fact in order to disprove

any unfair and unjust inferences which might be drawn from the fact that he purchased the goods from the Kendalls at less prices than they paid for them." *Train v. Taylor*, 51 Hun 215, 4 N. Y. Supp. 492.

In an action charging a conspiracy between the defendants to defraud the plaintiff, evidence is admissible on the part of one of the defendants that he never had any conversation with the other upon the subject of the alleged conspiracy. *Redding v. Goodwin*, 44 Minn. 355, 46 N. W. 563.

11. *Kelly v. People*, 55 N. Y. 565, 14 Am. Rep. 342.

12. *Bloomer v. State*, 48 Md. 521; *Carter v. State*, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262.

On a prosecution for conspiracy committed by the defendant and others, entries in the books of such other persons, a partnership, made by their clerk, a stranger to the conspiracy, may be received as evidence tending to strengthen the testimony connecting such third person with the conspiracy. *State v. Cardoza*, 11 S. C. 195.

On a prosecution of several persons for conspiracy to obstruct the passage of mails, telegrams passing between the different parties during the continuance of the conspiracy and having relation to the stoppage of mail trains are competent evidence if identified and brought home to them as circumstances tending to show such conspiracy. *Clune v. U. S.*, 159 U. S. 590, 40 L. ed. 269, 16 Sup. Ct. Rep. 125.

**Employees of Corporation.** — On an issue as to a fraudulent conspiracy between the officers of a corporation with the object to ruin the business

c. *Acquaintance*.—The fact that the parties charged with the conspiracy had a previous opportunity to become acquainted,<sup>13</sup> and are acquainted with each other, is a circumstance proper to be shown in proof of the conspiracy.<sup>14</sup>

d. *Overtures to Commit Crime*.—It is permissible to show that the defendant had proposed the scheme to the alleged co-conspirator,<sup>15</sup> or even to another person.<sup>16</sup>

of a tenant of the corporation by means of the unlawful and malicious issuance of a distress warrant and seizure of the tenant's property, it is proper to receive evidence that the magistrate who issued the warrant and the constable who served it were in the employ of the corporation. *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843.

In *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, it was held that editorial utterances in a newspaper published as the organ of various anarchistic associations whose publishers were on trial charged with being members of a conspiracy to kill police officers were proper to be considered by the jury in connection with all the other facts and circumstances, with a view of determining whether the defendants who were responsible for their issuance did or did not belong to the conspiracy charged.

13. *State v. Kennedy*, 154 Mo. 268, 55 S. W. 293.

14. *Scott v. State*, 30 Ala. 503; *Reinhold v. State*, 130 Ind. 467, 30 N. E. 306. "A conspiracy to commit crime is not likely to exist between strangers." See also *State v. Gadbois*, 89 Iowa 25, 56 N. W. 272.

The Relations and Conduct of the supposed co-conspirators may be treated as some evidence of a collusive combination. *McDowell v. Rissell*, 37 Pa. St. 164.

**Confidential Business Relations.**  
On an issue as to whether or not a transfer of property was effected in pursuance of a fraudulent conspiracy between the parties, it is proper to receive evidence of the confidential business relations between them. *Blum v. Jones*, 86 Tex. 492, 25 S. W. 694; *reversing* 23 S. W. 844.

**The Fact That the Parties Charged as Conspirators Were Frequently**

**Seen Together** on occasions other than the one at which the crime was committed may be received as a fact tending to prove conspiracy. *People v. Childs*, 127 Cal. 363, 59 Pac. 768.

In proof of a conspiracy to commit a crime it is proper to receive evidence showing that the defendant and those connected with him were familiar associates and confederates for the commission of crime. *State v. Stevens*, 67 Iowa 557, 25 N. W. 777. See also *Yeary v. State*, (Tex. Crim. App.), 66 S. W. 1, 106.

The fact that the defendant and others of a supposed conspiracy were engaged for a long time in private conversation a few hours before the commission of the crime may of itself, when the nature and substance of the conversation are not known, prove nothing; yet it is a circumstance proper for the consideration of the jury in determining whether there was, as charged, a conspiracy. *State v. Adams*, 20 Kan. 311.

15. *State v. Ford*, 3 Stroob. (S. C.) 517, where the court said that they had yet "to learn that proof which shows the inception in the mind of the prisoner of a scheme of villainy, which is afterwards developed by an act done, and for which he is on trial, is not competent."

16. *People v. Arnold*, 46 Mich. 268, 9 N. W. 406.

On an issue as to the fact of a conspiracy to commit a crime it is proper to receive evidence tending to show that prior to the conspiracy charged the accused was seeking an opportunity to meet his alleged co-conspirator in order to arrange with him to commit such crime; such evidence having a tendency to show a willingness on the part of the accused to enter into a conspiracy for the commission of such crime. *Reinhold v. State*, 130 Ind. 467, 30 N. E. 306; *citing* *Williams v. State*, 47

e. *Possession of Fruits of Crime*. — Possession by one of the conspirators of the property, stolen in pursuit of the common criminal purpose, is proper to be shown against another of the associates on trial.<sup>17</sup>

f. *Distribution of Spoils*. — Proof of the distribution of the spoils of the conspiracy between its members furnishes some evidence of the conspiracy.<sup>18</sup>

g. *Report of Conspiracy*. — Where it becomes currently reported that several persons have conspired to establish a boycott upon a certain person and such report is the natural consequence of the acts and utterances of such persons, the existence of the report may be proved, in a civil action against them for damages, notwithstanding that the plaintiff alleged specific acts done by the defendants to his prejudice.<sup>19</sup>

h. *Acts and Declarations of Parties*. — (1.) *Generally*. — The existence or nature of a conspiracy cannot be established by the acts or declarations of one conspirator in the absence and without the knowledge and concurrence of the others.<sup>20</sup> But evidence of

Ind. 568; *Walton v. State*, 88 Ind. 9.

17. *State v. Stevenson*, 26 Mont. 332, 67 Pac. 1,001.

Where several railroad cars were plundered at the same station and near the same time, and several defendants were jointly indicted and charged with breaking and entering a railroad car, on the separate trial of one, the fact that the same class of goods missed from such broken and rifled cars was found in the possession of each of them is admissible, both to establish a conspiracy and to implicate the defendant in the guilt of his associates. *Fisher v. State*, 73 Ga. 595.

18. *Kimmell v. Geeting*, 2 Grant's Cases, (Pa.), 125, where the court said: "If the distribution is made, not according to the arbitrary will of the criminal, but equally, or according to some rule of *distribution agreed upon*, this strengthens the evidence of original participation in the act of acquisition. It is not intended to liken the conduct of the plaintiffs in error to persons of the description here referred to, further than necessary to illustrate the principle. As men are not generally permitted to reap where they do not sow, their participation in the fruits of the enterprise, under the circumstances, was some evidence that they were engaged in it, and the declara-

tions of one of them, while so engaged, were properly admitted."

19. *Webb v. Drake*, 52 La. Ann. 290, 26 So. 791.

20. *Conspiracy Not Provable by Acts and Declarations*. — *United States*. — *U. S. v. Babcock*, 3 Dill. 581, 24 Fed. Cas. No. 14,487; *U. S. v. Goldberg*, 7 Biss. 175, 25 Fed. Cas. No. 14,832; *U. S. v. Newton*, 52 Fed. 275; *Winchester & P. Mfg. Co. v. Creary*, 116 U. S. 161; *U. S. v. McKee*, 3 Dill. 546, 26 Fed. Cas. No. 15,685; *Rea v. Missouri*, 17 Wall. 532. *Arkansas*. — *Gill v. State*, 59 Ark. 422, 27 S. W. 598.

*California*. — *Barkley v. Copeland*, (Cal.), 25 Pac. 405; *reversing* 86 Cal. 483, 25 Pac. 1.

*Indiana*. — *Roberts v. Kendall*, 3 Ind. App. 339, 29 N. E. 487.

*Iowa*. — *Wiggins v. Leonard*, 9 Iowa 194; *State v. Weaver*, 57 Iowa 730, 11 N. W. 675.

*Kansas*. — *Chapman v. Blakeman*, 31 Kan. 684, 3 Pac. 277.

*Kentucky*. — *Metcalf v. Conner*, Litt. Sel. Cas. 497, 12 Am. Dec. 340; *Holly v. Com.*, 18 Ky. L. Rep. 441, 36 S. W. 532.

*Michigan*. — *Solomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336.

*Missouri*. — *Holliday v. Jackson*, 30 Mo. App. 263.

*New York*. — *Cuyler v. Cartney*, 40 N. Y. 221, 33 Barb. 165; *Miller v. Barber*, 66 N. Y. 558.

distinct acts and declarations themselves in execution or for the promotion of the common design is admissible.<sup>21</sup>

*North Carolina.*—*Bryce v. Butler*, 70 N. C. 585.

*Ohio.*—*Clawson v. State*, 14 Ohio St. 234.

*Oregon.*—*Osmun v. Winters*, 30 Or. 177, 46 Pac. 780.

*Texas.*—*Blain v. State*, 33 Tex. Crim. App. 236, 26 S. W. 63; *Nelson v. State*, (Tex. Crim. App.), 67 S. W. 320.

*Vermont.*—*Windover v. Robbins*, 2 Tyler 1.

*Virginia.*—*Danville Bank v. Waddell*, 31 Gratt. 469.

**"No Man's Connection With the Conspiracy** can be legally established by what the others did in his absence and without his knowledge and concurrence." *U. S. v. Babcock*, 3 Dill. (U. S.) 581, 24 Fed. Cas. No. 14,487.

"To admit such declarations—such hearsay testimony—in proof of the conspiracy itself, would in civil matters 'put every man at the mercy of rogues;' and in charges of criminal conspiracy, render the innocent the helpless victims of villainous schemes, supported and proved by the prearranged and manufactured evidence of the promoters thereof." *People v. Irwin*, 77 Cal. 494, 20 Pac. 56.

"A species or form of evidence which is in its nature inadmissible, unless some prior or other fact is proved, cannot be received to establish the fact, proof of which is an indispensable condition of its own admissibility." *Cuyler v. McCartney*, 40 N. Y. 221, 33 Barb. 165.

**"The Reason for Requiring Proof of the Existence of the Conspiracy Aliunde the Acts and Declarations** of the co-conspirators made in the absence of appellant is to prevent the danger of the jury finding the conspiracy to exist from the acts and declarations alone. In those cases, therefore, where the existence of the conspiracy is not an issue, because it is merged in the crime, and manifest from the parties being present and acting together in the commission of the crime (*Cox's Case*, 8 Tex. App. 303), or where the proof *aliunde* establishing the conspiracy is so clear

and conclusive as to negative the probability that the jury could have relied on such acts and declarations in finding a conspiracy, then their admission only serves to throw light on the conduct and motive of the parties acting together. If, therefore, in such cases, acts and declarations transpiring before the formation of the conspiracy are admitted, still, if they relate to and are in the furtherance of the identical purpose actually carried out, their admission can seldom be otherwise than harmless." *Blain v. State*, 33 Tex. Crim. App. 236, 26 S. W. 63.

**21. Evidence of Distinct Acts and Declarations in Furtherance or Execution Thereof Admissible.**—*United States.*—*U. S. v. Lancaster*, 44 Fed. 896, 10 L. R. A. 333.

*California.*—*People v. Bentley*, 75 Cal. 407, 17 Pac. 436; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351.

*Connecticut.*—*Gardner v. Preston*, 2 Day 205, 2 Am. Dec. 158.

*Indiana.*—*Roberts v. Kendall*, 3 Ind. App. 339, 29 N. E. 487; *Card v. State*, 109 Ind. 415, 9 N. E. 591; *Jones v. State*, 64 Ind. 473.

*Maryland.*—*Powell v. Young*, 45 Md. 494.

*Massachusetts.*—*Com. v. Smith*, 163 Mass. 411, 40 N. E. 189.

*Michigan.*—*People v. Saunders*, 25 Mich. 119.

*Minnesota.*—*Redding v. Wright*, 49 Minn. 322, 51 N. W. 1,056.

*Mississippi.*—*Street v. State*, 43 Miss. 1.

*New York.*—*Jones v. Baker*, 7 Cow. 445; *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274.

*North Carolina.*—*State v. Brady*, 107 N. C. 822, 12 S. E. 325; *State v. Anderson*, 92 N. C. 732; *State v. Mace*, 118 N. C. 1,244, 24 S. E. 798.

*Ohio.*—*Clawson v. State*, 14 Ohio St. 234.

**The Acts of the Parties in the Particular Case**, the nature of those acts, their declarations and statements, whether verbal or in writing, and the character of the transactions or series of transactions, with the accompanying circumstances as the evi-

(2.) **Other Similar Offenses.** — Where a conspiracy to commit an unlawful act is in issue, evidence of other unlawful acts of like character committed by the same parties at or about the same time is admissible,<sup>22</sup> although it is also held that to make such evidence competent, some connection must exist between the several unlawful acts.<sup>23</sup>

dence may disclose them, should be investigated and considered as sources from which evidence may be derived of the existence or non-existence of the conspiracy. *U. S. v. Goldberg*, 7 Biss. (U. S.) 175, 25 Fed. Cas. No. 15,223. See also *U. S. v. Newton*, 52 Fed. 275.

The existence of a conspiracy must be commonly made out by the detached acts and statements of the individual conspirators, and in a prosecution therefor the admissions of a confederate after the offense was committed are admissible to prove his own participation. *People v. Arnold*, 46 Mich. 268, 9 N. W. 406.

In *Woods v. State*, (Tex. Crim. App.), 60 S. W. 244, a prosecution under an indictment charging the defendant with being an accessory after the fact to the crime of theft, it was held error to permit a witness to testify to a conversation between himself and the defendant, in which the defendant suggested to the witness to steal a bunch of cattle, because, although it might have been possible that the cattle stolen were the cattle alluded to in that conversation, the mere possibility that such was the case was not enough.

22. *United States*. — *Davis v. U. S.*, 107 Fed. 753; *Lincoln v. Claffin*, 7 Wall. 132.

*Connecticut*. — *State v. Spalding*, 19 Conn. 233, 48 Am. Dec. 158.

*Iowa*. — See also *State v. Lee*, 91 Iowa 499, 60 N. W. 119.

*Maine*. — *Aldrich v. Warren*, 16 Me. 465.

*Michigan*. — *People v. Saunders*, 25 Mich. 119.

*New York*. — *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274.

*Ohio*. — *Tarbox v. State*, 38 Ohio St. 581.

On a prosecution for conspiracy to defraud an insurance company, by procuring a policy on the life of the father of one of the defendants, by collusion with the company's local

agent, and misrepresenting the father's age and health in the application for the policy, and the procurement of a third person to personate such father in the medical examination, it is proper to admit in evidence an application by the father to the poor directors for relief, made two years prior to the insurance application, sworn to by the applicant before his son, one of the defendants, who was a justice of the peace, and stating therein his age to be greater than that stated in the application for insurance, and showing his ill health. Such evidence "was directly connected with this transaction, and as an overt act of one of the two joint conspirators it was evidence against both." *Com. v. O'Brien*, 140 Pa. St. 555, 21 Atl. 385.

*Lucky v. Roberts*, 25 Conn. 486, where the court said: "Whenever a conspiracy is alleged as a means of effecting a fraudulent purchase of goods it is the constant practice of the courts to receive as evidence of the character of the act like fraudulent acts between the same conspirators at or about the same time and of the same nature in furtherance of the fraudulent design. And so long as the conduct of men is allowed to throw light on their motives of action, so long is such evidence most proper to go to the jury when those motives are the subject of inquiry." See also *Thompson v. Rose*, 16 Conn. 71; *Gardner v. Preston*, 2 Day (Conn.) 205, 2 Am. Dec. 91.

On a prosecution for a conspiracy to deal unlawfully with the passes of one railroad, it is proper, for the purpose of establishing a fraudulent intent, to prove possession of passes of the same kind and description over another railroad which were stolen at the same time and from the same person as the passes in question. *Bloomer v. State*, 48 Md. 521.

23. "To make one criminal act evidence of another some connection

(3.) **Acts Occurring in Another State.** — The fact that some of the other acts offered in evidence to prove the conspiracy occurred in another state than that where the conspiracy was formed and accomplished does not affect their admissibility as circumstances, where they are not offered to prove an offense *per se*, but merely as circumstances tending to show privity between the alleged conspirators in the carrying on of the conspiracy.<sup>24</sup>

(4.) **Acts Involving Proof of Other Offenses.** — Evidence of acts done by the alleged co-conspirators in the execution of the plans and purposes of the conspiracy is competent to prove the existence of the conspiracy, although they involve proof of other offenses.<sup>25</sup>

must exist between them; that connection must be traced in the general design, purpose or plan, or it may be shown by such circumstances of identification as necessarily tends to establish that the person who committed one must have been guilty of the other. The collateral or extraneous offense must form a link in the chain of circumstances, or proofs relied upon for conviction; as an isolated or disconnected fact it is of no consequence." *Swan v. Com.*, 104 Pa. St. 218.

In *Strout v. Packard*, 76 Me. 148, 49 Am. Rep. 601, the court said: "That a joint purpose of the seven took effect in this single act of assault by one could not be proved against all by showing acts of alleged combination among some of them at other times, not participated in by the others. Such an act, as against those not participating in it, did not tend to prove that they had any common purpose with the others whatever, either when the act was committed, or on the night of this assault. The distinction is clear between the rule of evidence which applied here, and the rule which, when a conspiracy has once been proved *aliunde*, while it continues receives the declarations and acts of one conspirator, in furtherance of the common design, as evidence against even his absent associates. A conspiracy being proved among a certain number of men, the act of one, in pursuance of the common plan, may be the act of all. But a man is not to be proved to be a conspirator, having a joint illegal intent with others in a particular assault which he does not personally commit, by showing the misconduct

of the others on previous occasions in which he does not participate."

24. "Combinations and conspiracies can only be established by a number of indefinite circumstances which vary according to the objects to be accomplished. Their field of operations sometimes embraces various states, as the necessity of the conspirators require. Yet the state in which all or any of them resided and in which the conspiracy originated or was conducted has ample jurisdiction; otherwise the offense would be committed with impunity." *Bloomer v. State*, 48 Md. 521. See also *Hatfield v. Com.*, 11 Ky. L. Rep. 468, 12 S. W. 309.

Under a charge of conspiracy to defraud various counties by means of false claims it is proper to receive evidence that the alleged conspirators had filed such claims with the proper officers of the various counties as tending to show the fact of the conspiracy. *State v. McIntosh*, 109 Iowa 209, 80 N. W. 349.

25. *State v. McCahill*, 72 Iowa 111, 33 N. W. 599, affirming 30 N. W. 553; *State v. Adams*, 20 Kan. 311; *Com. v. Scott*, 123 Mass. 222; *State v. Greenwade*, 72 Mo. 298; *Shotwell v. Com.*, 23 Ky. L. Rep. 1,649, 65 S. W. 820.

On the prosecution of county commissioners for conspiracy to obtain money from the county by false bills, the reception of evidence of the payment of money to the defendants, or some of them, for the purpose of influencing their votes on matters before them other than those complained of is admissible as evidence from which the jury might infer that false and fraudulent bills were to be ren-

**C. CONCLUSIONS OF WITNESS**—The fact of a conspiracy cannot be established by the opinions or conclusions of a witness.<sup>26</sup> Nor can its objects be thus established.<sup>27</sup>

**3. Relation of Proof to Pleading.**—**A. IN GENERAL.**—On a charge of conspiracy, as in every other criminal charge, the crime must be proved as laid in the indictment,<sup>28</sup> although it is only

dered. *Ochs v. People*, 124 Ill. 399, 16 N. E. 662.

**Whatever is Done in Preparation of a Crime or in Concealing the Fruits Thereof** is competent to be shown, although in such preparation or concealment another and distinct offense is committed. And it is not essential that it be established beyond peradventure that the acts or conduct were based upon the conspiracy or in reference to the crime; it is enough that they harmonize with and tend to confirm the charge of conspiracy and are reasonably indicative of preparation for the crime. *State v. Adams*, 20 Kan. 311.

**26.** *Laytham v. Agnew*, 70 Mo. 48. See also *Ferguson v. State*, 134 Ala. 63, 32 So. 760.

**27.** *Girdner v. Walker*, 1 Heisk. (Tenn.) 186.

**28.** *U. S. v. Newton*, 52 Fed. 275; *Rex v. Pollman*, 2 Camp. 229; *Com. v. Manley*, 12 Pick. (Mass.) 173; *Evans v. People*, 90 Ill. 384. See also *Smith v. Nippert*, 79 Wis. 135, 48 N. W. 253.

A charge of conspiracy to cheat and defraud the citizens at large or particular individuals out of their land entries is not supported by evidence that the defendants conspired "to make entries in the land office before it was open and before it was declared to be open, or after it was open, for the purpose of appropriating lands to their own use and excluding others." *State v. Trammell*, 2 Ired. L. (N. C.) 379.

Under an indictment charging a conspiracy to falsely accuse a person of assault with intent to rape, proof of a conspiracy to accuse the person of seduction and adultery is a fatal variance. *State v. Hadley*, 54 N. H. 224.

Where the offense charged is a conspiracy to take and carry away with intent to steal or destroy cer-

tain public records, proof of a conspiracy to obtain by the consent of the officer having the records in his custody access to and inspection of such records would not support the charge, unless there was also the purpose to take and carry away with intent to steal or destroy such records. *U. S. v. Hutchins*, 1 Cin. Law Bul. 371, 26 Fed. Cas. No. 15,430.

In an action on the case in the nature of a conspiracy against several persons for obtaining goods on credit by false and fraudulent representations, evidence of representations made by one of the conspirators alone, in pursuance of a previous agreement and confederacy to that effect with the others, although in their absence, is properly received under a declaration charging all of the defendants with having made the representations. *Livermore v. Herschell*, 3 Pick. (Mass.) 33.

A charge of a conspiracy to defraud a particular individual is not established by proof of a conspiracy to defraud the public generally or any individual whom the conspirators might be able to defraud. *Com. v. Harley*, 7 Metc. (Mass.) 506. See also *Com. v. Kellogg*, 7 Cush. (Mass.) 473.

Under a charge of conspiracy to injure, threaten or intimidate a deputy collector of internal revenue on account of the discharge of his duty, or to prevent him from its further discharge by firing at him, it is not a fatal variance to show that the shots were fired at the party or posse to which the deputy collector belonged, he being present. *U. S. v. Johnson*, 26 Fed. 682.

Under a charge of conspiracy to obtain goods by false pretenses, proof of a conspiracy to obtain goods and labor is no variance. *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997.

necessary to prove material allegations.<sup>29</sup>

B. TIME. — It is not essential that the conspiracy be shown to have been formed at the precise time or times alleged.<sup>30</sup>

C. PLACE. — Nor is it a material variance that the proof of the accomplishment of the common design shows it to have taken place at a place other than in exact accordance with the original conception.<sup>31</sup> Nor on a prosecution under the Federal Statutes for a conspiracy alleged to have been entered into in a certain county is proof of a conspiracy entered into in another county in the same federal district a fatal variance.<sup>32</sup>

D. MEANS. — It is not incumbent to prove that all the means set out were in fact agreed upon to carry out the conspiracy, or that any of them were actually used or put in operation; it is sufficient if it be shown that one or more of the means set out were to be used.<sup>33</sup>

4. **Cogency of Proof.** — A. CIVIL ACTIONS. — Proof of conspiracy as a basis for damages for fraudulent conspiracy in a civil action must be full, clear and satisfactory,<sup>34</sup> although it need not be

29. U. S. v. Lancaster, 44 Fed. 896, 10 L. R. A. 333.

On a prosecution for conspiracy to steal certain chattels, the property of, and in the possession of the United States of America, evidence that the chattels in question were at the time in the possession of the collector of customs, having been seized by him as smuggled merchandise preparatory to proceedings for forfeiture and condemnation, is not a fatal variance. U. S. v. Gardner, 42 Fed. 829.

30. U. S. v. Goldberg, 7 Biss. (U. S.) 175, 25 Fed. Cas. No. 15,223; U. S. v. Hutchins, 1 Cin. Law. Bul. 371, 26 Fed. Cas. No. 15,430.

31. Thus, in *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, it was held that if there is a conspiracy to kill a policeman at a station-house, but the agents of the conspiracy kill the policeman at a short distance away from the station-house, there is no such departure from the original design as to relieve the conspirators from the responsibility. "A plan for the perpetration of a crime or for the accomplishment of any action, whether worthy or unworthy, cannot always be executed in exact accordance with the original conception. It must suffer some change or modification in order to meet emergencies or unforeseen contingencies."

32. U. S. v. Smith, 2 Bond (U. S.) 323, 27 Fed. Cas. No. 16,322.

33. U. S. v. Cassidy, 67 Fed. 698. See also U. S. v. Hutchins, 1 Cin. Law. Bul. 371, 26 Fed. Cas. No. 15,430.

On a charge of conspiracy to obtain goods by various false pretenses it is not a fatal variance where the proof shows a conspiracy to obtain the goods by any one of the false pretenses set out. *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997. The court said: "The subject of the issue is sufficiently proved by proving any one of the pretenses laid, provided such pretense would have been sufficient if it alone had been charged. The mentioning of the various false pretenses is rather a matter of enumeration than of essential description, and those pretenses not proved to have been contemplated may be rejected."

34. *Gilman v. People*, 178 Ill. 19, 52 N. E. 967.

Proof that several persons have similar or identical grounds of complaint and entertain like feelings of resentment against another, and when for the gratification of such feelings they, by their acts and utterances, endeavor to destroy his business, each being aware of the feelings and doings of the others and approving the results accomplished, affords sufficient evidence of a combination or common purpose to sustain a verdict, as well for punitive and exemplary damages as actual



beyond reasonable doubt.<sup>35</sup>

B. CRIMINAL ACTIONS. — But in a criminal prosecution for conspiracy, the crime must be shown to the satisfaction of the jury and beyond reasonable doubt.<sup>36</sup>

## II. ACTS AND DECLARATIONS OF CONSPIRATORS IN FURTHERANCE OF CONSPIRACY.

1. Rules as to Admissibility. — A. IN GENERAL. — The general doctrine is that where several persons have conspired together to commit an unlawful act or to commit an act, although not unlawful in itself, by means which are unlawful, the acts and declarations of the members of the conspiracy done or made during the existence of the conspiracy and in furtherance of its objects are original evidence against all the others,<sup>37</sup> as illustrated by the cases set out

damages. *Webb v. Drake*, 52 La. Ann. 290, 26 So. 791.

35. *Biever v. Herr*, 1 Pear. (Pa.) 510.

36. *U. S. v. Lancaster*, 44 Fed. 896, 10 L. R. A. 333; *U. S. v. Johnson*, 26 Fed. 682; *State v. Corcoran*, (Idaho), 61 Pac. 1,034; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

37. Acts and Declarations of Conspirators Admissible Against Co-conspirators. — *United States*. — *Jones v. Simpson*, 116 U. S. 609; *Lincoln v. Claflin*, 7 Wall. 132.

*Alabama*. — *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31.

*Arkansas*. — *Gray v. Nations*, 1 Ark. 557; *Clinton v. Estes*, 20 Ark. 216.

*California*. — *Barkly v. Copeland*, (Cal.), 25 Pac. 405; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635.

*Colorado*. — *Rollins v. Board of Com'rs*, 15 Colo. 103, 25 Pac. 319.

*Connecticut*. — *Colt v. Eves*, 12 Conn. 243.

*Florida*. — *Williams v. Dickenson*, 28 Fla. 90, 9 So. 847.

*Illinois*. — *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241.

*Indiana*. — *Roberts v. Kendall*, 3 Ind. App. 339, 29 N. E. 487; *Wolfe v. Pugh*, 101 Ind. 293.

*Iowa*. — *Taylor County v. Standley*, 79 Iowa 666, 44 N. W. 911; *Miller v. Dayton*, 57 Iowa 423, 10 N. W. 814.

*Kentucky*. — *Smithern v. Waddle*, 19 Ky. L. Rep. 1,418, 43 S. W. 453.

*Louisiana*. — *Marigny v. Union*

*Bank*, 5 Rob. 354; *Burroughs v. Nettles*, 7 La. (O. S.) 113.

*Maine*. — *Aldrich v. Warren*, 16 Me. 465.

*Maryland*. — *Powell v. Young*, 45 Md. 494.

*Massachusetts*. — *Livermore v. Herschell*, 3 Pick. 33.

*Michigan*. — *Edgell v. Francis*, 66 Mich. 303, 33 N. W. 501.

*Minnesota*. — *Carson v. Hawley*, 82 Minn. 204, 84 N. W. 746.

*Mississippi*. — *Trimble v. Turner*, 13 Smed. & M. 348, 53 Am. Dec. 90; *Stovall v. Farmers' & Merchants' Bank*, 8 Smed. & M. 305, 47 Am. Dec. 85.

*Missouri*. — *Exchange Bank v. Russell*, 50 Mo. 531.

*Montana*. — *Pincus v. Reynolds*, 19 Mont. 564, 49 Pac. 145.

*Nebraska*. — *Brown v. Winterstein*, (Neb.), 31 N. W. 246.

*New Hampshire*. — *Jacobs & Co. v. Shorey*, 48 N. H. 100; *Lee v. Lamprey*, 43 N. H. 13; *Page v. Parker*, 40 N. H. 47.

*New Jersey*. — *Patton v. Freeman*, 1 N. J. L. 113; *Ferguson v. Reeve*, 16 N. J. L. 193.

*New York*. — *Flagler v. Newcombe*, 13 N. Y. St. Rep. 739, 13 N. Y. Supp. 299; *Moers v. Martens*, 8 Abb. Pr. 257; *Cuyler v. McCartney*, 40 N. Y. 221, 33 Barb. 165; *Miller v. Barber*, 66 N. Y. 558.

*North Carolina*. — *Barnhart v. Smith*, 86 N. C. 473.

*Oregon*. — *Sheppard v. Yocum*, 10 Or. 402.

below.<sup>38</sup> Such evidence is not to be excluded as hearsay.<sup>39</sup>

**B. BASIS OF DOCTRINE.**—The principle upon which such evidence is admitted is that where a combination of individuals has been formed for an unlawful purpose they have assumed an individuality in doing wrong, and the conduct of each one in doing or promoting the act is chargeable to all of them.<sup>40</sup>

**C. RULE APPLIED.**—*a. Criminal Prosecutions.*—In regard to the admission of the acts and declarations of one conspirator as original evidence against all members of the conspiracy, substantially the same rule applies in criminal as in civil cases,<sup>41</sup> as will be

*Pennsylvania.*—McCabe *v.* Burns, 66 Pa. St. 356; Sommer *v.* Gilmore, 160 Pa. St. 129, 28 Atl. 654; Palmer *v.* Gilmore, 148 Pa. St. 48, 23 Atl. 1,041; Scott *v.* Baker, 37 Pa. St. 330; Rogers *v.* Hall, 4 Watts 359; Wilbur *v.* Strickland, 1 Rawle 458; McCaskey *v.* Graff, 23 Pa. St. 321, 62 Am. Dec. 336.

*South Dakota.*—Muller *v.* Flavin, 13 S. D. 595, 83 N. W. 687.

*Texas.*—Brown *v.* Chenoworth, 51 Tex. 469.

*Vermont.*—Broughton *v.* Ward, 1 Tyler (Vt.) 137; Jenne *v.* Joslyn, 41 Vt. 478.

*Virginia.*—Clayton *v.* Anthony, 6 Rand. 285.

*West Virginia.*—Ellis *v.* Dempsey, 4 W. Va. 126.

*Wisconsin.*—Tucker *v.* Finch, 66 Wis. 17, 27 N. W. 817.

**38. On Proof of a Conspiracy Between a Husband and Wife to Defraud His Creditors,** evidence of declarations made by him while the conspiracy was still pending, and tending to show the intent to defraud, is admissible against the wife; especially when the husband retains possession of the property which he had conveyed to his wife and which the creditors are seeking to subject. Ernest *v.* Merritt, 107 Ga. 61, 32 S. E. 898.

The rule admitting as evidence the acts and declarations of one co-conspirator in pursuance of the conspiracy, on proof *prima facie* establishing the fact of the conspiracy, applies to an action on the case in the nature of a conspiracy against several persons for obtaining goods on credit by false representations, so as to admit evidence of such representations made by one of the alleged conspirators in pursuance of the combina-

tion. Livermore *v.* Herschell, 3 Pick. (Mass.) 33.

**39.** Hughes *v.* Waples-Platte Grocer Co., (Tex. Civ. App.), 60 S. W. 981. And see cases cited in note 37.

**40.** U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333; U. S. *v.* Cole, 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14,832; Owens *v.* State, 16 Lea (Tenn.) 1. And see cases cited in note 37 *supra*.

**41. Rule Equally Applicable to Criminal Prosecutions.**—*England.* Queen's Case, 2 Brod. & B. 310, 6 Eng. C. L. 129; Hunt's Case, 3 B. & Ald. 566, 5 Eng. C. L. 377.

*United States.*—Wiborg *v.* U. S., 163 U. S. 632; Clune *v.* U. S., 159 U. S. 590, 40 L. ed. 269; American Fur Co. *v.* U. S., 2 Pet. 358; U. S. *v.* Johnston, 1 Cranch C. C. 237, 26 Fed. Cas. No. 15,490; *Ex parte* Bollman, 4 Cranch 75; U. S. *v.* Lancaster, 44 Fed. 896, 10 L. R. A. 333; U. S. *v.* Cassidy, 67 Fed. 698.

*Alabama.*—Williams *v.* State, 81 Ala. 1, 1 So. 179; Smith *v.* State, 52 Ala. 407; Johnson *v.* State, 29 Ala. 62, 65 Am. Dec. 383; Thomas *v.* State, 133 Ala. 139, 32 So. 250.

*Arkansas.*—Glory *v.* State, 13 Ark. 236.

*California.*—People *v.* Lane, 101 Cal. 513, 36 Pac. 16; People *v.* Collins, 64 Cal. 293, 30 Pac. 847; People *v.* Geiger, 49 Cal. 643.

*Colorado.*—Solander *v.* People, 2 Colo. 48.

*Connecticut.*—State *v.* Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

*Georgia.*—Horton *v.* State, 66 Ga. 690; Malone *v.* State, 8 Ga. 408.

*Illinois.*—Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Van Eyck *v.* People, 178 Ill. 199, 52 N. E. 852; Ochs *v.*

seen by the illustrative cases set out below.<sup>42</sup>

*People*, 124 Ill. 399, 16 N. E. 662;  
*Wilson v. People*, 94 Ill. 299.

*Indiana*.—*Nevill v. State*, 60 Ind. 308; *Card v. State*, 109 Ind. 415, 9 N. E. 591; *Jones v. State*, 64 Ind. 473; *Walton v. State*, 88 Ind. 9.

*Iowa*.—*State v. Lewis*, 96 Iowa 286, 65 N. W. 295; *State v. McCahill*, 72 Iowa 111, 33 N. W. 599, 30 N. W. 553; *State v. Mushrush*, 97 Iowa 444, 66 N. W. 746.

*Kentucky*.—*Powers v. Com.*, 22 Ky. L. Rep. 1,807, 61 S. W. 735; *Hatfield v. Com.*, 11 Ky. L. Rep. 468, 12 S. W. 309; *Miller v. Com.*, 78 Ky. 15, 39 Am. Rep. 194.

*Louisiana*.—*State v. Banks*, 40 La. Ann. 736, 5 So. 18.

*Maine*.—*State v. Soper*, 16 Me. 293, 33 Am. Dec. 665.

*Massachusetts*.—*Com. v. Waterman*, 122 Mass. 43; *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81; *Com. v. Tivnon*, 8 Gray 375, 69 Am. Dec. 248.

*Michigan*.—*People v. Parker*, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578.

*Minnesota*.—*State v. Beebe*, 17 Minn. 241.

*Missouri*.—*State v. Swain*, 68 Mo. 605; *State v. Minton*, 116 Mo. 605, 22 S. W. 808.

*Montana*.—*Territory v. Campbell*, 9 Mont. 16, 22 Pac. 121; *State v. Dotson*, 26 Mont. 305, 67 Pac. 938.

*New Hampshire*.—*State v. Larkin*, 49 N. H. 39.

*New York*.—*People v. McKane*, 80 Hun 322, 30 N. Y. Supp. 95; *People v. Sharp*, 45 Hun 460; *People v. Kerr*, 6 N. Y. Supp. 674.

*North Carolina*.—*State v. Brady*, 107 N. C. 822, 12 S. E. 325; *State v. Davis*, 87 N. C. 514; *State v. Poll*, 1 Hawks 442, 9 Am. Dec. 655.

*Ohio*.—*Goins v. State*, 46 Ohio St. 457, 21 N. E. 476; *Fouts v. State*, 7 Ohio St. 471.

*Pennsylvania*.—*Com. v. Eberle*, 3 Serg. & R. 9; *Kehoe v. Com.*, 85 Pa. St. 127; *Carroll v. Com.*, 84 Pa. St. 107; *McManus v. Com.*, 91 Pa. St. 57.

*South Carolina*.—*State v. Ford*, 3 Strob. L. (S. C.) 517n.

*Tennessee*.—*Owens v. State*, 16 Lea 1.

*Texas*.—*Hudson v. State*, (Tex. Crim. App.), 66 S. W. 668; *Steed v. State*, (Tex. Crim. App.), 67 S. W. 328; *Nelson v. State*, (Tex. Crim. App.), 67 S. W. 320; *Cline v. State*, 34 Tex. Crim. App. 347, 30 S. W. 801; *Mixon v. State*, 36 Tex. Crim. App. 66, 35 S. W. 394; *Howell v. State*, (Tex. Crim. App.), 57 S. W. 835; *Myers v. State*, 6 Tex. App. 1. *Vermont*.—*State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *State v. Thibau*, 30 Vt. 100.

*Virginia*.—*Sands v. Com.*, 21 Gratt. 871.

*Washington*.—*State v. Payne*, 10 Wash. 545, 39 Pac. 157.

*West Virginia*.—*State v. Cain*, 20 W. Va. 679.

42. In *McIntosh v. Com.*, 23 Ky. L. Rep. 1,222, 64 S. W. 951, a prosecution for conspiring for the purpose of molesting and injuring property, in pursuance of which conspiracy the defendants committed murder, it was held that the admission of evidence as to the disturbance by the principal defendant and some of his co-defendants just prior to the murder was proper under the conspiracy charged, since, although all the defendants were not there, some of them were, and the remarks made in the presence of the others were proper for the jury.

In *Green v. State*, 109 Ga. 536, 35 S. E. 97, a prosecution for riot, the evidence showed that the defendants had assembled for the purpose of preventing an arresting officer from removing a prisoner from jail; that the riotous assembly commenced at the ringing of a bell in the forenoon and continued practically throughout the day and until the arrival of a company of militia. It was held that declarations made by members of the riotous assembly other than those on trial, were admissible in evidence against the others. See also *Baptist v. State*, 109 Ga. 546, 35 S. E. 658.

On the trial of a charge for conspiracy to induce a liquor dealer to violate the revenue laws by illegal sales for the purpose of extorting money from him, statements by one of the defendants made on the day

b. *Fact of Conspiracy Not Averred.*—To authorize the admission of such evidence where the offense charged is not the conspiracy itself, it is not necessary that the fact of conspiracy be expressly averred in the indictment.<sup>43</sup>

c. *Identity of Conspiracy.*—Nor, in such case, need the conspiracy be one to commit the identical offense charged or even a

following the making of the complaint against such dealer, and while it was pending, that he expected to make something out of it and that another of the defendants was concerned with and instigated it, are admissible against the latter defendant, where he has been connected with the conspiracy by independent evidence. *People v. Saunders*, 25 Mich. 119.

Proof that at or before the commission of the particular offense there was a great riot by many persons who composed a mob, and that the accused was one of them and took part in the riot, and, indeed, incited it and was in great part responsible for it, renders admissible evidence of what was said and done by the mob or any of its members. *McRae v. State*, 71 Ga. 96.

**Boycott.**—On a prosecution for a conspiracy to injure an employer by means of a boycott, after proof of overt acts on the part of one of the defendants in attempting to effect the boycott, it is proper to receive evidence that the defendant in question and another person were seen walking up and down the most frequented street, and that from between them copies of a circular requesting "the wise" to boycott a paper named were from time to time dropped on the sidewalk, although the witness testifying was unable to say which of the persons dropped them. *State v. Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

In *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, the celebrated trial of the Chicago anarchists, the admission in evidence of Johann Most's book on the science of revolutionary warfare was complained of as error. The book was a treatise on the most improved method of making bombs and preparing dynamite and other explosives. In overruling this objection the court said: "The circulation

of this treatise was an act of the illegal organization to which all the defendants belonged, and was one of the methods by which that organization instructed and advised its members to get ready for the murder of the police during the eight-hour excitement. Its distribution amongst its members of the International groups at their picnics and meetings, through the agent of the International Association, is proven beyond controversy. The newspaper organs commended it, and quoted from it, and advertised it without charge. Lingg and Fischer read it and acted upon the suggestions contained in it. When the leaders of the organization thus made use of this treatise, they adopted it as a manual of tactics, and it became a book of their written advice and instructions to their followers. It was competent testimony, as showing the purposes and objects which they had in view, and the methods by which they proposed to accomplish those objects. When the newspaper organs commended its study to their readers, they made its suggestions a part of their own advice to those readers. The efforts of the defendants who controlled these organs to put this pamphlet into the hands of the members of the International groups were acts and declarations in furtherance of the conspiracy, and were binding upon the other defendants."

On a prosecution of county officers for a conspiracy to obtain money from the county by means of false pretenses it is proper to receive evidence that one of the defendants collected money from a person who had been appointed by the board to an official position, which money he turned over to another of the defendants. *Ochs v. People*, 124 Ill. 399, 16 N. E. 662.

<sup>43</sup>. *Goins v. State*, 46 Ohio St. 457, 21 N. E. 476. Compare *Osborn v. Robbins*, 7 Lans. (N. Y.) 44.

similar one.<sup>44</sup>

d. *Preparation of Means Not Used.*—Whenever there is testimony showing there was a conspiracy to commit a crime, evidence of acts done in preparation of means for such crime is competent, notwithstanding that the means so prepared are not actually used.<sup>45</sup>

e. *Absence of Conspirator.*—It is not necessary to the admissibility of evidence of the acts and declarations of the others that the co-conspirator to be affected should have been present and within hearing when they were done or made.<sup>46</sup>

f. *Actor or Declarant Not Party to the Record or Proceeding.* And where two or more persons are charged with a substantive offense, not a conspiracy, but which it appears was committed in pursuance of a conspiracy, it is not necessary that the member whose acts and declarations are offered in evidence should be a

44. *Goins v. State*, 46 Ohio St. 457, 21 N. E. 476; *Kelly v. People*, 55 N. Y. 505, 14 Am. Rep. 342; *People v. Van Tassel*, 156 N. Y. 561, 51 N. E. 274; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

45. *State v. Adams*, 20 Kan. 311.

46. *Absence of Party to be affected immaterial. United States. Lincoln v. Chaffin*, 7 Wall. 132; *U. S. v. McKee*, 3 Dill. 546, 26 Fed. Cas. No. 15,685; *Rea v. Missouri*, 17 Wall. 532.

*Alabama.*—*Bonner v. State*, 107 Ala. 97, 18 So. 226; *Scott v. State*, 30 Ala. 503.

*Arkansas.*—*Fort v. State*, 52 Ark. 180, 11 S. W. 959, 20 Am. St. Rep. 163.

*California.*—*People v. Cotta*, 49 Cal. 166; *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *People v. Dixon*, 94 Cal. 255, 29 Pac. 504.

*Connecticut.*—*State v. Grady*, 34 Conn. 118; *Cowles v. Coe*, 21 Conn. 220.

*Delaware.*—*State v. Clark*, 9 Houst. 536, 33 Atl. 310.

*Illinois.*—*Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *Philpot v. Taylor*, 75 Ill. 309, 20 Am. Rep. 241.

*Indiana.*—*Smith v. Freeman*, 71 Ind. 85; *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *Jones v. State*, 64 Ind. 473; *Hogue v. McClintock*, 76 Ind. 205.

*Iowa.*—*State v. Grant*, 86 Iowa 216, 53 N. W. 120.

*Kentucky.*—*Oldham v. Bentley*, 6 B. Mon. 428.

*Louisiana.*—*Bushnell v. City Nat. Bank*, 20 La. Ann. 464; *Gaidry v. Lyons*, 29 La. Ann. 4.

*Massachusetts.*—*Com. v. Brown*, 14 Gray 419.

*Mississippi.*—*Stovall v. Farmers' & Merchants' Bank*, 8 Smed. & M. 305, 47 Am. Dec. 85.

*Montana.*—*Kleinschmidt v. Dunphy*, 1 Mont. 118.

*New Jersey.*—*Patton v. Freeman*, 1 N. J. L. 113.

*New York.*—*Farrell v. People*, 21 Hun 485.

*North Carolina.*—*Hauser v. Tate*, 85 N. C. 81, 39 Am. Rep. 689; *State v. Anderson*, 92 N. C. 732.

*Ohio.*—*Goins v. State*, 46 Ohio St. 457, 21 N. E. 476.

*Pennsylvania.*—*McKee v. Gilchrist*, 3 Watts. 230; *Jackson v. Summerville*, 13 Pa. St. 359; *Burns v. McCabe*, 72 Pa. St. 309; *Price v. Junkin*, 4 Watts. 85, 28 Am. Dec. 685; *Bredin v. Bredin*, 3 Pa. St. 81; *McCabe v. Burns*, 66 Pa. St. 356.

*Texas.*—*Rix v. State*, 33 Tex. Crim. App. 353, 26 S. W. 505; *Nelson v. State*, (Tex. Crim. App.), 67 S. W. 320; *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *Franks v. State*, 36 Tex. Crim. App. 149, 35 S. W. 977; *Barber v. State*, (Tex. Crim. App.), 69 S. W. 515; *Segrest v. State*, (Tex. Crim. App.), 57 S. W. 845.

*Virginia.*—*Sands v. Com.* 21 Gratt. 871.

In an action against a father for alienating the affections of the plaintiff's wife, the daughter of the defendant, statements made by the

party to the record or proceeding;<sup>47</sup> although on a prosecution for criminal conspiracy it seems that he should be a party to the indictment, but not necessarily on trial.<sup>48</sup>

g. *Actor or Declarant Not Alleged to Be a Conspirator.* — Nor on a prosecution for an offense other than conspiracy need the actor or declarant have been alleged to be a member of the conspiracy.<sup>49</sup>

h. *Acts and Declarations by Employees.* — It is not necessary that the acts or declarations shall have been done or made by the parties themselves; they may employ others to act for them in the furtherance of their ends, and if the acts and declarations of such employees were authorized they are admissible in evidence against their employers, provided, of course, they were made during the progress of the conspiracy and in furtherance of its objects.<sup>50</sup>

i. *Time of Joining Conspiracy.* — The time when the party to be affected by evidence of acts and declarations of the others becomes a member of the conspiracy is not material.<sup>51</sup>

plaintiff's wife during the whole period of alienation explanatory of her residence with her parents are admissible in evidence against the defendant, although not made in the presence of the defendant, there being proof of a concert of action. *Edgell v. Francis*, 66 Mich. 303, 33 N. W. 501.

47. *United States.* — *U. S. v. Cole*, 5 McLean 513, 25 Fed. Cas. No. 14,832.

*Alabama.* — *Blount v. State*, 49 Ala. 381.

*Arkansas.* — *Gill v. State*, 59 Ark. 422, 27 S. W. 598.

*California.* — *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678.

*Connecticut.* — *State v. Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

*Georgia.* — *Green v. State*, 109 Ga. 536, 35 S. E. 97; *Slaughter v. State*, 113 Ga. 284, 38 S. E. 854.

*Illinois.* — *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

*New York.* — *People v. McKane*, 80 Hun (N. Y.) 322, 30 N. Y. Supp. 95.

*Texas.* — *Taylor v. State*, 3 Tex. App. 169; *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746.

*Virginia.* — See also *Clayton v. Anthony*, 6 Rand. (Va.) 285.

"It is plain that the indictment of the conspirator whose acts and declarations are offered against his fellow can neither impart any quality of

verity or of relevancy to such acts and declarations, nor withdraw it from them; hence his inclusion or exclusion as a part of the indictment is not material." *People v. McKane*, 80 Hun (N. Y.) 322, 30 N. Y. Supp. 95.

48. *Clune v. U. S.*, 159 U. S. 590, 40 L. ed. 269.

49. *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 289.

50. *State v. Grant*, 86 Iowa 216, 53 N. W. 120. See also *Com. v. Harley*, 7 Metc. (Mass.) 506; *Pacific Live Stock Co. v. Gentry*, 38 Or. 275, 61 Pac. 422.

51. *Alabama.* — *Stewart v. State*, 26 Ala. 44.

*Missouri.* — *State v. Crab*, 121 Mo. 554, 26 S. W. 548.

*New Jersey.* — *Den v. Johnson*, 18 N. J. L. 87.

*Pennsylvania.* — *Peterson v. Speer*, 29 Pa. St. 478.

*Tennessee.* — *Owens v. State*, 16 Lea 1.

*Texas.* — *Smith v. State*, (Tex. Crim. App.), 17 S. W. 560; *Hudson v. State*, (Tex. Crim. App.), 66 S. W. 668; *Loggins v. State*, 8 Tex. App. 434.

*Virginia.* — *Sands v. Com.*, 21 Gratt. 871.

*Wisconsin.* — *Holtz v. State*, 76 Wis. 99, 44 N. W. 1,107.

"It is not necessary that the defendant against whom the act or declaration is sought to be introduced should have been a conspirator at the

j. *Duration of Conspiracy.*—The fact that the acts and declarations, evidence of which is sought to be introduced, covered a period of several years is immaterial so long as the evidence is otherwise unobjectionable.<sup>52</sup>

k. *Character of Acts and Declarations.*—(1.) *Documents.*—Within this rule letters or telegrams<sup>53</sup> written by one of the supposed conspirators to the others,<sup>54</sup> or to third persons,<sup>55</sup> during the pendency of the conspiracy and in furtherance of its objects are admissible. So also is a letter to one of the supposed conspirators from a third person intimately acquainted with his affairs proved to have been received by him and advising him as to future conduct.<sup>56</sup>

(2.) *Threats.*—Any threats made by a conspirator,<sup>57</sup> although made at different times and not in the presence of the conspirators, are admissible.<sup>58</sup> And this is the rule also, even although the wit-

time the act or declaration took place. If he subsequently joined the conspiracy he ratified the previous acts of the conspirators and made such prior acts and declarations in reference to the common object evidence against him." *Baker v. State*, 80 Wis. 416, 50 N. W. 518.

The admissibility of testimony of an agent joining a conspiracy is in no ways affected by the fact that he was employed after the association was organized or that the acts done and declarations made were done and made after its business was under way. *McKee v. State*, 111 Ind. 378, 12 N. E. 510.

52. *Hudson v. State*, (Tex. Crim. App.), 66 S. W. 668; *Spies v. People*, 122 Ill. 1, 12 N. E. 865; 17 N. E. 898, 3 Am. St. Rep. 320.

53. *U. S. v. Babcock*, 3 Dill. (U. S.) 581, 24 Fed. Cas. No. 14,487.

54. *People v. Hampton*, 4 Utah 258, 9 Pac. 508.

55. *Chicago R. I. & P. R. Co. v. Collins*, 56 Ill. 212.

On a prosecution for conspiracy to cause it to falsely appear of record that a certain person is lawfully married to one of the defendants, a letter written by another defendant under a feigned name is properly admitted in connection with proof that it was in fact written by him; the contents of the letter showing a corrupt motive on the part of the writer and as an admission that there was no legal marriage. *Com. v. Waterman*, 122 Mass. 43.

Under a charge of conspiracy con-

sisting of the unlawful procurement by the conspirators by way of pledge of certain corporate stocks under a false claim of indebtedness, in which the conspiracy was alleged to have been formed prior to the procurement of the stocks and to have been a continuing one up to the time of the attempt by the conspirators to sell the stocks so pledged, it is proper to receive in evidence on behalf of the alleged conspirators, letters from one of them to another, written prior to the pledge of the stocks, as part of the *res gestae*, under the rule that any communications from one alleged conspirator to the other, made while the conspiracy was in progress and relating to the subject matter, are a part of the *res gestae*. *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786.

56. *Com. v. Waterman*, 122 Mass. 43.

57. *Gardner v. People*, 4 Ill. 83; *Voght v. State*, 145 Ind. 12, 43 N. E. 1,049; *State v. McCahill*, 72 Iowa 111, 30 N. W. 553, 33 N. W. 579; *Mask v. State*, 32 Miss. 405; *State v. Phillips*, 117 Mo. 389, 22 S. W. 1,079; *Blain v. State*, 33 Tex. Crim. App. 236, 26 S. W. 63; *Cline v. State*, 33 Tex. Crim. App. 482, 27 S. W. 128.

58. *State v. Mace*, 118 N. C. 1,244, 24 S. E. 928; *Stevens v. State*, (Tex. Crim. App.), 59 S. W. 545.

*Evidence of Acts of Violence and Threats of Other Strikers*, with whom was associated the defendant, on trial for murder at a time preceding the homicide, is competent to show the purpose of the strikers to

ness is unable to state which of the conspirators made the threats.<sup>59</sup>

## 2. Requisites of Admissibility. — A. PROOF OF CONSPIRACY.

a. *Necessity*. — Involved in all of the cases cited in support of the preceding sections is the essential element of the fact that a conspiracy had been formed; and accordingly it is necessary in all cases that there be proof of conspiracy,<sup>60</sup> otherwise evidence of the acts

use violence in order to accomplish their unlawful purposes. "As defendant acted in concert with the other strikers to effect the purpose common to all, the evidence was competent to establish that purpose." *State v. McCahill*, 72 Iowa 111, 33 N. W. 599.

59. *Mask v. State*, 32 Miss. 405; *Preston v. State*, 4 Tex. App. 186; *State v. Weaver*, 57 Iowa 730, 11 N. W. 675.

60. *Proof of Conspiracy Necessary*. — *United States*. — *Winchester & P. Mfg. Co. v. Creary*, 116 U. S. 161.

*Alabama*. — *Turner v. State*, 124 Ala. 59, 27 So. 272; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31.

*Arkansas*. — *Gill v. State*, 57 Ark. 422, 27 S. W. 598.

*California*. — *People v. Kelly*, 133 Cal. 1, 64 Pac. 1,091; *People v. Bentley*, 75 Cal. 407, 17 Pac. 436; *People v. Irwin*, 77 Cal. 494, 20 Pac. 56.

*Georgia*. — *Foster v. Thrasher*, 45 Ga. 517.

*Kentucky*. — *Powers v. Com.*, 22 Ky. L. Rep. 1,807, 61 S. W. 735; *Strange v. Com.*, 23 Ky. L. Rep. 1,234, 64 S. W. 980.

*Indiana*. — *Wolfe v. Pugh*, 101 Ind. 293.

*Iowa*. — *Forshee v. Abrams*, 2 Iowa 571; *Johnson v. Miller*, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 756; *Hertich v. Hertrich*, 114 Iowa 643, 87 N. W. 689.

*Massachusetts*. — *Burke v. Miller*, 7 Cush. 547.

*Michigan*. — *People v. Pitcher*, 15 Mich. 397; *Henrich v. Saier*, 124 Mich. 86, 82 N. W. 879.

*Minnesota*. — *Redding v. Godwin*, 44 Minn. 355, 46 N. W. 563.

*Missouri*. — *Weinstein v. Reid*, 25 Mo. App. 41; *Hart v. Hopson*, 52 Mo. App. 177; *Hart v. Hicks*, 129 Mo. 99, 31 S. W. 351; *Exchange Bank v. Russell*, 50 Mo. 531; *State v. Weaver*, 165 Mo. 1, 65 S. W. 308.

*New Hampshire*. — *Jacobs v. Shorey*, 48 N. H. 100.

*New York*. — *Brackett v. Griswold*, 128 N. Y. 644, 28 N. E. 365; *Jones v. Hurlburt*, 39 Barb. 403; *Miller v. Barbour*, 66 N. Y. 558; *Carpenter v. Shedden*, 5 Sandf. 77; *Panama R. Co. v. Charlier*, 27 N. Y. St. Rep. 381, 7 N. Y. Supp. 528; *Wilson v. O'Day*, 5 Daly 354; *People v. Pavlick*, 20 N. Y. St. Rep. 187, 3 N. Y. Supp. 232.

*North Carolina*. — *Blair v. Brown*, 116 N. C. 631, 21 S. E. 434.

*Ohio*. — *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430.

*Oregon*. — *Pacific Live Stock Co. v. Gentry*, 38 Or. 275, 61 Pac. 422, 65 Pac. 597; *State v. Roach*, 35 Or. 224, 57 Pac. 1,016.

*Pennsylvania*. — *Farren v. Mintzer*, (Pa.), 14 Atl. 267; *Helser v. McGrath*, 58 Pa. St. 458; *Com. v. Eberle*, 3 Serg. & R. 9.

*Tennessee*. — *Owens v. State*, 16 Lea 1; *Girdner v. Walker*, 1 Heisk. 186.

*Texas*. — *Martin-Brown Co. v. Perrell*, 77 Tex. 199, 13 S. W. 975; *Young v. State*, (Tex. Crim. App.), 69 S. W. 153; *Myers v. State*, 6 Tex. App. 1.

*Vermont*. — *Windover v. Robbins*, 2 Tyler 1.

*Virginia*. — *Triplett v. Goff*, 83 Va. 784, 3 S. E. 525.

*West Virginia*. — *Carskadon v. Williams*, 7 W. Va. 1; *State v. Cain*, 20 W. Va. 679.

*Wisconsin*. — *Baker v. State*, 80 Wis. 416, 50 N. W. 518.

In *Hertrich v. Hertrich*, 114 Iowa 643, 87 N. W. 689, an action to set aside a will on the ground that it was obtained through the undue influence of two of the legatees therein named, it was held proper to reject the evidence on the part of the plaintiffs to prove that one of the defendants had asked a particular friend and confidential adviser of the testator not to advise against the



and declarations of one member is inadmissible against the other parties to the conspiracy,<sup>61</sup> although it may be received against the party who made them, provided, of course, it comes within the rules discussed elsewhere in this work as to the admission of declarations against the declarant.<sup>62</sup>

**Acts and Declarations Contemporaneous With Main Fact.** — It is not necessary to show as an independent fact the community of design between the defendants and those whose acts and declarations are offered in evidence, where the acts and declarations were contemporaneous with the main fact and illustrative of its character and the connection of the defendant with it.<sup>63</sup>

**b. Mode of Proof.** — See *supra* Division I of this article.

**c. Order of Proof.** — The question whether or not proof of the conspiracy shall precede the admission of evidence of acts and declarations of supposed co-conspirators is merely one of order of proof which is a matter largely in the discretion of the trial court;<sup>64</sup>

execution of a new will for the reason that there were other legatees under the will besides the defendants, and that even if a conspiracy were proven between these two to procure a will by undue influences, the admissions of either one could not be received because their interests were separate and distinct from the interests of the other legatees.

61. "Before evidence of the acts and declarations of persons not parties to the action can be properly received in evidence, in cases of this character, the common unlawful design should be clearly proved, as a condition precedent to receiving evidence of such acts and declarations at all. Evidence which is merely admissible on the question of the common illegal purpose is not sufficient. On the trial of almost every issue of fact, evidence is admissible which, taken by itself, falls entirely short of establishing the fact to be proved, but which, taken in connection with other competent evidence, which is equally insufficient of itself to establish the fact in question, satisfactorily establishes the fact to be proved. The most that can be said in support of the evidence given with a view to establish the fact either that there was an unlawful compact for the purpose mentioned, or the connection of the plaintiff with it, if one existed, is that such evidence was competent upon the question, but insufficient to establish the fact. The

common purpose, as before remarked, must be clearly proved. Evidence which might be sufficient to submit to a jury on a question proper to be submitted to them, will not answer the requirement. It should be so strong as to make it their imperative duty to find in the affirmative, if the question were to be submitted to them, and where the court would set their verdict aside in case they did not so find." *Jones v. Hurlburt*, 39 Barb. (N. Y.) 403.

62. See the articles, "ADMISSIONS," "CONFESSIONS."

63. *Blount v. State*, 49 Ala. 381.

64. **Order of Proof Discretionary With Trial Judge.** — *California*. *People v. Daniels*, 105 Cal. 262, 38 Pac. 720; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678.

*Iowa*. — *State v. Grant*, 86 Iowa 216, 53 N. W. 120.

*Maryland*. — *Bloomer v. State*, 48 Md. 521.

*Massachusetts*. — *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189; *Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421.

*Missouri*. — *Hart v. Hicks*, 129 Mo. 99, 31 S. W. 351.

*New York*. — *Miller v. Barber*, 66 N. Y. 558; *People v. McKane*, 80 Hun 322, 30 N. Y. Supp. 95; *Place v. Minster*, 65 N. Y. 89.

*Texas*. — *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 289; *Avery v. State*, 10 Tex. App. 199.

and it is enough that there is some evidence of a conspiracy already introduced and an offer to produce further evidence.<sup>65</sup> And there is authority to the effect that the court in its discretion may allow evidence of the acts and declarations before any evidence *prima facie* showing the conspiracy has been given, subject to be withdrawn from the jury by proper instructions in case proof of the conspiracy is not subsequently made in the course of the trial.<sup>66</sup> But it is not error for the court to exclude such evidence before

**"The Proper Order of Proof in Cases of Conspiracy** is, first to give evidence of the unlawful combination, and afterwards to show the acts of the conspirators in pursuance thereof, or in some manner to connect them severally therewith. But it often happens that the existence of the conspiracy is only made out by inference from the facts and declarations of the several parties thereto; and to exclude evidence of these until the conspiracy is established in some other way, would, in many cases, give the guilty parties immunity. There is no class of cases in which it is more important that the circuit judge should have a large discretion as to the order in which evidence should be received; and this discretion cannot be reviewed on error except in clear cases of abuse, of which we discover no proof here. The opening of the case by the prosecution and any further explanations that may be called for, will generally enable the judge to exercise his discretion in such manner as, while not shutting out proper evidence, shall at the same time protect the accused from being prejudiced by testimony which, in the end, shall prove irrelevant, or not legally competent to charge the party on trial. And whenever facts are proved which depend upon other facts to give them a bearing upon the guilt of the accused, if such other facts are not put in, he has his remedy by motion to strike out the evidence." *People v. Saunders*, 25 Mich. 119.

In *State v. Moore*, 32 Or. 65, 48 Pac. 468, it was held that evidence of the facts and declarations of an alleged conspirator was admissible after testimony had been given which *prima facie* tended to prove the existence of a conspiracy or from which

it might reasonably be inferred. See also *Pacific Live Stock Co. v. Gentry*, 38 Or. 275, 61 Pac. 422, 65 Pac. 597.

65. *Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832; *State v. Cain*, 20 W. Va. 679; *State v. Mushrush*, 97 Iowa 444, 66 N. W. 746.

66. *United States*.—*Taylor v. U. S.*, 89 Fed. 954.

*Arkansas*.—*Lawson v. State*, 32 Ark. 220.

*Illinois*.—*Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

*Maryland*.—*Bloomer v. State*, 45 Md. 521.

*New York*.—*Miller v. Barber*, 66 N. Y. 558.

*South Carolina*.—*State v. Car-doza*, 11 S. C. 195.

*Tennessee*.—*Sweat v. Rogers*, 6 Heisk. (Tenn.) 117.

*Texas*.—*Loggins v. State*, 8 Tex. App. 434; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 289; *Harris v. State*, 31 Tex. Crim. App. 411, 20 S. W. 916.

"The conspiracy and common design must be shown, else the statements or declarations made by one of them in the absence of the others, but for the furtherance of that common design, cannot be given in evidence against the others. Proof of the plot or combination must precede, accompany or follow proof of declarations made by either of the alleged conspirators, to render them competent against the others; it must be shown that the conspiracy or combination was entered into before the declarations were made, though the conduct, acts and declarations of the separate individuals in the planning or execution of the joint scheme may be shown as evidence of the common design." *Page v. Parker*, 40 N. H. 47.

proof of the conspiracy has been made and none is offered.<sup>67</sup>

d. *Sufficiency of Proof*.—It is sufficient, ordinarily, if the evidence offered *aliunde* the acts and declarations themselves in proof of the conspiracy, or tending to prove it, is sufficient in the opinion of the trial court to authorize the jury to find in favor of the fact of its existence.<sup>68</sup>

**Slight Evidence of Collusion or Concert** may be enough.<sup>69</sup> But a bare suspicion is not enough.<sup>70</sup>

Admitting evidence of acts and declarations previous to proof of the conspiracy is not fatal error where proof of the conspiracy is subsequently made. *State v. Ward*, 19 Nev. 297, 10 Pac. 133.

67. *Weinstein v. Reid*, 25 Mo. App. 41. See also *Carskadon v. Williams*, 7 W. Va. 1.

68. *Walton v. State*, 88 Ind. 9; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31. See also *McAnally v. State*, 74 Ala. 9; *Ormsby v. People*, 53 N. Y. 472.

It is sufficient if there be proof of such facts and circumstances tending to the conclusion that there was a conspiracy as might reasonably induce the jury to believe that it existed. *Rea v. Missouri*, 17 Wall. (U. S.) 532.

On a prosecution for perjury committed by the defendant as a witness to a will, evidence that the will was false and fictitious and had been written by the beneficiary thereunder, who is alleged to have been a co-conspirator with the defendant to secure the probate of such will, and that the defendant had been endeavoring by improper means to secure a witness to the will after the death of the pretended testator, affords sufficient proof of the conspiracy between defendant and such beneficiary to make the acts and declarations of the latter, done in the course of carrying out the common criminal design, competent evidence against the former. *People v. Rodley*, 131 Cal. 240, 63 Pac. 351.

In *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430, the acts and declarations of the alleged co-conspirators were admitted because the conspiracy was proved to the "satisfaction of the jury."

To make the acts and declarations of a conspirator, in furtherance of

the common object, admissible against a co-conspirator, it is sufficient that the conspiracy has been proved by a competent witness. The court will not decide on his credibility. "It is true the question of the admissibility of the declarations is to be determined by the court, but it is to be determined upon competent evidence." *Com. v. Crowninshield*, 10 Pick. (Mass.) 497.

69. *Hauser v. State*, 85 N. C. 81, 39 Am. Rep. 689; *McDowell v. Risell*, 37 Pa. St. 164; *Taylor v. U. S.*, 89 Fed. 954.

**The Fact That a Vendor or Former Owner Remained in Possession** after a bargain or sale or other transfer, absolute in its terms, will, when creditors are concerned, be deemed such evidence of a conspiracy to affect their rights that the courts will admit the vendor's declarations as a co-conspirator with the persons pretending to claim under him. *Blake v. Graves*, 18 Iowa 312. See also the article, "FRAUDULENT CONVEYANCES."

70. There must be circumstances reasonably pointing to the conclusion of a conspiracy, and in order to justify the admissions of the declaration of a supposed co-conspirator, such circumstances must be more than enough to raise a bare suspicion of a possible conspiracy. *Hart v. Hopson*, 52 Mo. App. 177.

"Humane presumption of the law is against guilt, and though a conspiracy must ordinarily be proved by circumstantial evidence, yet it is not to be forgotten that the charge of conspiracy is easily made, and that in a race between creditors, suspicions of unfairness are readily awakened. Mere suspicious possibility of guilty connection is not to be received as proof in such a case, and especially in such a case because when the con-

The Fact That Two Witnesses Testified to the Same State of Facts as to a matter at issue does not establish a conspiracy so as to admit evidence of declarations of one against the other.<sup>71</sup>

e. *Questions for Court and Jury.*—It is for the court in the first instance to determine whether there is sufficient *prima facie* evidence of a conspiracy to warrant the admission of evidence of acts and declarations of a supposed co-conspirator;<sup>72</sup> but ultimately it is for the jury to determine whether upon the whole evidence any conspiracy has been shown, and if they find that none has been established it is then their duty not to consider the acts and declarations of the supposed co-conspirator which have been admitted.<sup>73</sup>

nection is proved the acts and declarations of others become evidence against the party accused." Benford v. Sanner, 40 Pa. St. 9, 80 Am. Dec. 545.

In *People v. Stevens*, 68 Cal. 113, 8 Pac. 712, it was held that testimony that while the defendant was in witness' store offering to sell property similar to that claimed to have been stolen, he saw the alleged co-conspirator standing outside, was not sufficient proof of a conspiracy as a foundation for the evidence.

71. *Henrich v. Saier*, 124 Mich. 86, 82 N. W. 879.

72. *Miller v. Dayton*, 57 Iowa 423, 10 N. W. 814; *Loggins v. State*, 8 Tex. App. 434; *State v. Corcoran*, (Idaho), 61 Pac. 1,034.

A foundation must be laid by proof sufficient in the opinion of the judge to establish *prima facie* the fact of conspiracy between the parties or proper to be laid before the jury as tending to establish such fact. *Brown v. Winterstein*, (Neb.), 31 N. W. 246; holding that an instruction to the jury in these words was not erroneous because stating that in "the opinion of the judge" the proof was sufficient to establish *prima facie* the fact of conspiracy.

In determining the sufficiency of the proof of a conspiracy as against a defendant on trial in order to justify evidence of acts and declarations of co-conspirators, the uncorroborated testimony of self-confessed accomplices and members of the conspiracy is not to be rejected; to do so would be to invade the province of the jury in respect of the credibility of witnesses, and as accomplices are competent witnesses their credibility is

for the jury and not the court. *U. S. v. McKee*, 3 Dill. (U. S.) 546, 26 Fed. Cas. No. 15,685.

It seems that when complicity is established it is a primary question to be decided by the trial judge, whose decisions cannot be reviewed on appeal. *Bryce v. Butler*, 70 N. C. 585.

In *People v. Smith*, 162 N. Y. 520, 56 N. E. 1,001, it was held error for the court to assume, for the purpose of receiving evidence of acts and declarations of a supposed co-conspirator, the existence of the conspiracy, not upon the evidence adduced in the case at bar, but on evidence alleged to have been received in another case as quite satisfactory to the mind of the court.

73. *People v. Geiger*, 49 Cal. 643; *People v. Fehrenbach*, 102 Cal. 394, 36 Pac. 678.

*Connecticut.*—*Gardner v. Preston*, 2 Day (Conn.) 205, 2 Am. Dec. 91.

*Iowa.*—*Miller v. Dayton*, 57 Iowa 423, 10 N. W. 814.

*Massachusetts.*—*Com. v. Brown*, 14 Gray, 419.

*Missouri.*—*Poe v. Stockton*, 39 Mo. App. 550.

*Texas.*—*Renner v. State*, (Tex. Crim. App.), 65 S. W. 1,102; *Segrest v. State*, (Tex. Crim. App.), 57 S. W. 845; *Wright v. State*, 40 Tex. Crim. App. 447, 50 S. W. 940.

In *Hudson v. State*, (Tex. Crim. App.), 66 S. W. 668, the court charged the jury that he admitted evidence of the acts and declarations of the defendant's supposed co-conspirator upon the idea and rule that the latter was a conspirator with the defendant, and then said that his action in admitting this evidence

**B. TIME OF ACTS OR DECLARATIONS.** — *a. In General.* — In order that evidence thereof be admissible, the acts and declarations of the supposed co-conspirators must be those only which were made during the pendency of the wrongful enterprise and in furtherance of its objects.<sup>74</sup>

meant only that sufficient evidence of the conspiracy was offered to permit the testimony to go to the jury for them to determine from all the evidence whether or not there was in fact such a conspiracy. It was held that this was a direct statement by the court to the jury; that the court in its opinion thought sufficient evidence of the conspiracy was offered to permit the testimony to go to the jury; that the court should have charged the jury that they were not to consider the acts and declarations shown for any purpose whatsoever, unless they should first decide from the evidence beyond a reasonable doubt that the defendant conspired with the other to commit the crime, and that if they should find that said conspiracy was so formed, then those acts and declarations could be considered by the jury in passing upon the animus, intent and purpose of defendant in committing the crime, if he did commit it, and for no other purpose.

In *Harris v. State*, 31 Tex. Crim. App. 411, 20 S. W. 916, the court charged substantially, and it was held properly so, that, "where a conspiracy was entered into between two or more, the acts and declarations of each in regard to the common purpose are the declarations of all; and when one enters into a conspiracy already formed, every act done by the others before his entry or afterwards, in pursuance of the common design, and until its consummation, is the act of the one so entering. If the jury believes beyond a reasonable doubt that Harris and others formed a common purpose to kill deceased, and defendant entered into the conspiracy at any time before the death of Shields, the acts and declarations of the co-conspirators made and done in pursuance of the common design after said agreement was entered into by Harris, and before the killing of Shields, were admissible against

defendant. If defendant did not enter into such conspiracy, they would disregard such testimony in passing on defendant's guilt." See also *Stevens v. State*, (Tex. Crim. App.), 59 S. W. 545.

**74. Must Be in Furtherance of Conspiracy.** — *Arkansas.* — *Bennett v. State*, 62 Ark. 516, 36 S. W. 947; *Clinton v. Estes*, 20 Ark. 216.

*California.* — *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401.

*Illinois.* — *Samples v. People*, 121 Ill. 547, 13 N. E. 536.

*Iowa.* — *Johnson v. Miller*, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 756; *State v. McGee*, 81 Iowa 17, 46 N. W. 764.

*Kentucky.* — *Miller v. Com.*, 78 Ky. 15, 39 Am. Rep. 194.

*Minnesota.* — *Nicolay v. Mallory*, 62 Minn. 119, 64 N. W. 108; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1,056.

*Mississippi.* — *Gillem v. State*, 62 Miss. 547.

*Nebraska.* — *Stratton v. Oldfield*, 41 Neb. 702, 60 N. W. 82.

*New Hampshire.* — *Page v. Parker*, 40 N. H. 47.

*New Jersey.* — *Ferguson v. Reeve*, 16 N. J. L. 193.

*Ohio.* — *Fouts v. State*, 7 Ohio St. 471; *Rufus v. State*, 25 Ohio St. 464; *Patton v. State*, 6 Ohio St. 467.

*South Carolina.* — *State v. Simons*, 4 Stro. 266.

*Texas.* — *Hudson v. State*, (Tex. Crim. App.), 66 S. W. 668; *Stevens v. State*, (Tex. Crim. App.), 59 S. W. 545.

Where a person threatens to take the life and forms the design to take the life of another, and subsequent to such formed design secured the services of a co-conspirator, such subsequent procurement of the services does not render inadmissible evidence of the acts, threats and formed design of the person so securing such services. *Hudson v. State*, (Tex. Crim. App.), 66 S. W. 668, where the

b. *Acts and Declarations Prior to Conspiracy.*—Accordingly, acts and declarations done and made before the formation of the conspiracy are not admissible against the co-conspirators,<sup>76</sup> unless brought home to them.<sup>76</sup>

c. *Acts and Declarations After Conspiracy Accomplished.*  
(1.) *Generally.*—Again, such acts and declarations of the members of a supposed conspiracy are not admissible if made after the common enterprise is at an end,<sup>77</sup> except as against the party who made

court said, if the acts and declarations of a conspirator are admissible when made during and in pursuance of a conspiracy "we take it that it follows by logical sequence that the acts and declarations made prior to the formation of the conspiracy make manifest the purpose of the same and are admissible."

75. *People v. Parker*, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578; *Williams v. Dickenson*, 28 Fla. 90, 9 So. 847; *Lyons v. Wattenbarger*, 1 Heisk. (Tenn.) 193; *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746; *Stewart v. State*, 26 Ala. 44; *Powers v. Com.*, 22 Ky. L. Rep. 1,807, 61 S. W. 735; *Willis v. State*, 67 Ark. 234, 54 S. W. 211.

"It is the singleness attaching to conspirators as a body and growing out of a combination in the prosecution of a common design that founds the principles under which the declarations of one with reference to that design may be attributed to all. The reason fails and the principle is inapplicable where the declarations precede the combination." *Langford v. State*, 130 Ala. 74, 30 So. 503.

76. The admission of evidence or threats made at a time when the conspiracy had not been formed, although error, is not fatal to conviction where the proof shows that within a day or so the conspiracy did exist and the conspirator who had made the threats without any legal excuse or palliation did what those threats showed he intended to do. *Wilson v. People*, 94 Ill. 299.

77. *Acts and Declarations After Conspiracy Accomplished Not Admissible.*—*United States.*—*Brown v. U. S.*, 150 U. S. 93; *Conn. Mut. L. Ins. Co. v. Hillmon*, 107 Fed. 834.

*Arkansas.*—*Willis v. State*, 67 Ark. 234, 54 S. W. 211; *Clinton v.*

*Estes*, 20 Ark. 216; *Rowland v. State*, 45 Ark. 132.

*California.*—*People v. Irwin*, 77 Cal. 494, 20 Pac. 56; *People v. Opie*, 123 Cal. 294, 55 Pac. 989; *People v. Collum*, 122 Cal. 186, 54 Pac. 589; *People v. Aleck*, 61 Cal. 137.

*Georgia.*—*Howard v. State*, 109 Ga. 137, 34 S. E. 330.

*Illinois.*—*Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

*Indiana.*—*Card v. State*, 109 Ind. 415, 9 N. E. 591; *Roberts v. Kendall*, 3 Ind. App. 339, 29 N. E. 487.

*Iowa.*—*Johnson v. Miller*, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 756; *Taylor County v. Standley*, 79 Iowa 666, 44 N. W. 911; *State v. Grant*, 86 Iowa 216, 53 N. W. 120.

*Kansas.*—*State v. Rogers*, 54 Kan. 683, 39 Pac. 219.

*Kentucky.*—*Powers v. Com.*, 22 Ky. L. Rep. 1,807, 61 S. W. 735; *Miller v. Com.*, 78 Ky. 15, 39 Am. Rep. 194; *Twyman v. Com.*, 17 Ky. L. Rep. 1,038, 33 S. W. 409.

*Louisiana.*—*Reid v. Louisiana State Lottery*, 29 La. Ann. 388; *State v. Carroll*, 31 La. Ann. 860.

*Massachusetts.*—*Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997; *Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421; *Com. v. McDermott*, 123 Mass. 440, 25 Am. Rep. 120.

*Michigan.*—*Solomon v. Kirkwood*, 55 Mich. 256, 21 N. W. 336.

*Minnesota.*—*State v. Palmer*, 79 Minn. 428, 82 N. W. 685.

*Missouri.*—*State v. Beauleigh*, 92 Mo. 490, 4 S. W. 666; *Laytham v. Agnew*, 70 Mo. 48; *Poe v. Stockton*, 39 Mo. App. 550; *State v. McGraw*, 87 Mo. 161.

*Nebraska.*—*Stratton v. Oldfield*, 41 Neb. 702, 60 N. W. 82.

*Nevada.*—*State v. Ah Tom*, 8 Nev. 213.

them.<sup>78</sup> And this rule applies also to declarations made after the conspiracy has been accomplished and in the absence of the party to be affected by the evidence.<sup>79</sup>

(2.) **Conspiracy Not Fully Accomplished.** — If, however, the objects of the conspiracy have not been fully accomplished by the com-

*New York.* — *People v. Davis*, 56 N. Y. 95; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

*Ohio.* — *Sharpe v. State*, 29 Ohio St. 263.

*Oregon.* — *Sheppard v. Yocum*, 10 Or. 402.

*Pennsylvania.* — *Heine v. Com.* 91 Pa. St. 145; *Wagner v. Aulenbach*, (Pa. St.), 32 Atl. 1,086; *Wagner v. Haak*, 170 Pa. St. 495, 32 Atl. 1,087.

*South Carolina.* — *State v. Green*, 40 S. C. 328, 18 S. E. 933, 42 Am. St. Rep. 872.

*Tennessee.* — *Snowden v. State*, 7 Baxt. 482; *Garber v. State*, 4 Coldw. 161.

*Texas.* — *Ezell v. State*, (Tex. Crim. App.), 65 S. W. 370; *Faulkner v. State*, (Tex. Crim. App.), 65 S. W. 1,093; *Armstead v. State*, 22 Tex. App. 51, 2 S. W. 627; *Estes v. State*, 23 Tex. App. 600, 5 S. W. 176; *McKenzie v. State*, 32 Tex. Crim. App. 568, 25 S. W. 426, 40 Am. St. Rep. 795; *Simms v. State*, 10 Tex. App. 131; *Avery v. State*, 10 Tex. App. 199; *Caudill v. State*, (Tex. Crim. App.), 35 S. W. 373.

*Utah.* — *People v. Farrell*, 11 Utah 411, 40 Pac. 703.

*Vermont.* — *State v. Dyer*, 67 Vt. 690, 32 Atl. 814; *Hall v. Jones*, 55 Vt. 297.

*Virginia.* — *Danville Bank v. Waddill*, 31 Gratt. 469; *Oliver v. Com.*, 77 Va. 590; *Hunter v. Com.*, 7 Gratt. 641, 56 Am. Dec. 121.

In *Faulkner v. State*, (Tex. Crim. App.), 65 S. W. 1,093, it was held error to admit evidence that the defendant's co-conspirator had dyed his mustache in an endeavor on his part to disguise himself after the commission of the offense.

78. *Bloomer v. State*, 48 Md. 521; *State v. Brady*, 107 N. C. 822, 12 S. E. 325; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273; *Strout v. Packard*, 76 Me. 148, 49 Am. Rep. 601; *State v. Robinson*, 52 La. Ann. 616, 27 So. 124.

In *State v. McIntosh*, 109 Iowa 209, 80 N. W. 349, a jail guard was permitted to testify to a conversation between some of the defendants overheard by him while they were in jail. The witness was unable to state which one made the statements to which he testified. It was insisted that as the statements were made after the alleged conspiracy was ended, only the defendant making them was bound thereby, and that as the statements were not made by the defendant on trial they were incompetent as against him. But the court held that as it was evident that the conversation in question took place in the presence and hearing of all the defendants, and while it might be true that none of the statements testified to were made by the defendant on trial, they were made in his hearing and he did not rebut them, and that hence the evidence was properly received.

79. **Declarations After Conspiracy Accomplished and in Absence of Party to Be Affected Not Admissible.**

*Alabama.* — *Gore v. State*, 58 Ala. 391.

*California.* — *People v. Gonzales*, 71 Cal. 569, 12 Pac. 783.

*Illinois.* — *Snyder v. Laframboise*, 1 Ill. 343, 12 Am. Dec. 187.

*Indiana.* — *O'Neil v. State*, 42 Ind. 346.

*Iowa.* — *State v. Green*, 20 Iowa 424.

*Kansas.* — *State v. Young*, 55 Kan. 349, 40 Pac. 659.

*Missouri.* — *State v. Hickman*, 75 Mo. 416.

*Montana.* — *State v. English*, 14 Mont. 399, 36 Pac. 815.

*Nebraska.* — *Priest v. State*, 10 Neb. 393, 6 N. W. 468.

*North Carolina.* — *State v. Earwood*, 75 N. C. 210.

*Texas.* — *Estes v. State*, 23 Tex. App. 600, 5 S. W. 176.

*Virginia.* — *Danville Bank v. Waddill*, 31 Gratt. 469.

mission of the offense for which the conspiracy was formed, acts and declarations done and made thereafter and in pursuance of the conspiracy are still within the rule permitting evidence of them to be given.<sup>80</sup>

(3.) **Division of Fruits of Crime.**—Thus where the common purpose of the conspirators embraced not merely the commission of a series of unlawful acts, but also the disposition of the fruits of those acts and the division of the proceeds amongst themselves, acts and declarations by any of them, although after the commission of the unlawful acts, but before the disposition or division, are admissible in evidence against the other conspirators,<sup>81</sup> notwithstanding such acts and declarations also referred to a past act committed in execution of the conspiracy.<sup>82</sup>

(4.) **Acts to Escape Detection.**—Acts of the parties, although after the consummation of the crime, done for the purpose of escaping detection are admissible.<sup>83</sup>

80. *United States.*—U. S. v Lancaster, 44 Fed. 896, 10 L. R. A. 333.

*Alabama.*—Jackson v. State, 54 Ala. 234.

*Arkansas.*—Clinton v. Estes, 20 Ark. 216.

*Connecticut.*—State v. Shields, 45 Conn. 256.

*Georgia.*—Byrd v. State, 68 Ga. 661.

*Kansas.*—State v. Cole, 22 Kan. 332.

*Massachusetts.*—Com. v. Scott, 123 Mass. 222, 25 Am. Rep. 81.

*New Hampshire.*—State v. Pike, 51 N. H. 105.

In *Morrison v. State*, 5 Ohio 438, a prosecution for concealing a person knowing him to be a horse thief, it was held that confessions of the latter, although in the presence of the defendant, were not competent to establish his status as such horse thief.

In *Grogan v. State*, 63 Miss. 147, it was held proper to receive evidence of an attempt by one of the conspirators to complete the commission of the crime, in the perpetration of which he and his co-conspirator had but a few moments before been interrupted.

Where the conspiracy charged is to burn property insured against fire with intent to injure or defraud the insurer, the objects and purposes of the conspiracy are not fully accomplished until payment from the insurer has been actually procured, and hence acts or declarations of one of

the conspirators evidencing an effort on his part to procure such payment are competent as acts and declarations of a co-conspirator in furtherance of the original objects and purposes of the conspiracy. *People v. Trim*, 39 Cal. 75.

81. *Pacific Live Stock Co. v. Gentry*, 38 Or. 275, 61 Pac. 422, 65 Pac. 597; *State v. Pratt*, 121 Mo. 566, 26 S. W. 556.

**As Illustrating This Rule** it has been held that if two persons conspired to commit larceny and then to divide the proceeds between them, what one said and did between the larceny and the dividing was good evidence against both. *Scott v. State*, 30 Ala. 503; *State v. Byers*, 16 Mont. 565, 41 Pac. 708. See also *Mixon v. State*, (Tex. Crim. App.), 31 S. W. 408; *People v. Pitcher*, 15 Mich. 397; *Baker v. State*, 80 Wis. 416, 50 N. W. 518; *State v. Grady*, 34 Conn. 118; *O'Neal v. State*, 14 Tex. App. 582. But if the common design and purpose terminated with the larceny the rule does not apply. *Franks v. State*, 36 Tex. Crim. App. 149, 35 S. W. 977.

**The Theory Upon Which Such Evidence is Admitted** is that the conspiracy does not end until there has been such division. *People v. Opie*, 123 Cal. 294, 55 Pac. 989.

82. *State v. Thaden*, 43 Minn. 253, 45 N. W. 447.

83. *Barber v. State*, (Tex. Crim. App.), 69 S. W. 515. See also *State*



(5.) **Physical Facts.** — The rule excluding evidence of such acts and declarations has no application whatever to evidence concerning a physical fact proved to exist after the accomplishment of the conspiracy and tending to prove the guilt of one of the conspirators.<sup>84</sup>

**Appearance of Conspirator.** — On proof of a conspiracy to commit a crime, evidence of the appearance of one of the conspirators immediately after the commission of the crime, and probably before he had an opportunity to change his apparel, is admissible as against his confederates on the separate trial of the latter.<sup>85</sup>

(6.) **Fraudulent Conveyances.** — Upon proof of a conspiracy between a vendor and a vendee for the purpose of defrauding the former's creditors, evidence of his declarations and admissions is proper,<sup>86</sup> although they were made after the conveyance and in the absence of his co-conspirators.<sup>87</sup>

*v. Shields*, 45 Conn. 256; *Carter v. State*, 106 Ga. 372, 32 S. E. 345, 71 Am. St. Rep. 262; *Byrd v. State*, 68 Ga. 661; *Miller v. Dayton*, 57 Iowa 423, 10 N. W. 814.

In *People v. Stanley*, 47 Cal. 113, 17 Am. Rep. 401, it was held that, although there was proof of a conspiracy between the defendant and others to commit a crime, evidence of the flight of a co-conspirator was not admissible as against the defendant. See also *State v. Barham*, 82 Mo. 67. Compare *People v. Collins*, 48 Cal. 277, *distinguishing* the *Stanley* case *supra*; *Allen v. State*, 12 Lea (Tenn.) 424.

84. *Musser v. State*, 157 Ind. 423, 61 N. E. 1, so holding of evidence that one of the conspirators was, after the robbery, in possession of money of the same denomination and kind shown to have been in the victim's possession. See also *Fitzpatrick v. U. S.* 178, U. S. 304, 44 L. ed. 1,078, where the court said: "The true distinction is between statements made after the fact, which are competent only against the party making the statement, and facts connecting either party with the crime, which are competent as a part of the whole transaction. In the trial of either party it is proper to lay before the jury the entire affair, including the acts and conduct of all the defendants from the time the homicide was first contemplated to the time the transaction was closed. It may have a bearing only against the party do-

ing the act, or it may have a remoter bearing upon the other defendants; but, such as it is, it is competent to be laid before the jury." *People v. Cleveland*, 107 Mich. 367, 65 N. W. 216; *Pierson v. State*, 18 Tex. App. 524; *Allen v. State*, 12 Lea (Tenn.) 424.

85. *State v. Aiken*, 41 Or. 294, 69 Pac. 683. The court said: "The rule under which evidence of the appearance of a jointly charged conspirator soon after the commission of a crime is admissible as against his confederate, who is being separately tried, is undoubtedly based upon the theory that such appearance is the necessary consequence of a joint participation in an unlawful enterprise, resulting from the undistorted rays of the afterglow of the fire of a criminal intent. The evidence of such appearance is not admissible, however, as against the accused, who is being separately tried, unless it first appears that the conspirators have made united preparation for or jointly participated in, the commission of a crime." Compare *People v. Opie*, 123 Cal. 294, 55 Pac. 989.

86. *O'Neil v. Glover*, 5 Gray (Mass.) 144; *Souder v. Schechterly*, 91 Pa. St. 83; *Boyd v. Jones*, 60 Mo. 454; *Waterbury v. Sturtevant*, 18 Wend. (N. Y.) 353.

**For a Full Discussion** of the application of this rule, *see* the article, "FRAUDULENT CONVEYANCES."

87. *Galle v. Tode*, 56 N. Y. St. Rep. 851, 26 N. Y. Supp. 633.

**3. Acquittal of Conspirator.** — The acquittal of one of two persons charged with conspiracy is conclusive evidence for the other subsequently tried.<sup>88</sup> Acquittal of one of several conspirators renders evidence of his acts and declarations, although in furtherance of the common design, inadmissible against the others.<sup>89</sup> But the record of acquittal of one of the supposed conspirators in a prosecution in another state, although for the same conspiracy, is not competent evidence in bar of a prosecution of another of the conspirators in the state where the conspiracy was formed and accomplished.<sup>90</sup>

But where two or more persons are charged with a substantive offense, not a conspiracy, which it appears was committed in pursuance of a conspiracy, the acts and declarations of one shown to have been engaged in the conspiracy to commit such substantive crime are admissible in evidence on the trial of the other defendant, notwithstanding the person whose declarations are sought to be proved has been previously acquitted.<sup>91</sup>

**4. Statements in Entirety.** — Where the declarations of an alleged co-conspirator have been offered in evidence, the defendant on trial against whom such declarations are directed has the right to all the statements made at that time, but not to statements made at other times, although on the same subject and even the same day.<sup>92</sup>

**5. Mode of Proof.** — The fact that the co-conspirator whose admissions or declarations are sought to be proved is always a competent witness does not make him the only or even the best witness by whom they could be proved. Being the verbal acts, they may be established by any one who was present and heard them.<sup>93</sup>

**6. Conclusiveness.** — Declarations of a co-conspirator, although admissible, as previously shown, are not conclusive as against the one to be affected by them.<sup>94</sup>

**7. Admissibility for Co-conspirator.** — The declarations of a con-

88. *Paul v. State*, 12 Tex. App. 346; *Rex v. Hornetooke*, Old Bailey, 1,794. "This must of course mean an acquittal by a court of competent jurisdiction in the same state in which the subsequent prosecution was pending and for the same offense. As conspiracy is the consent of two or more minds, where two only are charged the acquittal of one must be the acquittal of both." *Bloomer v. State*, 48 Md. 521.

The Reason for This Rule is based upon the ground that it takes two or more persons to form a conspiracy. *Musser v. State*, 157 Ind. 423, 61 N. E. 1.

89. *Paul v. State*, 12 Tex. App.

346. So holding on the ground that because if he was not a co-conspirator his acts and declarations could not be binding on the others.

90. *Bloomer v. State*, 48 Md. 521.

91. *Musser v. State*, 157 Ind. 423, 61 N. E. 1; *Holt v. State*, 39 Tex. Crim. App. 282, 45 S. W. 1,016, 46 S. W. 829; *People v. Kief*, 126 N. Y. 661, 27 N. E. 556.

92. *Cornelius v. Com.*, 15 B. Mon. (Ky.) 539.

93. *Shelton v. State*, 11 Tex. App. 36. For a full discussion of this rule see the article "RES GESTÆ."

94. *Com. v. Eberle*, 3 Serg. & R. (Pa.) 9. See the article "DECLARATIONS."

spirator are not admissible for his co-conspirator on trial,<sup>95</sup> unless a part of the *res gestae* or part of a conversation already put in evidence against him.<sup>96</sup>

### III. CONSPIRATORS AS WITNESSES.

On the separate trial of one of several parties charged with conspiracy, those not on trial are competent witnesses.<sup>97</sup>

95. *Casey v. State*, 37 Ark. 67; *Lyon v. State*, 22 Ga. 399; *State v. Anderson*, 24 S. C. 109; *Ferguson v. State*, 134 Ala. 63, 32 So. 760; *People v. Hall*, 94 Cal. 595, 30 Pac. 7; *Robinson v. State*, 114 Ga. 445, 40 S. E. 253; *Sible v. State*, 3 Heisk. (Tenn.) 137.

On a prosecution for conspiring to commit a crime, evidence that the co-conspirator not on trial had on his trial for the crime itself denied the conspiracy is not competent evidence for the defendant on trial for the conspiracy. *Bailey v. State*, (Tex. Crim. App.), 59 S. W. 900.

96. *Wright v. State*, 10 Tex. App. 476.

97. *State v. Slutz*, 106 La. 637, 31 So. 179.

In Kentucky persons jointly indicted are competent witnesses for each other, although the indictment alleges a conspiracy between them. *Richards v. Com.*, 24 Ky. L. Rep. 14, 67 S. W. 818; *Williams v. Com.*, (Ky.), 68 S. W. 7; *Kidwell v. Com.*, 97 Ky. 538, 31 S. W. 131. Although prior to a statute passed March 23, 1894, the rule was otherwise under an express provision of the code (Ky. Crim. Code, § 234, § 233, Subs. 3-4.)

See the article "COMPETENCY."

---

## CONTEMPORANEOUS CONSTRUCTION.—See Contracts.

# CONTEMPT.

BY HENRY G. TARDY.

## I. NATURE OF THE PROCEEDINGS FOR ITS PUNISHMENT, 439

1. *Generally*, 439
2. *Manner of Bringing Contemner Into Court*, 440
3. *Making of Preliminary Defense*, 440
  - A. *In General*, 440
  - B. *Common Law Rule as to Such Defenses*, 440
  - C. *Rule in Federal Courts*, 441
  - D. *Counter Affidavits*, 441
4. *Right of Contemner to Be Heard*, 441
5. *Judicial Notice*, 442
6. *Presumptions*, 443
7. *Necessity for Incriminating Evidence*, 444
  - A. *In Direct Contempts*, 444
  - B. *In Constructive Contempts*, 445

## II. EVIDENCE RECEIVABLE, 446

1. *Generally*, 446
  - A. *In Direct Contempts*, 446
    - a. *To Convict*, 446
    - b. *To Purge*, 446
  - B. *Language Used in Court Papers*, 447
  - C. *In Constructive Contempts*, 448
    - a. *Rules of Evidence Applicable*, 448
    - b. *Necessity for Proving Intent*, 449
    - c. *Compelling Contemner to Testify*, 450
    - d. *Evidence Receivable on Reference to Master*, 450
    - e. *To Ascertain Punishment or Indemnity*, 451
    - f. *Evidence of Other Acts of Contempt*, 451
    - g. *Acts or Admissions of Contemner*, 451
    - h. *Reception of Affidavits*, 451
    - i. *Use of Depositions*, 452
    - j. *Use of Oral or Documentary Evidence*, 452
  - D. *To Convict for Contemptuous Publication*, 452
    - a. *In General*, 452
    - b. *Language Constituting Contempt*, 452
    - c. *Language Concerning Matter Pending*, 453
    - d. *Place of Publication*, 454

- e. *Manner of Ascertaining Meaning or Intent*, 455
- 2. *Evidence Receivable in Defense*, 457
  - A. *In General*, 457
  - B. *Former Jeopardy*, 457
  - C. *Want of Jurisdiction*, 457
    - a. *In General*, 457
  - D. *Invalidity of Violated Order as Defense*, 459
  - E. *Want of Privity*, 460
    - a. *To Preliminary Injunction*, 460
    - b. *To Permanent Injunction*, 462
- 3. *Want of Contemptuous Intent*, 462
  - A. *In General*, 462
  - B. *Innocent Technical Violation*, 463
  - C. *Mistaken Interpretation*, 463
  - D. *Uncertain Terms of Order*, 464
  - E. *Ignorance as an Excuse*, 464
  - F. *Advice of Counsel*, 464
  - G. *Fact of Appeal as Defense*, 465
- 4. *Performance as Defense*, 465
- 5. *Inability to Comply With Order*, 466
- 6. *Suppression of Testimony*, 467
- 7. *Want of Notice*, 468
  - A. *In General*, 468
  - B. *Injunctive or Mandatory Orders*, 468
- 8. *Defensive Evidence to Contemptuous Publications*, 469
- 9. *Burden of Proof*, 470
  - A. *On Part of Prosecution*, 470
  - B. *On Part of Contemner*, 470
- 10. *Degree of Proof*, 470
  - A. *In General*, 470
  - B. *Distinction in Criminal and Civil Contempts*, 472
- 11. *Sufficiency of Proof*, 472
  - A. *Direct Contempts*, 472
  - B. *In Constructive Contempts*, 472
    - a. *When Conducted on Affidavits*, 472
    - b. *When Conducted as a Trial*, 472

### III. TESTIMONY WHICH MAY BE COMPELLED, 474

- 1. *Nature of Right to Compel Testimony*, 474
- 2. *What Courts, Officers or Bodies May Compel Testimony*, 475
  - A. *Courts*, 475
  - B. *Grand Juries*, 476
  - C. *Legislative Bodies*, 476
    - a. *Congress and State Legislatures*, 476
    - b. *Municipal Bodies*, 477

- D. *Administrative Officers*, 477
- E. *Notaries Public*, 478
- F. *Referees and Commissioners*, 478
- 3. *Who May Be Compelled to Testify*, 478
  - A. *Compelling Attendance by Means of Attachment*, 478
    - a. *In General*, 478
    - b. *Procedure to Punish*, 479
  - B. *Compelling Witness to Be Sworn*, 481
    - a. *In General*, 481
    - b. *Procedure to Punish*, 482
  - C. *Compelling Expert Testimony*, 482
  - D. *Compelling Affidavits From Unwilling Affiants*, 483
    - a. *In General*, 483
    - b. *Procedure to Obtain Affidavits*, 484
    - c. *What Facts May Be Shown by the Affidavit*, 485
- 4. *What Testimony is Compellable*, 485
  - A. *In General*, 485
    - a. *When Before the Court*, 485
    - b. *When Before the Grand Jury*, 488
    - c. *When Before Legislative or Similar Body*, 489
    - d. *When Testifying at Preliminary, Supplementary or Similar Examination*, 490
    - e. *When Testifying by Deposition*, 492
  - B. *Right of Witness to Aid of Attorney*, 493
  - C. *Liability of Person or Attorney Advising Witness Not to Answer*, 493
  - D. *What Constitutes Refusal to Testify*, 494
  - E. *Manner of Conducting Examination of the Witness*, 494
  - F. *Procedure Preliminary to Committing Witness*, 496
  - G. *Punishment and Discharge*, 500
    - a. *Extent of Punishment to Be Awarded*, 500
    - b. *When Entitled to Be Discharged*, 500
  - H. *Requirements of Commitment*, 501
    - a. *When Refusing to Be Sworn*, 501
    - b. *When Refusing to Testify*, 501
- 5. *Review*, 502
  - A. *By Appeal or Writ of Error*, 502
    - a. *General Rule as to Contempt*, 502
    - b. *Refusals to Testify*, 503
  - B. *Certiorari*, 504
  - C. *Habeas Corpus*, 505
    - a. *In General*, 505
    - b. *Procedure at Hearing of Writ*, 508
  - D. *By Writ of Prohibition, Injunction or Motion*, 509

## I. NATURE OF THE PROCEEDINGS FOR ITS PUNISHMENT.

1. **Generally.** — Proceedings for the punishment of a contempt are generally considered as being in the nature of a criminal proceeding,<sup>1</sup> and are regarded as being independent and distinct from the proceedings in which the contempt was committed,<sup>2</sup> although the practice of entitling them as distinct proceedings is not uniform;<sup>3</sup> but on the other hand it has been said that such proceedings are not criminal cases in the sense in which crimes are generally treated,<sup>4</sup> nor are they considered criminal cases in which the pardoning power of the executive exists,<sup>5</sup> nor are contempt proceedings, the object of which

1. *Baltimore & O. R. R. Co v. Wheeling (City)*, 13 Gratt. (Va.) 40; *Ruhl v. Ruhl*, 24 W. Va. 279.

Contempt proceedings for disobedience of process of court is a criminal proceeding. *Baldwin v. State*, 126 Ind. 24, 25 N. E. 820.

Contempt proceedings for violation of order restraining liquor nuisance is criminal in character though issued in equity. *Grier v. Johnson*, 88 Iowa 99, 55 N. W. 80.

Contempt proceedings arising from injunction orders regarding sales of liquor are criminal proceedings. *State v. Massey*, 10 N. D. 154, 80 N. W. 225.

An attachment for not performing an award is, strictly speaking, a criminal proceeding, though in some respects it is considered as in the nature of civil process. *McClure v. Gulick*, 17 N. J. L. 340.

An attachment against a witness for not obeying a subpoena is a criminal proceeding. *Goodrich v. U. S.*, 42 Fed. 392.

The court in *Ex parte Robertson*, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. Rep. 207, in speaking of civil or constructive contempts, say that the proceeding is generally regarded as a prosecution for an offense.

2. *Oster v. People*, 192 Ill. 473, 61 N. E. 469; *State v. Matthews*, 37 N. H. 450; *Passmore Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374; *State v. Nathans*, 49 S. C. 199, 27 S. E. 52; *Ex parte Langdon*, 25 Vt. 680; *Ruhl v. Ruhl*, 24 W. Va. 279; *McMillan v. Hickman*, 35 W. Va. 705, 14 S. E. 227; *Hayes v. Fischer*, 102 U. S. 121.

A rule for attachment against a witness is a collateral proceeding. *Hogan v. Alston*, 9 Ala. 627.

3. **Practice of Entitling Contempt Proceeding.** — Contempt, though a specified criminal offense, is prosecuted as a matter of practice in the cause, or proceeding, out of which it arose, and not as a separate proceeding with a title of its own. *Ex parte Ah Men*, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263.

The court in *Winslow v. Nayson*, 113 Mass. 411, held that a complaint for a contempt in disobeying an interlocutory order in equity was an incident to the principal action and should be filed in it, and not as a separate suit.

Where the proceeding is for a criminal contempt it is more appropriate to prosecute it in the name of the people, but where the prosecution is really but an incident of the principal suit, the practice is to entitle and file the papers in the original cause. *Cartwright's Case*, 114 Mass. 230.

**The Question Not Deemed Important.** — The question whether contempt proceedings should be entitled and prosecuted as an independent proceeding in the name of the people, or carried on as a part of the civil proceeding to which it is incident, is not generally considered important, although where the proceeding is for a criminal contempt, it would be more appropriate to prosecute in the name of the people. *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1,004, 41 Am. St. Rep. 375; *Arnold v. Com.*, 80 Ky. 300, 44 Am. Rep. 480, to the same effect.

4. *Casey v. State*, 25 Tex. 381; *Taylor v. Goodrich*, 25 Tex. Civ. App. 109, 40 S. W. 515; *Com. v. Bell*, 145 Pa. St. 374, 22 Atl. 641, 644.

5. *Taylor v. Goodrich*, 25 Tex.

are purely remedial, considered as criminal proceedings so that in them the rules of criminal evidence must be applied.<sup>6</sup>

**2. Manner of Bringing Contemner Into Court.**—After the court acquires knowledge of a constructive contempt, it issues an order to show cause why an attachment should not issue against the alleged contemner,<sup>7</sup> or in some cases it issues an attachment in the first instance,<sup>8</sup> although if contemner be present in court, it may even dispense with the rule.<sup>9</sup>

**3. Making of Preliminary Defense.**—A. IN GENERAL. —After contemner is in court by any of these modes, he may answer in the form of an affidavit,<sup>10</sup> or he may demand that interrogatories be filed for him to answer,<sup>11</sup> or in case he denies the alleged contempt, the prosecutor may compel answers to interrogatories which are intended to elicit a fuller statement of the facts and circumstances constituting the alleged contempt.<sup>12</sup>

B. COMMON LAW RULE AS TO SUCH DEFENSES. —Under the

Civ. App. 109, 40 S. W. 515. But *contra* see *Ex parte Hickey*, 4 Smed. & M. 751; *State v. Sauvinet*, 24 La. Ann. 119, 13 Am. Rep. 115.

The court in *In re Nevitt*, 117 Fed. 448, reviewed the authorities as to whether the President could exercise his pardoning power over a person committed for a criminal contempt, but refused to decide the question, although it indicated that the President could not do so.

6. See note *infra* 47.

7. *State v. Matthews*, 37 N. H. 450; *Ex parte Cottrell*, 59 Cal. 420.

In *Ex parte Mason*, 16 Mo. App. 41, the court said that "According to the more usual practice in these cases, there are two proceedings which are analogous to the preliminary examination and the trial in an ordinary criminal prosecution. The first is a preliminary order to show cause, not why the accused should not be punished for the alleged contempt, but why an attachment should not be issued against him for the same. Upon the return of this order, there is regularly a proceeding somewhat in the nature of a preliminary examination in a criminal case. The accused may appear either in person or by counsel. The formalities of a regular trial are dispensed with. He may show cause by *ex parte* affidavits, or in any other appropriate mode. If he fails to show sufficient cause, an attachment is regularly issued, upon which he is arrested and brought be-

fore the court and there required in person to answer interrogatories. At common law, his answers are conclusive in his own favor; but according to the English chancery practice, countervailing evidence will be heard. This is the formal trial which takes place; and if, upon this trial, he fails to purge himself, the court proceeds to assess the punishment. This may be regarded as a fair outline of the more usual practice in American courts."

**8. May Proceed by Attachment in First Instance.**—*State v. Matthews*, 37 N. H. 450, 4 Black. Com. 286.

The court may, in the exercise of a sound discretion, dispense with the order to show cause and proceed by attachment in the first instance. *Ex parte Mason*, 16 Mo. App. 41, citing *In re Stacy*, 10 Johns. (N. Y.) 328; *U. S. v. Bollman*, 1 Cranch C. C. 373, 24 Fed. Cas. No. 14,622; *State v. Raborg*, 5 N. J. L. 628; *State v. Ackerson*, 25 N. J. L. 209; *Petrie v. People*, 40 Ill. 334; *In re Stephens*, 1 Ga. 584; *Ex parte Langdon*, 25 Vt. 680.

9. *State v. Hansford*, 43 W. Va. 773, 28 S. E. 791.

10. *State v. Matthews*, 37 N. H. 450.

11. *State v. Matthews*, 37 N. H. 450; *U. S. v. Duane*, Wall Sr. 102, 25 Fed. Cas. No. 14,997.

12. *State v. Matthews*, 37 N. H. 450.



strict common law rule, the contemner in a court of law answered the charge of contempt on oath,<sup>13</sup> and if by his oath he purged himself of the contempt, he was discharged,<sup>14</sup> but in a court of equity his answer or affidavits were rebuttable by affidavits on the part of the prosecution,<sup>15</sup> whereas in the court of law his answer was held conclusive,<sup>16</sup> without considering the weight of evidence, or the credibility of what was sworn in the answer,<sup>17</sup> though he was liable to be subsequently prosecuted for perjury should his answer have been false.<sup>18</sup>

**C. RULE IN FEDERAL COURTS.** — The common law rule just stated has been held to be the rule applicable in the federal courts with reference to criminal constructive contempts.<sup>19</sup>

**D. COUNTER AFFIDAVITS. — EVIDENCE NOT PLEADING.** — It has been held that the counter affidavits used in such preliminary proceedings are not pleadings, but evidence,<sup>20</sup> and that the issues in contempt proceedings are questions of fact.<sup>21</sup>

**4. Right of Contemner to Be Heard.** — Where the contempt is committed out of the immediate view and presence of the court, contemner is entitled to be heard in his defense,<sup>22</sup> but it has been held that the court may refuse to hear the evidence on part of con-

13. *State v. Matthews*, 37 N. H. 450; *Crow v. State*, 24 Tex. 12; *Hebb v. County Court*, 48 W. Va. 279, 37 S. E. 676.

14. 4 Black. Com. 286; *Saunders v. Melhuish*, 6 Mod. 73; *Oster v. People*, 192 Ill. 473, 61 N. E. 469; *State v. Earl*, 41 Ind. 464; *Haskett v. State*, 51 Ind. 176; *Stewart v. State*, 140 Ind. 7, 39 N. E. 508; *People v. Few*, 2 Johns. (N. Y.) 290; *Thomas v. Cummins*, 1 Yeates (Pa.) 40; *In re Moore*, 63 N. C. 397; *U. S. v. Dodge*, 2 Gall. 313, 25 Fed. Cas. No. 14,975; *U. S. v. Duane*, Wall. Sr. 102, 25 Fed. Cas. No. 14,997.

15. *Loven v. People*, 158 Ill. 159, 42 N. E. 82; *Stewart v. State*, 140 Ind. 7, 39 N. E. 508; *Smith v. Smith*, 23 How. Pr. (N. Y.) 134; *U. S. v. Anonymous*, 21 Fed. 761; *Boyd v. Glucklich*, 116 Fed. 131.

16. *Oster v. People*, 192 Ill. 473, 61 N. E. 469; *Burke v. State*, 47 Ind. 528; *U. S. v. Anonymous*, 21 Fed. 761, and authorities cited therein.

In common law proceeding for contempt in attempting to bribe a juror, where respondent denies a charge by affidavit, the court cannot hear oral evidence to contradict such affidavit. *Welch v. People*, 30 Ill. App. 399. And see *State v. Earl*, 41 Ind. 464, to the same effect.

17. *Stewart v. State*, 140 Ind. 7, 39 N. E. 508.

18. 4 Black. Com. 288; *Rex v. Sims*, 12 Mod. 511; *Burke v. State*, 47 Ind. 528; *Stewart v. State*, 140 Ind. 7, 39 N. E. 508.

19. *Boyd v. Glucklich*, 116 Fed. 131.

20. *State v. Matthews*, 37 N. H. 450; *State v. McKinnon*, 8 Or. 487.

21. *State v. McKinnon*, 8 Or. 487.

22. **Right of Contemner to Be Heard.** — *State v. Judges*, 32 La. Ann. 1,256; *Steller v. Steller*, 25 Mich. 159; *State v. Willis*, 61 Minn. 120, 63 N. W. 169; *Ex parte Mason*, 16 Mo. App. 41; *Ward v. Ward*, 70 Vt. 430, 41 Atl. 435.

In *McClatchy v. Superior Court*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691, the court said: "Contempt of court is a specific criminal offense (*Ex parte Hollis*, 59 Cal. 408; *Ex parte Gould*, 99 Cal. 360, 37 Am. St. Rep. 57); and a party charged therewith, although the proceeding is more or less summary in character, has the same inalienable right to be heard in his defense, especially in instances like the present, of mere constructive contempt, as he would against a charge of murder, or any other crime."

In the case of *Welch v. Barber*, 52

temner where his answer contains admissions of guilt and affirmative matter constituting a direct contempt.<sup>23</sup> And it has been held that contemner is not entitled to be heard as to matters which are of mere favor and not of strict right,<sup>24</sup> and that he is not entitled as a matter of right to be heard by counsel,<sup>25</sup> and that in constructive contempt, if contemner relies upon an excuse only, he should appear in his own proper person and not by his attorney.<sup>26</sup>

**5. Judicial Notice.** — The court can take judicial notice of its own orders or actions in the matter out of which the alleged contempt arose,<sup>27</sup> or of the facts constituting the contempt where the contempt was committed in its presence,<sup>28</sup> but not of acts occurring beyond its

Conn. 147, 52 Am. Rep. 567. Where contemner was charged with contempt in having applied for a continuance on the ground of a feigned illness, and contemner alleged in his answer thereto that he was, in fact, sick, and unable to attend court, he has a right to be present and be heard as to his defense.

So in *Buckley v. Perrine*, 55 N. J. Eq. 514, 36 Atl. 1,088, it was held that where a contempt in a divorce action was not committed in *facie curiae*, the contemner should have ample notice and a full opportunity to make a defense before being committed.

**23.** *Bloom v. People*, 23 Colo. 416, 48 Pac. 519.

**24.** *Hovey v. Elliott*, 167 U. S. 409.

**25.** In *Ex parte Hamilton*, 51 Ala. 66, the court, proceeding upon the theory that the contempt proceeding was not a criminal prosecution, held that in contempt proceedings for the violation of an injunction, contemner was not entitled, as a matter of right, to be heard by counsel. But to the contrary effect see *Whitten v. State*, 36 Ind. 196.

**26.** *People v. Freer*, 1 Caines (N. Y.) 518.

**27.** *Ex parte Ah Men*, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; *Jordan v. Circuit Court*, 69 Iowa 177, 28 N. W. 548; *State v. Bee Pub. Co.*, 60 Neb. 282, 83 N. W. 204, 83 Am. St. Rep. 531, 50 L. R. A. 195.

**28. Judicial Notice of Pending Proceedings.** — In contempt proceedings, where the contempt consists of an improper publication concerning matters pending in court, the publication being admitted, the court may determine all the necessary facts

without other evidence of what occurred in court than its own judicial knowledge, and without the necessity of introducing any evidence. *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829.

**What Facts May Be Judicially Noticed.** — In *Dines v. People*, 39 Ill. App. 565, which was a contempt proceeding against the clerk of court for destroying certain ballots in his custody in violation of an order of the court to preserve them, the court, in discussing what facts it could take judicial notice of, said: "Of what facts will a court take judicial notice? Of the signatures of their own officers, their own judgments and orders, whether a bill of exceptions has been signed by the judge, and various other matters. The rule which seems to us to govern in the present case is thus laid down in *Wharton*, and approved in *Secrist v. Petty*, 109 Ill. 188: 'The doctrine is well recognized that a court will take judicial notice of the state of the pleadings, and the various steps which have been taken in a particular cause, and consequently the judge must take notice of his own *official acts* in the progress of such a case, and he therefore needs no proof to advise him of what he has done in it.' What are official acts? We think they are such only as would form part of the record.

A court can only take judicial notice of such acts and proceedings as would properly go upon the record. Hence, the fact that the order was made when it was filed, and also its contents, were all proper subjects of judicial notice; but the knowledge, opinion or recollection resting in the breast of the judge that the clerk did not know the contents of the

presence,<sup>29</sup> nor of the existence of a prior but different contempt proceeding against contemner.<sup>30</sup>

**6. Presumptions.** — Contempt proceedings being criminal in their nature, presumptions and intendments in favor of conviction will not be indulged,<sup>31</sup> and it is held that where the contempt is committed out of the presence of the court, the usual presumptions in favor

order, could not be made a part of the record, and hence was merely his personal and not his judicial knowledge.

We do not mean to be understood that the court can only take judicial notice of such acts and proceedings as are actually recorded. Mere verbal orders may be given by the judge, which are never placed upon record, and for the disobedience of which one might be punished, as for contempt. But all such orders and proceedings could properly be placed upon the record of the court, if necessary, and usually would be, if proceedings in the nature of punishing for contempt were to grow out of them."

But to the contrary effect see *State v. Hudson Co. Elec. Co.*, 61 N. J. L. 114, 38 Atl. 818, where it was held that in contempt proceedings to punish a party for disobedience of a stay implied in a writ of *certiorari*, the court would not, in such contempt proceedings, take judicial notice of the files in the *certiorari* suit without their formally being put in evidence. *In re Percy*, 2 Daly (N. Y.) 530.

**Pertinent Facts Cognizant by Use of Senses** may be judicially noticed where connected with the transaction. *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

**29. Facts Beyond Observation.** *In re Smith*, 52 Kan. 13, 33 Pac. 957, it was held that the district court was not authorized, in the absence of a proper motion to bring the matter before the court and without written or oral evidence, to decide upon judicial knowledge that a defendant was guilty of contempt in disobeying a provisional order when such alleged disobedience occurred away from the court and beyond its powers of observation.

**Abusive Publication and Who Was Publisher.** — The court cannot *ex mero motu* assume as a part of its

judicial knowledge that an abusive publication existed in point of fact, and that a certain party was responsible for its publication. *Holt's Case*, 55 N. J. L. 384, 27 Atl. 909.

**30. Of Previous Contempt Proceeding.** — Court cannot take judicial notice of the facts which formed the ground of a previous proceeding for contempt against the same contemner, nor of his having been adjudged guilty in that proceeding. *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

*31. Batchelder v. Moore*, 42 Cal. 412; *Hydock v. State*, 59 Neb. 296, 80 N. W. 902; *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415.

**No Presumption That Clerk of Court Knew Contents of Order Filed.** In *Dines v. People*, 39 Ill. App. 565, it was held that in proceedings against a clerk of court for contempt for destroying certain ballots in his custody, in violation of an order of the court to preserve them, the prosecution must show that he willfully intended to disobey, or obstruct, the order of the court, and hence that no presumption will be indulged that he knew the contents of the order when he filed it, although such clerk might be presumed to know the orders and proceedings of the court of which he was clerk, in so far as any person might be damaged by reason of his ignorance.

**No Presumption of Actual Knowledge of Injunctive Order.** — Judge Lochren in *Dowagiac Mfg. Co. v. Minnesota M. P. P. Co.*, 124 Fed. 737, held that where an injunctive order has been ordered but not issued, in order to convict a person for its violation, it must be shown clearly that the offender had knowledge of the order for the injunction, in such a way that it can be held that he understood it, and with such knowledge willfully violated it, for presumption of actual knowledge can-

of the accused in criminal cases will prevail,<sup>32</sup> though it has been held that where the failure to keep certain books would be a misdemeanor, the court will not presume a failure to keep them in order to excuse contemner from producing them under a subpoena *duces tecum*,<sup>33</sup> and in a contempt proceeding against an attorney for the filing of a contemptuous document, it will be presumed that it was filed according to law, and that he was responsible for such filing.<sup>34</sup> So also in proceedings for contemptuous publications, it will be presumed that the words used were intended to be interpreted and construed according to the ordinary meaning of words employed.<sup>35</sup>

**7. Necessity for Incriminating Evidence.** — A. IN DIRECT CONTEMPTS. — Where the contempt is committed in the immediate view and presence of the court, contemner may be convicted without any evidence, save what may be gathered by the exercise of the sense of hearing and seeing on part of the court.<sup>36</sup>

not be indulged in a proceeding for contempt.

32. *Bates' Case*, 55 N. H. 325; *Harris v. Clark*, 10 How. Pr. (N. Y.) 415; *State v. Ralphsnnyder*, 34 W. Va. 352, 12 S. E. 721.

In *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580, it was said that the offense of contempt being criminal in its nature, both the charge, and the finding and judgment of the court must be strictly construed in favor of the accused.

**33. Performance of Duty Will Be Presumed.** — In *Fenlon v. Dempsey*, 50 Hun 131, 2 N. Y. Supp. 763, which was a contempt proceeding against officers of a corporation for failing to produce certain books of the corporation, including the stock transfer book, it was held that the burden of proof was upon contemnners to excuse their failure to produce the books, because under the law under which the corporation was organized, its trustees were bound to keep books of the character called for by the subpoena, and the failure to keep such books was prescribed by the statute to be a misdemeanor, and hence that the presumption was that the trustees of the corporation had performed their duty in that respect.

34. *State v. Soule*, 8 Rob. (La.) 500.

35. *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787.

36. *Easton v. State*, 39 Ala. 551, 87 Am. Dec. 49; *People v. Turner*, 1 Cal. 152; *Whittem v. State*, 36 Ind. 196; *Ex parte Wright*, 65 Ind. 504;

*State v. Henthorn*, 46 Kan. 613, 26 Pac. 937; *In re Wood*, 82 Mich. 75, 45 N. W. 1,113; *Ex parte Terry*, 128 U. S. 289.

**Power of Summary Punishment Must Be Prudently Exercised.** — The court in *State v. Ives*, 60 Minn. 478, 62 N. W. 831, said, in speaking of contempts committed in the immediate view and presence of the court, that, "They are punishable summarily by order of the presiding judge, who takes judicial notice of such contempts, acts upon his own motion, and upon facts within his own knowledge based upon the words or acts of the accused, or both, said or done in his presence or hearing. No formal trial is necessary. The court simply makes an order without proof, reciting what occurred in its presence or hearing, adjudging the person proceeded against guilty, and fixing his punishment. Gen. St. 1894, § 6,157. This is an arbitrary power, born of necessity, which must be exercised with great prudence and always limited to cases of direct contempts."

**Manner of Contemner May Be Considered.** — Language not in itself constituting a direct contempt may be treated as such, if uttered in an insulting manner. *Holman v. State*, 105 Ind. 513, 5 N. E. 556.

**Rule as to Contemptuous Misbehavior.** — The court in *Savin, Petitioner*, 131 U. S. 267, in speaking of contemptuous misbehavior in the presence of the court, said that "It is true that the mode of proceeding

**B. IN CONSTRUCTIVE CONTEMPTS.** — But where the contempt was committed beyond the immediate view and presence of the court, and contemner denies that he committed the acts constituting the alleged contempt, or insists that his acts were not contemptuous, the court should hear evidence and determine contemner's guilt or innocence from such evidence.<sup>37</sup>

for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender without further proof, and without issue or trial in any form.' *Ex parte Terry*, 128 U. S. 289, 309: whereas, in cases of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Bl. Com. 286. But this difference in procedure does not affect the question as to whether particular acts do not, within the meaning of the statute, constitute misbehavior in the presence of the court."

37. *Sherwood v. Sherwood*, 32 Conn. 1; *Whittem v. State*, 36 Ind. 196.

**Necessity for Incriminating Evidence.** — In *Ex parte Kilgore*, 3 Tex. App. 247, the court said: "The judgment final was rendered without the introduction of any evidence to prove the allegations in the complaint. The parties were charged with disobeying and disregarding a writ of *certiorari*. There should certainly have been some evidence of that fact before they could have been adjudged guilty of its commission. An affidavit made by a party at interest would not, of itself, simply be sufficient to establish the fact; and more especially are we induced to adopt this conclusion when, as in the present case, the parties offered in a sworn statement to purge themselves of supposed contempt, and denied most positively and emphatically that they had violated or disregarded the orders or writs of the court in the manner set out in the affidavit."

In contempt proceedings for refusal to answer questions before a referee, contemner should be allowed a full and complete examination by means of which the charges made may be either proved or contemner exonerated. *U. S. v. Church of Jesus Christ*, 6 Utah 9, 21 Pac. 503.

In *Welch v. Barber*, 52 Conn. 147, 52 Am. Rep. 567, it was held that where the contemner was not personally present in court at the time when his application for a continuance, based on his serious illness, which did not actually exist, was presented, the court could not of his own motion, and upon facts within his own knowledge, find contemner guilty, since the facts establishing his guilt must be adduced at a trial.

In speaking of the statutory procedure in cases of constructive contempt, the court, in *State v. Ives*, 60 Minn. 478, 62 N. W. 831, said that "When the accused is brought before the court, or appears in response to the order, the court proceeds to hear the case without a jury. In doing so it cannot act upon facts within its own knowledge, or information obtained outside of the orderly course of the trial, or upon the affidavit upon which the warrant issued, for it is not competent evidence against the accused upon his trial. It must proceed to investigate the charge by examining him, and the witnesses for and against him; and upon the evidence so taken the court must determine whether the person proceeded against is guilty of the contempt charged." *Gen. St. 1894*, § 6,166, 6,167."

**Customary Procedure.** — The court in *Bates Case*, 55 N. H. 325, said that probably the customary procedure in contempts committed in *facie curiae* is to punish summarily, after such hearing as the presiding judge may deem just and necessary, but where the offense is not so committed in the presence of the court,

## II. EVIDENCE RECEIVABLE.

**1. Generally.** — A. IN DIRECT CONTEMPTS. — a. *To Convict.* In order to convict, as we have seen, no evidence *aliunde* is necessary where the offense was committed under the immediate view and presence of the court.<sup>38</sup>

b. *To Purge.* — Where the offense was committed in the court's view and presence while in session, contemner will not be allowed to offer evidence contradicting the court's version of the affair,<sup>39</sup>

the case is ordinarily governed by the analogies of criminal procedure, and proofs upon both sides may be taken, and the determination made from a consideration of the whole evidence. The court in elaborating further said that it seemed to be more appropriate, and at the same time safe enough for the protection of the court, to adhere as closely as possible to the plan and method of criminal procedure, applying the same rules of evidence and presumption of law, except as to the matter of a jury trial.

**On Commitment of Executor.** — A commitment of an executor for contempt in failing to pay over money, as ordered on approval of his final report, cannot be made without evidence of the demand required by the statute to be made. *Blake v. People*, 161 Ill. 74, 43 N. E. 590.

**Consideration of Evidence in Collateral Proceeding.** — Where the court, in chancery proceedings for the restoration of property taken from a receiver, issues an attachment against the receiver for a criminal contempt in having allowed the goods in his custody to have been surreptitiously removed from his custody, and the contemner files an answer to such contempt proceedings, the evidence taken under the petition for the restoration of the property cannot be considered by the court in determining the sufficiency of contemner's answer to the contempt proceedings where it is not introduced as evidence in the contempt proceedings. *Oster v. People*, 192 Ill. 473, 61 N. E. 469, 56 L. R. A. 462.

**-38. Contemptuous Language Speaks for Itself.** — The determination whether a contempt has been committed does not depend upon the intention of the offending party, but

upon the act which he has committed; hence, a disclaimer of intentional disrespect or design to embarrass the administration of justice is no excuse for the person charged with the offense, where the contrary appears from a fair interpretation of the language used. *Dodge v. State*, 140 Ind. 284, 39 N. E. 745.

**39.** *State v. Judges*, 32 La. Ann. 1,256.

**Attorney's Disclaimer** of contemptuous language in presence of court will not purge. *Dodge v. State*, 140 Ind. 284, 39 N. E. 745.

In *State v. Gibson*, 33 W. Va. 97, 10 S. E. 58, which was a contempt proceedings against an attorney for use of insulting and defamatory language concerning the trial judge, both in the presence of the court and also during the noon recess, the supreme court held that the court properly refused to permit contemner to prove that he had not used the language charged to have been used in the presence of the court, but that the court erred in refusing to allow contemner to prove that he had not used the language charged to have been used during the noon recess.

In *Ex parte Terry*, 128 U. S. 289, it was held that upon the commission of a criminal contempt in its presence, the court could proceed upon its knowledge of the facts and punish the offender without further proof, and without issue or trial in any form.

**On Commitment in Supplementary Proceedings.** — In *re Rosenberg*, 90 Wis. 581, 63 N. W. 1,065, 64 N. W. 299, which was a summary commitment of a judgment debtor, who refused to comply with oral directions of the court touching the discovery in the supplementary proceedings then on trial, it was said that

though it has been stated that in some cases it may be proper for the court to allow the contemner an opportunity to apologize, and then consider such apology in mitigation when awarding the punishment,<sup>40</sup> or to allow contemner to give such explanation of his conduct as will extenuate it;<sup>41</sup> but of course the court is in no manner bound to do so.<sup>42</sup>

**B. LANGUAGE USED IN COURT PAPERS.**—Where the contempt consists of language used in petitions or papers prepared and used by counsel in proceedings in court, the court will construe the effect of the language used,<sup>43</sup> notwithstanding the disavowal of disrespectful intention on the part of the counsel,<sup>44</sup> though it is held in such cases counsel may state necessary facts, provided that it be done in a manner not calculated to scandalize the court or bring the

"Whether the petitioner's answers were untruthful, evasive, or prevaricating, so as, in effect, to amount to a refusal to answer and to give the discovery called for; or whether it was fairly within his ability to make the discovery required of him; whether his conduct was innocent or contumacious—were questions which the exigency of the case required the circuit court to determine."

40. *State v. Henthorn*, 46 Kan. 613, 26 Pac. 937.

**Advisability of Accepting Reasonable Apology.**—In *People v. Turner*, 1 Cal. 152, it was said that in exercising the arbitrary power of punishment, a judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws, and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct."

41. *Russell v. French*, 67 Iowa 102, 24 N. W. 741.

**Allowing Evidence of Extenuating Facts.**—In matter of *Falkenberg v. Frank*, 20 Misc. 692, 46 N. Y. Supp. 675, the court said: "In a criminal contempt, if a contempt was committed, the explanation on the part of the offender would not relieve him from the effect of the criminal contempt, but might go towards an extenuation of the act, and might affect the judgment of the justice before whom it had been committed."

**But Wrongful Rulings or Remarks** to counsel by the trial judge do not justify or excuse contemptuous con-

duct or language on the part of the counsel while in the court room. *Holmann v. State*, 105 Ind. 513, 5 N. E. 556; *Dodge v. State*, 140 Ind. 284, 39 N. E. 745.

42. *Ex parte Terry*, 128 U. S. 289.

**43. Responsibility and Construction of Language in Court Papers.** In *U. S. v. Church of Jesus Christ*, 6 Utah 9, 21 Pac. 503, the court said in reference to a paper filed in a proceeding before the supreme court that the good faith of the contemnners would not avail, for they would be held responsible for the language used by them, and the court would construe or say what was the effect of the language used.

**44. Disavowal of Intentional Contempt Ineffective Where Language Plain.**—Where counsel drafting a petition for rehearing in the supreme court, uses language which reflects upon the good faith and diligence of the judge who wrote the original opinion, he will be found guilty of contempt, notwithstanding his disavowal of disrespectful intention. *McCormick v. Sheridan*, (Cal.), 20 Pac. 24.

So also *In re Woolley*, 11 Bush (Ky.) 95, which was a proceeding for a direct contempt in having filed a petition for rehearing in which the attorney, in a supercilious and dogmatic style, charged the court with having overlooked the facts in the record, and with having assumed facts not proved, and ignored facts which were unquestioned, the attorney was found guilty of contempt in open court, notwithstanding his disclaimer of intentional contempt.

judge thereof in public contempt.<sup>45</sup>

C. IN CONSTRUCTIVE CONTEMPTS. — a. *Rules of Evidence Applicable.* — It is generally held that in cases of strictly criminal contempts the rules of evidence applicable to criminal cases should be applied,<sup>46</sup> whereas in purely civil contempts any evidence which will

**45. Rule for Statement of Scandalous Facts in Court Papers.** — In *Hughes v. People*, 5 Colo. 436, which was a contempt proceeding for stating in an application for a change of venue, facts which directly charged the presiding judge with judicial corruption and oppression in the very case at bar, the court in refusing to allow testimony as to the truth of the charges, laid down the principles which govern in such cases, in the following language: "As stated, however, we conceive that in all cases, necessary material or pertinent facts should be set out; in case of the prejudice of the judge, his attention would thus be called to some circumstances which he may have forgotten, or of which he was entirely ignorant, but which the petitioner might conceive to be a cause of prejudice, and a sense of justice requires that he should not be baldly charged with prejudice against a suitor while left in surprise and wonderment at a cause he may not imagine, or may believe exists only in the imagination or wicked invention of the applicant, and without the necessary knowledge upon which to act in the exercise of that discretion to allow or deny the charge, a right which is expressly given such judge by the Code provision.

While, then, facts are to be stated, they are not to be set out beyond what is necessary, where they involve judicial acts or character of the judge; and we may say that it would never be necessary to set out facts that would in themselves, or by the manner of stating them, be calculated to scandalize the court or judge thereof, or bring them into public contempt.

A contempt consists as well in the manner of the person committing it as in the subject-matter of its foundation; matters which, if true, would in their very nature be scandalous, may be presented, hinted at, or brought to the attention of the court

in so respectful a manner that no judge would ever think to construe a contempt therefrom; while, on the other hand, it is easy to see, when under the guise and pretense of setting out privileged and necessary matters, circumstances are detailed, and scandalous and insulting charges and innuendoes are made and insinuated upon pretended "information and belief," in a manner that bears the unmistakable ex-marks of malice and deliberate contempt."

**46. Rules of Evidence of Criminal Procedure Applicable.** — *In re Buckley*, 69 Cal. 1, 10 Pac. 69; *Harwell v. State*, 10 Lea (Tenn.) 544; *State v. Cunningham*, 33 W. Va. 607, 11 S. E. 76; *Accumulator Co. v. Consolidated E. S. Co.*, 53 Fed. 796; *U. S. v. Jose*, 63 Fed. 951.

Only such evidence should be received in general as would be admissible on the trial of an indictment for the same grade of offense. *Bates' Case*, 55 N. H. 325.

In *Welch v. Barber*, 52 Conn. 147, 52 Am. Rep. 567, which was a contempt proceeding in which contemner was charged with having applied for a continuance on the ground of a feigned illness, the prosecution was initiated by the filing of an affidavit of three persons to the effect that contemner was not ill as he had claimed. A hearing was then had, in the absence of contemner, at which the affidavit was offered in evidence, but subsequently two of the affiants in the affidavit appeared personally and testified to the facts contained in the affidavit. A deposition was also offered and admitted in evidence on behalf of the prosecution. The supreme court in passing on the question said: "The court also erred in admitting the affidavit in evidence on the trial. The affidavit had performed its office when it satisfied the court that this was a case which it ought to notice. It could not be received in evidence to prove guilt without violating two cardinal prin-



satisfy the conscience of the court will be deemed sufficient;<sup>47</sup> and it has been said that as to such criminal contempts the negative pregnant rule is as applicable to evidence therein as it is to pleading.<sup>48</sup>

b. *Necessity for Proving Intent.*—Where the prosecution is for the commission of a criminal contempt, it is necessary for the prosecution to prove a contemptuous intent on the part of the contemner,<sup>49</sup>

ciples in all criminal trials—the right of the accused to confront the witnesses against him in open court, and his right to cross-examine them. The error was not healed by the subsequent appearance of two of the affiants as witnesses. The deposition was also improperly received, and for obvious reasons.”

**Rule Applied in Violations of Injunctive Orders.**—In *Gage v. Denbow*, 49 Hun 42, 1 N. Y. Supp. 826, it was said in a contempt proceeding for the violation of an injunctive order that “In respect to intent, the rule in proceedings for contempt is analogous to that in prosecutions for crime. The intent required to be proved is not an intent to violate the law, or the order of the court, but to do the act which the law or the order of the court forbids.”

And see *Boyd v. State*, 19 Neb. 128, 26 N. W. 925, to the same effect.

**47. Rule in Civil Contempt.**—*Rapalje* on Contempt, § 126; *Buck v. Buck*, 60 Ill. 105.

It was held in *Nebraska Children's Home Soc. v. State*, 57 Neb. 765, 78 N. W. 267, in a proceeding which was characterized as remedial, that where contemner failed to answer the information, he confessed the information and tendered no issue, and that the court, under such circumstances, properly refused to hear evidence on part of contemner.

**48. State v. Downing**, 40 Or. 309, 58 Pac. 863, 66 Pac. 917.

**49. Conflicting Engagements of Absent Counsel.**—The failure of an attorney to attend a county court at the time of trial, previously fixed with his consent, is not a contempt where he shows that he was at the time engaged upon the trial of a case in the police court, which he had commenced with every reasonable expectation of being able to complete before the time fixed for the other case, and where he made efforts in the police court to obtain a continu-

ance after partly heard, but was unable to obtain it, and thereupon notified the county court of the facts in a respectful manner. *Wise v. Com.*, 97 Va. 779, 34 S. E. 453.

**A Corporation** may be liable for a criminal contempt though that crime involves a specific intent. *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159.

**Rule as to Intent Stated as to Both Criminal and Civil Contempts.** In *People v. Aitken*, 19 Hun (N. Y.) 327, the court said: “Proceedings to punish for a contempt of court are of two kinds, each having a distinct object in view—the one to protect the rights of private parties, and the other to maintain the dignity of the court, and to punish people guilty of willful disobedience to its mandates.

In the former case, therefore, the purpose being to preserve private rights, it is immaterial whether the contempt complained of was designedly or negligently committed; the power and duty of the court to redress the wrongs and enforce and preserve the rights of the injured party are the same.

If, for instance, a person transfer property, or do any other act, in disobedience of an injunction or other order, it can make no difference to the injured suitor whether it was done innocently, or with evil intent. His loss is the same in either event, and proceedings to punish the offender, with a view of adjusting the rights of the parties, would look to indemnity only; of course, if the disobedience was willful, the court could, at the same time that it enforced indemnity, inflict punishment for a criminal contempt.

On the other hand, if the only purpose of the proceeding is to punish the offender and maintain the dignity of the court, the disobedience must be designed and willful, and hence

unless the act is such as presupposes a contemptuous intent from the very act itself,<sup>50</sup> but where the prosecution is for a civil contempt, it is not necessary to prove that the contemptuous act was willfully or designedly done.<sup>51</sup>

c. *Compelling Contemner to Testify*. — A person charged with the commission of a constructive criminal contempt cannot, in the proceeding for its punishment, be compelled to testify against himself,<sup>52</sup> but this rule has been held not to apply to a proceeding for the punishment of a civil contempt in a jurisdiction where the procedure is conducted according to the rules of the common law;<sup>53</sup> and it has also been held that the compelling of answers to interrogatories in a proceeding for the punishment of a criminal contempt under the common law rule is not a violation of the constitutional provision against compelling an accused person to testify against himself.<sup>54</sup>

d. *Evidence Receivable on Reference to Master*. — The court may, in its discretion, refer a contempt proceeding to a master to ascertain and report the facts,<sup>55</sup> but it is said that the master cannot on such a

the law terms this a criminal contempt. If, for example, one, after careful examination, wrongly interpret, and, through this mistake, disobey an order, the majesty of the law is not offended, nor the dignity of the court impaired; and, as he is innocent of willful offense, the infliction of punishment could have no justification.

The willful disobedience expressed in the statute means conduct intentionally and designedly at variance with the mandate of the court. The disobedience need not be malicious, but it must be in pursuance of an intent to disregard the mandate of the violated order."

50. *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159; *In re Terry*, 36 Fed. 419.

**Intent of Embezzler of Trust Funds Is Immaterial.** — In *Cartwright's Case*, 114 Mass. 230, the court held in a contempt proceeding against a receiver for appropriating trust funds without an order of the court that his intent was immaterial, and that it was the act of appropriating which constituted the contemptuous conduct.

51. **Intent Immaterial in Purely Civil Contempts.** — Chief Justice Taney in *Whartman v. Whartman*, Taney's Dec. (U. S.) 362, in a pro-

ceeding arising from contemner's violation of an order requiring him to pay certain money into court, said: "As regards the question whether a contempt has or has not been committed, it does not depend on the intention of the party, but upon the acts he has done. It is a conclusion of law from the act; disobedience to the legitimate authority of the court is, by law, a contempt, unless the party can show sufficient cause to excuse it."

In *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 105, 21 Atl. 182, a railway superintendent was held guilty of contempt for violation of an injunctive order restraining the operation of engines in front of a certain residence, although it was shown that such operation was without any willful intention to disregard or contemn the authority or dignity of the court.

52. **Contemner Cannot Be Compelled to Testify.** — *In re Nickell*, 47 Kan. 734, 28 Pac. 1,076, 27 Am. St. Rep. 315; *In re Haines*, 67 N. J. L. 442, 51 Atl. 929.

**Nor in Contempt Proceeding for Violation of an Injunctive Order.** *Ex parte Gould*, 99 Cal. 360, 33 Pac. 1,112, 37 Am. St. Rep. 57, 21 L. R. A. 751.

53. *Buck v. Buck*, 60 Ill. 105.

54. *State v. Soule*, 8 Rob. (La.) 500.

55. *State v. Matthews*, 37 N. H.

reference take *ex parte* affidavits as proof unless especially directed to do so.<sup>56</sup>

e. *To Ascertain Punishment or Indemnity.* — Evidence of the amount of damages sustained by reason of the contemptuous violation of an injunctive order is admissible for the purpose of ascertaining the amount of fine to be assessed.<sup>57</sup>

f. *Evidence of Other Acts of Contempt.* — It is said that evidence of other acts of contempt is, as a general rule, inadmissible,<sup>58</sup> but where contemner seeks to mitigate his acts by showing that he acted under mistake or by inadvertence, evidence of such other acts is admissible to show the purpose and spirit of the contemner in doing the contemptuous act charged.<sup>59</sup>

g. *Acts or Admissions of Contemner.* — Admissions of contemner are competent evidence against him,<sup>60</sup> as also are acts on his part tending to show his ability to obey an order of the court where he denies his ability;<sup>61</sup> but on the other hand, contemner's counsel cannot make admissions on his behalf.<sup>62</sup>

h. *Reception of Affidavits.* — In all jurisdictions where the common law prevails in regard to the procedure in contempt cases, the use of *ex parte* affidavits is permissible, both on the part of the prosecution,<sup>63</sup> and as counter proof on the part of contemner;<sup>64</sup> and they

450; Newark P. R. & F. Co. v. Elmer, 9 N. J. Eq. 760; *In re Day*, 34 Wis. 638; MacBeth v. Gillinder, 54 Fed. 171.

56. Cumming v. Waggoner, 7 Paige (N. Y.) 603.

57. Rogers Mfg. Co. v. Rogers, 38 Conn. 121; Moffat v. Herman, 116 N. Y. 131, 22 N. E. 287; Noble Township v. Aasen, 10 N. D. 264, 86 N. W. 742.

58. Rogers Mfg. Co. v. Rogers, 38 Conn. 121.

59. Rogers Mfg. Co. v. Rogers, 38 Conn. 121.

60. *Admissions of a Judgment Debtor* concerning the control of a saloon, made before a referee in supplementary proceedings, are competent evidence against him in contempt proceedings for violation of an injunction restraining the sale of liquor in such saloon. Parks v. Johnson, 86 Iowa 475, 53 N. W. 285.

61. *Transfer of Property* to prevent payment of alimony in a suit about to be commenced may be shown upon the question as to whether contemner has in possession or control the means of obeying the order of the court. Stuart v. Stuart, 123 Mass. 370.

62. Scott v. Chambers, 62 Mich. 532, 29 N. W. 94.

63. People v. Brower, 4 Paige (N. Y.) 405; State v. Mitchell, 3 S. D. 223, 52 N. W. 1,052; Rutherford v. Metcalf, 5 Hayw. (Tenn.) 58.

64. Accumulator Co. v. Consolidated E. S. Co., 53 Fed. 796.

*Allowance of Ex Parte Affidavits.* In Witter v. Lyon, 34 Wis. 564, which was a contempt proceeding initiated by an order to show cause based on *ex parte* affidavits, pursuant to the Wisconsin statutes, the court said: "It is the well-settled judicial construction of the same statute in New York, whence our own was borrowed, that where an order to show cause is granted, the course to be pursued may conform to the general practice of the court on orders to show cause why relief should not be granted. The order, being granted on *ex parte* affidavits and proofs, may be discharged on evidence of the same kind produced by the party against whom it was obtained." Hence, where the affidavits produced by contemner established *prima facie* that he is not guilty of the contempt he should be discharged.

are also permissible in other jurisdictions where authorized by statute.<sup>65</sup>

i. *Use of Depositions.* — But it has been held that depositions are not admissible in a prosecution for a criminal contempt to prove contemner's guilt,<sup>66</sup> although they have been held allowable in chancery courts where the proceeding is being conducted in accordance with the usual chancery practice.<sup>67</sup>

j. *Use of Oral or Documentary Evidence.* — Both oral<sup>68</sup> and documentary<sup>69</sup> evidence is admissible at the hearing of contempt proceeding.

D. TO CONVICT FOR CONTEMPTUOUS PUBLICATION. — a. *In General.* — In the production of evidence to prove a person guilty of the publication of a contemptuous publication, the prosecution must prove the fact of the publication and the connection of the contemner with such publication,<sup>70</sup> but where the contemptuous language and its publication are admitted, the court may use its judicial knowledge of its own proceedings to ascertain the intent of the publisher,<sup>71</sup> or where the contemner, in addition to admitting the language and its publication, sets up explanations which tend to scandalize or insult the court, no other evidence need be produced to convict contemner.<sup>72</sup>

After proof of the language used, and its publication, the main thing to be proved is whether the language, or its manner of use, constitutes a contempt of court.<sup>73</sup>

b. *Language Constituting Contempt.* — What particular language in a publication will constitute a contempt of court is a question which must depend upon the circumstances of each particular case.<sup>74</sup>

65. *State v. Mitchell*, 3 S. D. 223, 52 N. W. 1,052.

66. *Welch v. Barber*, 52 Conn. 147, 52 Am. Rep. 567.

67. See *Una v. Dodd*, 38 N. J. Eq. 460, where the matter is fully discussed and the English authorities reviewed.

68. *Mahoney v. Van Winkle*, 33 Cal. 448; *Huntington v. McMahon*, 48 Conn. 174; *Henry v. Ellis*, 49 Iowa 205; *Bates' Case*, 55 N. H. 325; *Slater v. Merritt*, 75 N. Y. 268.

69. *Stuart v. Stuart*, 123 Mass. 370; *State v. Ackerson*, 25 N. J. L. 209.

**Sworn Answers of Contemner** are evidence in his favor and to be considered and weighed with the other evidence in the case. *State v. Matthews*, 37 N. H. 450.

In contempt proceedings in the Federal Court to compel an officer of the court to pay over money due from him in his official capacity, the

sworn answers of the officer are evidence in his favor. *In re Pitman*, 1 Curt. 186, 19 Fed. Cas. No. 11,184.

70. *Holt's Case*, 55 N. J. L. 384, 27 Atl. 909.

71. *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829.

72. *Bloom v. People*, 23 Colo. 416, 48 Pac. 519.

73. *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; *Bloom v. People*, 23 Colo. 416, 48 Pac. 519; *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829.

74. **Language Constituting Contempt.** — In *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787, the court said: "It would be idle to declare that particular words or a particular method of defamation should be unlawful, so long as other words and other methods equally defamatory may be resorted to."

c. *Language Concerning Matter Pending.* — But it is generally held necessary to prove that the contemptuous language was used concerning a matter pending in the court,<sup>75</sup> and that it was calculated or had a tendency to affect, obstruct or embarrass the administration of justice in such pending case,<sup>76</sup> or destroy the confidence of the public in the fairness of the court with reference to its action in such pending matter.<sup>77</sup> Most of the adjudicated cases have arisen

75. *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159; *State v. Kaiser*, 20 Or. 50, 23 Pac. 964, 8 L. R. A. 584.

76. *Instances of Publications Which Affected Pending Proceedings.* In *Ex parte Barry*, 85 Cal. 603, 25 Pac. 256, 20 Am. St. Rep. 248, a newspaper article charging a judge with "deliberate lying about the law, deliberate intentional falsification in his official capacity, and deliberate intentional denial of justice in sustaining a demurrer," the case not having been finally disposed of, was held language calculated to intimidate or improperly influence a timid judge, or one unduly sensitive to public feeling or censure, and within the statutory provisions declaring an "unlawful interference with the proceedings of a court" to be a contempt.

In *re Cheeseman*, 49 N. J. L. 115, 6 Atl. 513, 60 Am. Rep. 596, the superior court approved a commitment for a contemptuous newspaper publication in a case where the publisher, who had been indicted and had a mistrial, published in his paper an article intended to cast discredit upon the members of the grand jury that had indicted him, upon the sheriff who had summoned the jury, and upon the judge who had presided at his trial, and who, in the regular course of his official duty, would preside when he should be tried again.

In *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159, the court held an article which merely stated the amount of money which the defendant had offered to pay the plaintiff, and the amount which plaintiff had demanded before commencing suit, as constituting a contempt, even though the statement

was true, since the evidence, even if true, was not admissible.

**Essentials of Such Publications.** In *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638, the court in discussing the essentials of a contemptuous publication said: "The article was a libel upon the presiding judge, but that alone did not form the basis of the information. The intention of the publication was to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus to bring it into contempt; to inflame the prejudices of the people against it; to lead them to believe that the trial then being conducted was a farce and an outrage, which had its foundation in fraud and wrong on the part of the judge and other officers of the court, and, if communicated to the jury, to prejudice their minds, and thus prevent a fair and impartial trial. Besides, the tendency was, when read by the judge, to produce irritation, and, to a greater or less extent, render him less capable of exercising a clear and impartial judgment. It therefore tended directly to obstruct the administration of justice in reference to the case on trial, and its publication was a contempt of court."

77. **Destruction of Public Confidence in Courts.** — In *Bloom v. People*, 23 Colo. 416, 48 Pac. 519, it was said: "To publish of a judge that his decisions in a case pending are influenced by political or money considerations certainly would tend to bring him into disrepute, and to embarrass him in future decisions in the case, and have a tendency to interfere with the due administration of justice therein."

In *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829, it was held that newspaper publications while a matter is pending in court, as to whether or

over language which was used with reference to a matter which was pending in the court.<sup>78</sup>

d. *Place of Publication*. — In regard to contemptuous publications concerning the higher appellate courts, no objections seem to have been raised to proof as to the place of their publication, but as to such publications concerning *nisi prius* courts, it has been held that it is no objection that it was published at a distant place, where the publisher could reasonably expect it to circulate and be read at the place where the matter was pending.<sup>79</sup>

not a certain report presented by the grand jury would be received by the court or returned to the grand jury for further action or correction, and stating that the actions of the judge seemed to indicate that he intended to withhold the report, and that if he did so his act could be characterized as a most flagrant violation of the people's rights, and charging by implication that the judge was endeavoring to browbeat the grand jury into bending to his own will, constituted a contempt of court.

78. *Ex parte Barry*, 85 Cal. 603, 25 Pac. 256, 20 Am. St. Rep. 248; *Bloom v. People*, 23 Colo. 416, 48 Pac. 519; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *In re Cheeseman*, 49 N. J. L. 115, 6 Atl. 513, 60 Am. Rep. 596; *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638; *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829; *State v. Kaiser*, 20 Or. 50, 23 Pac. 964, 8 L. R. A. 584.

There is, however, a conflict of authority as to whether contemptuous language which has no reference to a pending matter, but which tends to degrade the court or bring the administration of justice in disrepute, really constitutes a contempt of court. In some jurisdictions such language has been held to constitute a contempt of court, while in other jurisdictions it has been held sufficient.

**Instances Where Publication Referred to Past Proceedings.** — In *State v. Morrill*, 16 Ark. 384, a publication charging the judges of the supreme court with having been bribed to render a certain decision which they had rendered, was held a contempt, on the ground that it tended to degrade the tribunal, de-

stroy public confidence and respect in its judgments, and obstruct the free course of justice by defeated attorneys.

*In re Chadwick*, 109 Mich. 588, 67 N. W. 1,071, a publication by the attorney for the defeated party in which the attorney criticised the decree and charged the court with unfairness and improper conduct in having submitted to personal interviews, was held a contempt.

*In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747, the court held that a letter, written by the attorney for the defeated party, in a litigation just decided, in which he declared that the decision was directly contrary to every principle of law governing the case, and that it was his desire that no such decision should stand unreversed in any court in which he practiced, was a contempt.

**Publication Must Refer to Pending Matter.** — *State v. Anderson*, 40 Iowa 207. The case of *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158, sets forth the reasons for the rule and practically overrules *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528, which has been frequently cited in support of the contrary doctrine.

79. **Place of Circulation More Important Than Place of Publication.** In *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L. R. A. 159, it was said: "The intention of the publisher of a newspaper is that it should be bought and read by persons within the place where it circulates."

Where a newspaper has a large circulation in the county where the trial is in progress, and the publisher has reasonable ground to believe that his contemptuous article concerning the court and a matter then pending therein will be circu-

e. *Manner of Ascertaining Meaning or Intent.* — In ascertaining the meaning or intent with which the alleged contemptuous language was used, contemner is entitled to have the article fairly interpreted and construed,<sup>80</sup> but common words should be construed and interpreted according to their ordinary meaning,<sup>81</sup> and given their plain and unmistakable meaning.<sup>82</sup> Where the language employed is somewhat ambiguous, all parts of the article should be construed together,<sup>83</sup> and where the contempt consists of a series of articles, and the publisher denies personal knowledge of some parts of the series, the whole series may be construed together in ascertaining whether intent was to unlawfully control or obstruct the court's

lated in the court room and about the court house during the trial, and read, and it was in fact so circulated and read, the fact that it was in fact written and published in a city somewhat distant from the place of trial is no defense. *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

80. *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

81. *Common Words Given Ordinary Meaning Regardless of Disavowal.* — In *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787, the court after holding that common words should be construed according to the ordinary meaning of the words employed, said: "We should stultify ourselves as judges to accept the construction which respondents now seek to give their language. We do not believe, nor can we, for the purpose of escaping an unpleasant responsibility, affect to believe, that persons capable of writing such articles did not intend to convey the meaning which their own words import. The rule is elementary that a person is presumed to intend the natural and probable consequences of his own voluntary act, and such rule is certainly applicable to words deliberately written and printed."

82. *Plain and Unmistakable Meaning Should Be Given.* — In *Fishback v. State*, 131 Ind. 304, 30 N. E. 1,088, the court said: "If the article is *per se* libelous, making a direct charge against the court or jury, admitting of but one fair and reasonable construction, and requiring no

innuendo to apply its meaning to the court, then it would be trifling with justice to say that in such a case the publisher could admit the publication, but deny that he intended the plain and unmistakable meaning which the language used conveys; but when the language used in an article is not *per se* libelous, and only becomes so, and made to apply to the court, by the use of innuendoes, and is fairly susceptible of an innocent meaning in so far as any reflection upon the court is concerned, and the defendant answers under oath that he used it in a sense not libelous, and declares he intended no imputation upon the court, either impugning the motives or integrity of the judge, or to embarrass the administration of justice, his answer must be taken as conclusive."

And see *Percival v. State*, 45 Neb. 741, 64 N. W. 221, 50 Am. St. Rep. 568, to the same effect.

83. *Distinctions Between Criticism and Defamation.* — It has been held that there is a difference between mere criticism of a decision of the court and defamatory publications which impugn the motives of the court in rendering its decisions, or which tend to destroy public confidence in the purity of the courts. *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787.

In *State v. Morrill*, 16 Ark. 384, it was said: "Any citizen has the right to publish the proceedings and decisions of this court, and if he deem it necessary for the public good, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges for their stations, and the fidelity with which

action in the matter referred to in the publications.<sup>84</sup> So also where the contempt consists of both editorial comment and reporter's items of news, the editorial article will be considered as evidencing knowledge of the reporter's items,<sup>85</sup> and where the publication is couched in ambiguous terms and a contemptuous intent is disavowed by its author, testimony of witnesses is admissible to show whether in their

they perform the important public trusts reposed in them; but he has no right to attempt, by defamatory publications, to degrade the tribunal, destroy public confidence in it, and dispose the community to disregard and set at naught its orders, judgments and decrees. Such publications are an abuse of the liberty of the press, and tend to sap the very foundation of good order and well being in society, by obstructing the course of justice. If a judge is really corrupt, and unworthy of the station which he holds, the constitution has provided an ample remedy for *impeachment* or *address*, where he can meet his accuser face to face, and his conduct may undergo a full investigation. The liberty of the press is one thing, and licentious scandal is another."

The court in *In re Chadwick*, 109 Mich. 388, 67 N. W. 1,071, said: "So long as critics confine their criticisms within the facts, and base them upon the decisions of the court, they commit no contempt, no matter how severe the criticisms may be; but when they pass beyond that line, and charge that they have not had a fair trial or hearing on account of the corruption of the presiding judge, or his listening to arguments and personal interviews out of court, the tendency is to poison the fountain of justice, and to create distrust, and destroy the confidence of the people in their courts, which are of the utmost importance to them in the protection of their rights and liberties."

**84. Series of Articles Are Construed Together.**—In *State v. Rosewater*, 60 Neb. 438, 83 N. W. 353, in discussing the matters to be considered in ascertaining the contemptuous intent of contemner in publishing a series of articles concerning a matter pending in the supreme court, where the publisher disclaims per-

sonal knowledge of all articles except the first one, the court said: "The first article, standing alone, would not, perhaps, be so aggravated in its character as to require judicial notice. It was not as serious a breach of the proprieties which should obtain during the pendency of an important trial in a court of justice as some of those which followed. Yet, it was this (the first article) which set the precedent, and was the initiatory step and beginning of a series of wrongful acts which, following one after the other, disclosed a manifest purpose to warp the judgment, and control by unlawful methods judicial action, and which finally led to the unanimous opinion of the court that such reprehensible course of action should not, in justice to the inviolable rights of citizens, be permitted to pass unnoticed and unchallenged."

**85. Construction of Editorial and Reportorial Together.**—In *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787, the publishers of a series of contemptuous newspaper articles consisting of editorial and local items, sought to excuse themselves on the ground that they were not cognizant of the local articles until after their publication, but the court in discussing the matter said: "Nevertheless, considering the subject-matter of the first local article and the subject-matter of the editorial published on the same day, it is impossible to believe that the editor and reporter did not have a perfect understanding as to the position which the paper should take in reference to this court, as well as the other matters discussed by them in their respective articles. The views of the editor supplement and indorse the language of the reporter; and the very next day the columns of the paper are again made use of by the reporter to repeat the attack thus



opinion the article referred to the court, or was used with a contemptuous intent.<sup>86</sup> It has also been held that contemner's refusal to retract the language, when given the opportunity by the court, is a circumstance showing that contemner had intended the language to be contemptuous.<sup>87</sup>

**2. Evidence Receivable in Defense.** — A. *IN GENERAL.* — Any evidence going to show that the acts charged do not constitute a contempt is receivable as a matter of defense.<sup>88</sup>

B. *FORMER JEOPARDY.* — Where the facts constitute a continuing contempt,<sup>89</sup> or by additional acts constitute a new contempt,<sup>90</sup> the fact of having been previously punished therefor is not receivable in defense.

C. *WANT OF JURISDICTION.* — a. *In General.* — In contempt proceedings contemner may always show as a matter of defense that the court has no jurisdiction on account of want of jurisdiction to entertain the suit or proceeding forming the basis of the contempt proceeding,<sup>91</sup> or a want of jurisdiction of the parties to such original

made upon this court. When the act of an employee is either directed or afterwards ratified by his employer, it becomes the act of the employer, and the maxim, *Respondent superior*, applies."

86. *Henry v. Ellis*, 49 Iowa 205.

87. *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829.

88. *Whittem v. State*, 36 Ind. 196; *Peel v. Peel*, 50 Iowa 521.

89. **Former Punishment No Bar to Continuing Contempt.** — The fact that the court has punished a contemner for failure to obey an order to surrender certain property to the court, or upon its order, does not preclude it from proceeding to punish him again where he still continues to disobey the mandate of the order in question. *State v. Judge*, 50 La. Ann. 552, 23 So. 478.

90. **Former Punishment No Bar to Subsequent Contempt Partly Based Thereon.** — Where newspaper reporter who concealed himself in jury room, was summoned before the judge, who required him to deliver his notes and admonished him to secrecy, it was not a bar to subsequent contempt proceedings for publishing his recollections. *People v. Barrett*, 56 Hun 351, 9 N. Y. Supp. 321.

91. **Instances of Want of Jurisdiction of Original Proceeding.** — Where the court has no jurisdiction of a

cause it is not contempt to violate an injunction issued by the court in such case. *Willeford v. State*, 43 Ark. 62; *State v. Thread*, 48 La. Ann. 1,448, 21 So. 28; *In re Sawyer*, 124 U. S. 200.

An order made by a district judge of one district as presiding judge of another district, while the judge of such latter district was actually presiding, is void, and its violation cannot form the basis of a contempt proceeding. *People v. O'Neil*, 47 Cal. 109.

In *Call v. Pike*, 66 Me. 350, it was held that where a justice of the peace was disqualified to take a deposition he could not commit a witness for refusing to testify before him.

In *State v. McKinnon*, 8 Or. 487, a commitment for disobeying an order made during vacation was reversed because of the judge having no power to make it during vacation.

And in *Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570, it was held that an order to produce a child in a divorce action where the court of one county had assumed jurisdiction of the suit while it was pending in another court, could not form a basis of a contempt proceeding.

In *Kennedy v. Weed*, 10 Abb. Pr. (N. Y.) 62, it was held that a judgment debtor cannot be punished for contempt for disobeying an order in

suit or proceeding,<sup>92</sup> or a want of jurisdiction over the subject matter therein,<sup>93</sup> or because the court in such original suit or proceeding rendered a judgment or made an order not authorized by law,<sup>94</sup> or one in excess of its powers.<sup>95</sup> It has also been held that where the contempt proceedings are based on the refusal to answer questions, contemner may obtain his discharge by showing that the main action has been

supplementary proceedings where the proceedings were founded on an affidavit which did not truly describe the judgment.

So in *Page v. Randall*, 6 Cal. 32, the fact that a debtor was in attendance upon a court as a witness, juror or party was held not to exempt him from being served with process in supplementary proceedings, and hence that it could form no defense in contempt proceedings for failure to answer questions in the supplementary proceedings.

92. *Ex parte Stickney*, 40 Ala. 160; *Ex parte Truman*, 124 Cal. 387, 57 Pac. 223; *McKinney v. Frankfort & S. L. R. Co.*, 140 Ind. 95, 38 N. E. 170, 39 N. E. 500; *Robertson v. Tapscott*, 81 Va. 533; *Schwartz v. Barry*, 90 Mich. 267, 51 N. W. 279; *State v. Circuit Court*, 98 Wis. 143, 73 N. W. 788.

93. **Instances of Want of Jurisdiction Over Subject Matter.** — While proceedings for the sale of public lands are in progress and incomplete, the state courts have no rights to restrain the action of the register and receiver of a federal land office in making or refusing to make a sale of public lands: hence, it is no contempt to violate an injunctive order in regard to such a matter. *People v. Kidd*, 23 Mich. 440.

Where a court issuing a *mandamus* to election inspectors to receive relator's ballot, had no jurisdiction to issue it, its violation is not a contempt. *People v. Donovan*, 135 N. Y. 76, 31 N. E. 1,009.

94. *Ex parte Hollis*, 59 Cal. 405; *Brown v. Moore*, 61 Cal. 432; *Ex parte Widmer*, 91 Cal. 367, 27 Pac. 733; *Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570; *Forrest v. Price*, 52 N. J. Eq. 16, 29 Atl. 215; *State v. Rice*, (S. C.), 45 S. E. 153; *In re McCain*, 9 S. D. 57, 68 N. W. 163; *State v. Blair*, 39 W. Va. 704, 20 S. E. 658;

*State v. Langhorne*, 12 Wash. 588, 41 Pac. 917.

**Unauthorized Order to Produce Books to Enable Discovery.** — In *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1,004, 41 Am. St. Rep. 375, which was a proceeding for a civil contempt for refusing to obey an order requiring defendant to place his books of account in the hands of the clerk of court, there to remain indefinitely, with leave to plaintiff and his attorneys to make copies of the entries therein, not for the purpose of being then used in evidence under the direction of the court, but for the purpose of enabling plaintiff to prepare his case, with the advantage of being advised beforehand of defendant's defense to his action, the court held that defendant had the right, in the contempt proceedings against himself, to question the propriety of the order, since it was unauthorized and its violation constituted no contempt.

**Compelling Submission to Another Jurisdiction.** — The courts of Pennsylvania cannot compel by an attachment a resident of Pennsylvania to go into another state and submit himself to the jurisdiction of its tribunals. *Com. v. Sage*, 160 Pa. St. 399, 28 Atl. 863.

**Alimony Order After Demand for Change of Venue.** — An order awarding alimony after a change of the place of trial has been properly demanded by defendant is unauthorized, and defendant is not in contempt for refusing to pay the alimony awarded. *Hennessy v. Nicol*, 105 Cal. 138, 38 Pac. 649.

95. *St. Louis, K. & S. R. v. Wear*, 135 Mo. 230, 36 S. W. 357, 658; *Daniel v. Owen*, 72 N. C. 340; *In re McCain*, 9 S. D. 57, 68 N. W. 163; *In re Reese*, 98 Fed. 984.

**Order in Excess of Power.** — In *State v. Wilcox*, 24 Minn. 143, it was held that an order by a judge of pro-

dismissed.<sup>96</sup> And it has been held that where the contempt proceedings are merely in aid of a civil suit they will fail with the setting aside of the order on which they were based,<sup>97</sup> but where the contempt partakes both of a civil and criminal character, the dismissal of the main suit will not affect the prosecution in so far as the criminal character of the contempt is concerned.<sup>98</sup>

D. INVALIDITY OF VIOLATED ORDER AS DEFENSE. — A contemner who violates an injunctive or mandatory order cannot show as a matter of defense that the allegations in the original bill forming the basis for such order were untrue,<sup>99</sup> nor can he show that such violated order was erroneously or irregularly granted,<sup>1</sup> nor can he, when ordered by the court to produce books before a commissioner, sus-

bate of one county directing the county treasurer of another county, which was attached to his county for judicial purposes, to pay certain fees incurred in committing an insane person to the hospital, was not a judicial order and could not be enforced by contempt proceedings.

In *Weaver v. Toney*, 107 Ky. 419, 54 S. W. 732, it was held that the violation of a mandatory injunction giving the entire relief prayed for in the petition, was not a contempt where it had been granted without notice to the contemner.

96. *In re Hall*, 10 Mich. 210.

97. *State v. Rice*, (S. C.), 45 S. E. 153.

98. *In re Fanning*, 40 Minn. 4, 41 N. W. 1,076.

99. *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121; *First Congregational Church v. Muscatine (City)*, 2 Iowa 69; *Hamlin v. New York*, N. H. & H. R. Co., 170 Mass. 584, 49 N. E. 922; *Forest v. Price*, 52 N. J. Eq. 16, 29 Atl. 215; *People v. Dwyer*, 90 N. Y. 402.

#### Conclusions of Alimony Award.

In contempt proceedings to enforce payment of alimony, where the issue as to the amount of defendant's property was raised in the suit and determined by the verdict, the defendant will not be allowed to make any further inquiry as to his ability to pay the amount awarded without alleging new and additional facts arising since the rendition of the verdict. *Briesnick v. Briesnick*, 100 Ga. 57, 28 S. E. 154.

1. *Alabama*. — *Ex parte Stickney*, 40 Ala. 160.

*Colorado*. — *People v. District Court*, 19 Colo. 343, 35 Pac. 731.

*Connecticut*. — *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121.

*Illinois*. — *Knott v. People*, 83 Ill. 532; *Leopold v. People*, 140 Ill. 552, 30 N. E. 348.

*Indiana*. — *Hawkins v. State*, 126 Ind. 294, 26 N. E. 43.

*Iowa*. — *State v. Baldwin*, 57 Iowa 266, 10 N. W. 645.

*Kansas*. — *Billard v. Erhart*, 35 Kan. 616, 12 Pac. 42.

*Louisiana*. — *State v. Rost*, 50 La. Ann. 1,006, 24 So. 783.

*Minnesota*. — *State v. District Court*, 71 Minn. 383, 73 N. W. 1,092.

*Mississippi*. — *Ex parte Wimberley*, 57 Miss. 437.

*New Hampshire*. — *Robinson v. Owen*, 46 N. H. 38.

*New Jersey*. — *Forrest v. Price*, 52 N. J. Eq. 16, 29 Atl. 215.

*New York*. — *Ketchum v. Edwards*, 153 N. Y. 534, 47 N. E. 918.

*North Dakota*. — *State v. Markuson*, 7 N. D. 155, 73 N. W. 82.

*Pennsylvania*. — *Silliman v. Whitmer*, 173 Pa. St. 401, 34 Atl. 56.

*South Carolina*. — *State v. Nathans*, 49 S. C. 199, 27 S. E. 52.

*Tennessee*. — *Vanvabry v. Staton*, 88 Tenn. 334, 12 S. W. 786.

*Vermont*. — *Stimpson v. Putnam*, 41 Vt. 238.

*West Virginia*. — *State v. Harpers Ferry Bridge Co.*, 16 W. Va. 864.

*Wisconsin*. — *State v. Circuit Court*, 98 Wis. 143, 73 N. W. 788.

**Granting of More Relief Than Warranted.** — Where a court has jurisdiction of an application for *mandamus* and authority to determine all

tain his refusal to do so on the ground that the commissioner's authority had expired.<sup>2</sup>

**E. WANT OF PRIVACY.** — a. *To Preliminary Injunction.* — Want of privacy is no defense to contempt proceedings for the violation of a temporary injunctive order where contemner has knowingly aided or abetted its violation,<sup>3</sup> or where he as an agent or servant, with knowledge of the issuance of the order against his principal or employer, has violated the order,<sup>4</sup> or where he is one of the unknown parties of an order issued in a suit against a few individuals as representatives of a numerous class,<sup>5</sup> or where he has actual knowledge

questions presented by the application, the fact that it granted relator more comprehensive relief than was warranted by the application is not a defense in contempt proceedings for failure to obey the mandate, in so far, at least, as it related to the matters contemplated by the application. *State v. Judge*, 23 Mont. 171, 57 Pac. 1,095.

**Fact That Judgment for Alimony awards wife more of defendant's estate than she is entitled to under law is no excuse in contempt proceedings for its non-compliance.** *State v. Jamison*, 69 Minn. 427, 72 N. W. 451.

**Estoppel of Judgment Creditor by Supplementary Proceedings.** — In *In re Lewis*, (Kan.), 72 Pac. 788, it was held that a contemner cited for failure to pay money found to be due the judgment creditor in supplementary proceedings cannot excuse his disobedience of the order by asserting that the money does not belong to the judgment debtor, since such a showing should have been made at the original hearing.

2. *Tredway v. Van Wagenen*, 91 Iowa 556, 60 N. W. 130.

3. **Want of Privacy to Temporary Injunction.** — A person who knowingly aids in violating an injunctive order against defendants, "their servants, aiders and abettors," commits a contempt notwithstanding he is not personally named in the order, nor a party to the original bill. *Fowler v. Beakman*, 66 N. H. 424, 30 Atl. 1,117.

A person willfully trespassing on lands for the purpose of shooting game, where he knows that such acts have been prohibited by an injunction

against certain defendants and "all persons whomsoever," may be guilty of contempt, although he was not a party to the suit nor in privacy with any of the parties, since his acts, independent of their effect upon the rights of the suitors, are in disrespect of the court and its decree. *Chisolm v. Caines*, 121 Fed. 397.

A person who with knowledge of an order restraining the removal of fixtures, removes them, is guilty of contempt though not a party to the proceeding. *Poertner v. Russell*, 33 Wis. 193.

4. **Violation of Injunctive Order by Agent or Servant.** — A party who with full knowledge that an injunctive order has been granted, and of its contents and service, violates it while acting as the agent, servant or assistant of the party served, is guilty of contempt. *Aldinger v. Pugh*, 57 Hun 181, 10 N. Y. Supp. 684.

An engineer of a railroad, which was enjoined from refusing to accept certain cars for transportation pursuant to the interstate commerce act, was in contempt although he was not a party to the suit nor actually served with a copy of the injunction. *In re Lemon*, 166 U. S. 548.

5. **Injunction Against Interference With Interstate Commerce.** — In *U. S. v. Agler*, 62 Fed. 824, which was an injunction against interference with interstate commerce, the court said that the injunction was valid and binding on the unknown defendants when served on them, although they are not at the time parties to the suit, and it also said that such an injunction issued against one man enjoining or restraining

of the prohibitory order, and violates it with intent to condemn the power and dignity of the court.<sup>6</sup>

And where contemner has been enjoined individually from doing certain acts, it is no defense that he has done such acts in a representative or associate capacity,<sup>7</sup> but where he has been merely enjoined from doing certain acts as an agent or servant of a specified party he may show in defense that he has done the violating acts in his individual capacity, or as an agent or servant of some other party.<sup>8</sup> And where he has been commanded to do a certain thing as

him and all that give aid and comfort to him, or all that aid and abet him, is valid against everybody that aids or gives countenance to the man to whom it is addressed.

**Injunction Against Members of Labor Union.**—In *American S. & W. Co. v. Wire Drawers & D. M. Union*, 90 Fed. 598, the court in discussing what parties were necessary to be made defendants in injunction proceedings against a labor union and the persons composing it, said: "From the very nature of the case, there are sufficient of the members of the unions to defend this suit, and enough to answer all practical purposes of the orders and decrees that may be asked against them. The fact of numerous membership and the necessity for proceeding against a few are stated, and the court can see that those mentioned fairly represent the whole. The fallacy of the objection made is in supposing that the required 'representative' capacity resides in some official or authorized representative quality, attaching by reason of the action of the union itself in conferring it. As plaintiffs that might be required, as a reading of the above cases will show, but as defendants it is not. It depends on the facts in each case, and the court will regulate that matter by its decree, according to circumstances, and will insist that those brought in shall fairly represent the whole, according to the nature of the relief sought and the peculiarities of the association. In a case of an organized strike of laborers it is fair enough if the leaders of the strike be brought in to represent the organization, no matter what their official relation to their society may be."

**6. Contemner, Not Party or Employee of Party Enjoined, May Be Punished.**—In *re Coggs*, (Mo.), 75 S. W. 183, which was a contempt proceeding to vindicate the power and dignity of the court on account of contemner violating a temporary injunction, the appellate court refused to discharge contemner, although he was not a party to the injunction, nor in any sense an agent or employee of the party enjoined.

And see also *Chisolm v. Caines*, 121 Fed. 397, for a further discussion of the subject.

In *State v. Lavery*, 31 Or. 77, 49 Pac. 852, it was said: "While there is some conflict of authority upon the question of the liability of a person for violating the process of a court, the weight and better reason seem to support the rule that a stranger to an injunction, who has notice or knowledge of its terms, is bound thereby, and may be punished for contempt by violating its provisions. *Rap. Contempt*, par. 46; *Ewing v. Johnson*, 34 How. Prac. 202; *Woffle v. Vanderheyden*, 8 Paige 45; *U. S. v. Debs*, *supra*."

**7. Enjoined Members of Labor Union Cannot Act in Associate Capacity.**—In *American S. & W. Co. v. Wire Drawers & D. M. Union*, 90 Fed. 598, it was held that a preliminary injunction directed against specific individuals constituting or representing a labor union, which was a voluntary association, would also operate to restrain such individuals from acting in violation of such injunction in their associate or representative capacity.

**8. Enjoined Servants or Agents May Act in Other Capacity.**—An injunction restraining defendants and their agents, servants, etc., from do-

an officer of a corporation, he may show that he is no longer an officer with power to do the thing commanded.<sup>9</sup>

b. *To Permanent Injunction.* — Where the injunction has been made permanent, contemner may show in defense that he was not a party to the suit in which it was issued.<sup>10</sup>

3. **Want of Contemptuous Intent.** — A. **IN GENERAL.** — Where the alleged contemptuous acts are plainly in violation of an injunctive or mandatory order, contemner cannot excuse his violation of such order by showing a want of contemptuous intent on his part,<sup>11</sup> although he may show such want of intent in mitigation of the

ing certain acts binds such agents only while acting as such for the defendants, and not in their personal capacity after they have ceased to be such agents. *Dadirrian v. Gullian*, 79 Fed. 784. And see also *In re Reese*, 98 Fed. 984, to the same effect.

9. **Corporation Officer May Show His Resignation**, and that he has no longer control of the books of the corporation, in answer to contempt proceedings for non-compliance of a *mandamus* to bring the books. *U. S. v. Seaboard R. Co.*, 85 Fed. 955.

10. **Rule Where Injunction Is Permanent.** — One not a party to a suit in which an injunction has issued, nor mentioned in the injunctive decree, nor served with a copy of it, cannot be punished for its violation, notwithstanding that the prohibited act is illegal in itself. *Barthe v. Larquie*, 42 La. Ann. 131, 7 So. 80.

A person cannot be committed for contempt for violation of a restraining order made by a federal court, in a suit between private parties, to which he was not made a party either by words of specific or general description, and especially where he was a non-resident who could not be sued in that court without his consent. *In re Reese*, 98 Fed. 984.

**Distinctions Between Violations of Temporary and Permanent Injunctions.** — It has been held that an interlocutory injunction affects all the parties and all who have notice of its issuance, but that a permanent injunction only affects those who have been made parties to the proceeding. *American S. & W. Co. v. Wire Drawers & D. M. Union*, 90 Fed. 598; *In re Reese*, 98 Fed. 984.

11. *Ashby v. Ashby*, 62 N. J. Eq. 618, 50 Atl. 473; *Hawkins v. State*,

126 Ind. 294, 26 N. E. 43; *Wilcox Silver-Plate Co. v. Schimmel*, 59 Mich. 524, 26 N. W. 692; *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 105, 21 Atl. 182; *Baker v. Cordon*, 86 N. C. 116, 41 Am. Rep. 448; *Herring v. Pugh*, 126 N. C. 852, 36 S. E. 287; *Wartman v. Wartman*, Taney's Dec. (U. S.) 362.

**Fact That Receiver Claims Lien on Property** is no excuse for refusing to obey an order to turn the property over. *Tinsley v. Anderson*, 171 U. S. 101.

**Common Rumor That Injunction Has Been Dissolved** is no excuse for its violation. *Morris v. Hill*, 28 N. J. Eq. 33.

**Commencement of Suit by State Officer in violation of federal injunction.** *In re Ayres*, 123 U. S. 443, which was a contempt proceeding against the attorney-general of Virginia for commencing certain suits in violation of an injunctive order of the federal courts, and in which the attorney-general set up that he was acting officially pursuant to a Virginia statute, the supreme court said: "The government of the United States, in the enforcement of its laws, deals with all persons within its territorial jurisdiction, as individuals owing obedience to its authority." And continuing it said: "Nothing can be interposed between the individual and the obligation he owes to the constitution and laws of the United States, which can shield or defend him from their just authority, and the extent and limits of that authority the government of the United States, by means of its judicial power, interprets and applies for itself."

**But to the Contrary Effect**, see *Ex*

punishment to be awarded him.<sup>12</sup> But it has been held that contemner may show in defense that he has not been given a reasonable opportunity to comply with the order.<sup>13</sup>

**B. INNOCENT TECHNICAL VIOLATION.** — So also it has been held that contemner may excuse his violation of an injunctive order by showing that it was merely a technical violation without a contemptuous intent or substantial injury.<sup>14</sup>

**C. MISTAKEN INTERPRETATION.** — A mistaken interpretation of doubtful language in an injunctive order is an excuse for its violation,<sup>15</sup> or at least such an excuse as will reduce the punishment to a minimum.<sup>16</sup> And a mistaken construction of the law by a grand jury has been held available as an excuse for acts under such construction.<sup>17</sup> And it has also been held that the service of process,<sup>18</sup> or of legal papers which make the duty of the served person doubtful,<sup>19</sup> may be shown as a defense.

*parte* Woodruff, 4 Ark. 630, where it was held that an attachment for contempt would not be awarded against inferior judges where they had no intentions to disobey the order of the appellate court, but that a *mandamus* would issue in such a case.

See also in *Hughson v. People*, 91 Ill. App. 396, holding where disobedience of a decree is not willful and does not clearly appear to have arisen from intent to set at naught or bid defiance thereto, the party could not be punished for contempt.

And in *Wells v. Com.*, 21 Gratt. (Va.) 500, where advice of an attorney in good faith was held excusable.

12. *Des Moines St. R. Co. v. Des Moines B. G. St. R. Co.*, 74 Iowa 585, 38 N. W. 496; *State v. Collins*, 62 N. H. 694; *Bond v. Bond*, 69 N. C. 97; *In re Fitton*, 16 How. Pr. (N. Y.) 303; *Bowers v. Von Schmidt*, 87 Fed. 293.

13. *Hughson v. People*, 91 Ill. App. 396.

14. *Boston & M. C. C. & S. Min. Co. v. Montana Ore. Purchasing Co.*, 24 Mont. 117, 60 Pac. 807; *Postal Tel. Cable Co. v. Norfolk & W. R. Co.*, 88 Va. 929, 14 S. E. 691.

**Instance of Innocent Technical Violation.** — In *Shirk v. Cox*, 141 Ind. 301, 40 N. E. 750, it was held a good defense where it was shown that contemner, who had employees

digging a ditch, was over twelve miles away from them at the time of service of an injunction restraining further work on the ditch, and that the order was served on a legal holiday, and that he notified his employees to quit work the next day.

Compare *Rogers v. Pitt*, 89 Fed. 424.

15. *People v. Aitken*, 19 Hun (N. Y.) 327; *Baker v. Cordon*, 86 N. C. 116, 41 Am. Rep. 448.

16. *Des Moines St. R. Co. v. Des Moines B. G. St. R. Co.*, 74 Iowa 585, 38 N. W. 496.

17. **Mistaken Construction of a Law by a Grand Jury** by reason of which they issued an attachment against the presiding judge was held excusable in *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1,111.

18. **Obedience to Process.** — It is not violation of an order prohibiting delivery of certain warrants to all but certain people, to deliver them to the sheriff by virtue of a process in his hands. *State v. District Court*, 71 Minn. 383, 73 N. W. 1,092.

19. **Receiving of Complex Legal Papers.** — In contempt proceedings against a sheriff for failing to make the money due on an execution, the sheriff may show that when about to make the sale under the execution, he was served with an affidavit of illegality, which alleged that the defendant in execution was entitled to his exemption of the land about to

**D. UNCERTAIN TERMS OF ORDER.** — Contemner may also show as a defense to contempt proceedings for the violation of an injunctive order that the violated order is drawn in such general or indefinite terms that he cannot know from it what restraints it imposes on him,<sup>20</sup> but it is the better practice in such cases to apply to the court for a construction or modification of the order.<sup>21</sup>

**E. IGNORANCE AS AN EXCUSE.** — Neither ignorance of the law<sup>22</sup> nor ignorance of the plain commands in an injunctive order<sup>23</sup> will suffice as an excuse for acts in violation of the law, or of such injunctive order.

**F. ADVICE OF COUNSEL.** — It is no defense for contemner to show that his contemptuous act was in consequence of advice of counsel,<sup>24</sup> but evidence of such advice when sought and obtained in good faith is receivable in mitigation of the offense,<sup>25</sup> and in several instances

be sold by reason of bankruptcy proceedings in the Federal Court. *Heard v. Callaway*, 51 Ga. 314.

20. *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121; *Birchett v. Bolling*, 5 Munf. (Va.) 442; *Howard v. Mast*, 33 Fed. 867.

**Indefinite Descriptions of Goods.** In *Privett v. Pressley*, 62 Ind. 491, it was held that where an order for the delivery of certain goods failed to describe or identify the goods, or state their value, the holder of the goods could set up such uncertainty and indefiniteness as a defense to contempt proceedings for failure to obey the order.

**Incomplete Order.** — In *Tinke v. Langdon*, 60 How. Pr. (N. Y.) 180, it was held under an order appointing a receiver and directing the debtor to assign and convey his lands and real estate, the debtor could, in proceedings for contempt in failing to surrender possession, show in defense that the order contained no directions to surrender the possession.

21. *Wells Fargo & Co. v. Oregon R. & Nav. Co.*, 19 Fed. 20.

22. *State v. Simmons*, 1 Ark. 265; *In re Contempt by Two Clerks*, 91 Ga. 113, 18 S. E. 976.

**Illegal Commands of Superior Officer.** — In *State v. Sparks*, 27 Tex. 627, it was held that an illegal command from a superior military officer would not justify interference with the jurisdiction of a court by a subordinate officer.

But see *In re Fitton*, 16 How. Pr.

(N. Y.) 303, where a police officer was allowed to show that he acted pursuant to orders of his superior officer.

23. *Murdock's Case*, 2 Bland (Md.) 461, 20 Am. Dec. 381.

**Ignorance of Laboring Men** is no excuse for violation of an injunction restraining further work on a ditch in which they were working. *Shirt v. Cox*, 141 Ind. 301, 40 N. E. 750.

24. *Continental Natl. Bldg. & L. Assn. v. Scott*, 41 Fla. 421, 26 So. 726; *Lindsay v. Hatch*, 85 Iowa 332, 52 N. W. 226; *Buffum's Case*, 13 N. H. 14; *West Jersey Traction Co. v. Camden (City)*, 58 N. J. L. 536, 37 Atl. 578; *Territory v. Clancey*, 7 N. M. 580, 37 Pac. 1,108; *Coffin v. Burstein*, 68 App. Div. 22, 74 N. Y. Supp. 274; *Stolls v. Tuska*, 82 App. Div. (N. Y.) 84; *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834; *Royal Trust Co. v. Washburn B. & I. R. R. Co.*, 113 Fed. 531.

**Advice as to Proposed Contemptuous Publication.** — The fact that before the publication of a contemptuous publication concerning the court the contemner obtained professional opinion that it would not constitute a contempt does not change the essential character of the defamatory article, nor relieve the contemner of responsibility for its origin and dissemination. *Myers v. State*, 46 Ohio St. 473, 22 N. E. 43, 15 Am. St. Rep. 638.

25. *Coffin v. Burstein*, 68 App. Div. 22, 74 N. Y. Supp. 274; *Erie R.*



it has been held sufficient to excuse the awarding of punishment altogether.<sup>26</sup> Where, however, contemner relies on such advice for defensive purposes, he should show that his acts were within the advice given him.<sup>27</sup>

**G. FACT OF APPEAL AS DEFENSE.** — It is no defense in contempt proceedings for the violations of an injunctive order, that an appeal has been taken,<sup>28</sup> even though a *supersedeas* bond be filed.<sup>29</sup>

**4. Performance as Defense.** — Of course, the performance of an injunctive order would be a complete defense to a contempt proceeding for its violation,<sup>30</sup> but contemner must show that he has

Co. v. Ramsey, 45 N. Y. 637; Stolls v. Tuska, 82 App. Div. (N. Y.) 84; State v. Harpers Ferry Bridge Co., 16 W. Va. 864; Rogers v. Pitt, 89 Fed. 424.

**26. Advice of Eminent Counsel** to young woman was held to show good faith on her part in proceedings for violation of injunction. Parsons v. People, 51 Ill. App. 467.

**Advice and General Practice.** Sheriff may show that according to advice of counsel and rulings of court it was the practice to do as he had done in regard to process. Harrell v. Feagin, 59 Ga. 821.

**27. Societe Anonyme v. Western Distilling Co.,** 42 Fed. 96.

**Extent of Advice to Be Shown.** In People v. Edson, 19 Jones & S. (N. Y.) 238, it was held that contemner, relying on advice of counsel, should show the name of counsel consulted, the information laid before him, and the exact import of his advice.

**28. Heinlen v. Cross,** 63 Cal. 44; Hawkins v. State, 126 Ind. 294, 26 N. E. 43; People v. Bergen, 53 N. Y. 404.

**29. Lindsay v. Clayton Dist. Ct.,** 75 Iowa 509; State v. Dillon, 96 Mo. 56, 8 S. W. 781; Sixth Ave. R. Co. v. Gilbert Elev. R. Co., 71 N. Y. 430.

**30. McLendon v. McGlaun,** 60 Ga. 244.

**Performance of Both Spirit and Letter of Order.** — The spirit as well as the letter of an injunctive order must be obeyed, hence the court will not allow contemner to evade responsibility for violating an injunction, by doing through subterfuge that which,

while not in term a violation, yet produces substantially the same results.

**Must Perform Both Spirit and Letter of Order.** — Where party was enjoined from corresponding with complainant's customers, it is no excuse that the customers wrote first. Loven v. People, 57 Ill. App. 506.

In Northwood v. Barber Asphalt Pav. Co., 126 Mich. 284, 85 N. W. 724, 54 L. R. A. 454, it was held that the compliance with the specific directions in a decree for the abatement of a nuisance caused by dust and noxious gases from an asphalt paving plant was no defense to contempt proceedings for failure to obey the general clause of the decree forbidding the continuance of such nuisance, although contemnors had tried the specific directions and found them insufficient.

And see Economist Furnace Co. v. Wrought-Iron Range Co., 86 Fed. 1,010, where the rule was applied to the injunction restraining interference with complainant's business of selling stoves and ranges in a certain territory.

*Ex parte* Miller, 129 Ala. 130, 30 So. 611, 87 Am. St. Rep. 49; Gibbs v. Morgan, 39 N. J. Eq. 79; State v. Lavery, 31 Or. 77, 49 Pac. 852.

**Illustrations of Violations Through Subterfuge.** — Where the person restrained from removing logs from certain lands, after such restraining order, organizes a corporation and becomes president of it, and the corporation removes the logs from the land, he will be held guilty, although he claims that they were removed

complied with the order in all respects,<sup>31</sup> unless he can show that a strict compliance has been waived.<sup>32</sup> It is, however, held the better practice, where the order has been modified by consent of the parties, to bring notice thereof to the court and procure a modification of the order.<sup>33</sup>

**5. Inability to Comply With Order.** — A *bona fide* inability on part of the alleged contemner to comply with the order of the court is a good defense for his disobedience,<sup>34</sup> but such inability must not have

without his knowledge or consent. *Hessey v. Gund*, 98 Wis. 53, 74 N. W. 342.

So also in *Denis v. Leclerc*, 1 Mart. (La.) 297, 5 Am. Dec. 712, a defendant who had been enjoined from publishing a letter, annexed a copy of it to his answer, and published an advertisement in a paper by which he invited all who wished to see the letter to call at the clerk's office and gratify their curiosity. The court held him guilty of contempt in having indirectly done the very thing which he was prohibited from doing.

**31. Where Liquor Nuisance Has Been Enjoined**, contemner who relies on facts suspending the operation of the prohibiting statutes must set them up as a defense and show full compliance with such facts. *West v. Bishop*, 110 Iowa 410, 81 N. W. 696.

**Compliance with Decree for Conveyance.** — Where, by the terms of a decree, complainant is entitled to a clear conveyance from respondent, a deed from him reciting that "having conveyed said land" to a third person named "I now make this conveyance by order of said court, in order to purge myself of contempt in not conveying said land according to said order of court," is not such a compliance as will purge respondent of contempt. *Snowman v. Harford*, 57 Me. 397. And see also *Langley v. Wynn*, 70 Ga. 430, where a dilatory compliance by a constable with a rule to pay money by making a levy was held insufficient.

**32. Waiver of Strict Compliance.** In contempt proceedings for failure to turn over money ordered on approval of an executor's final report, evidence of an agreement with the distributee that certain moneys could

be deducted from his share is admissible. *Blake v. People*, 161 Ill. 74, 43 N. E. 590.

**33. Bowers v. Von Schmidt**, 87 Fed. 293.

**34. Poverty Is a Good Excuse** for non-payment of an order for payment of money. *McKissack v. Vorhees*, 119 Ala. 101, 24 So. 523; *Herrington v. Cassem*, 82 Ill. App. 594; *Walton v. Walton*, 54 N. J. Eq. 607, 35 Atl. 289; *In re Ockershausen*, 59 Hun 200, 13 N. Y. Supp. 396.

**So Also Ill-health Has Been Held Sufficient** in *Scott v. Layng*, 59 Mich. 43, 26 N. W. 220, 791; *Smith v. Smith*, 92 N. C. 304; *Newhouse v. Newhouse*, 14 Or. 290, 12 Pac. 422.

**Want of Funds by an Executor** was held sufficient excuse for non-payment of a payment directed in a decree allowing a bill. *Matter of Davidson*, 5 Dem. Sur. (N. Y.) 224. So also in *Succession of Johnson*, 21 La. Ann. 297, where the executor had paid the fund to another creditor under order of the court.

**Physical Inability** to perform the ordered act is always a good excuse. *Adams v. Haskell*, 6 Cal. 316, 65 Am. Dec. 517; *In re Hausman*, 121 Fed. 984.

**For Instance, Failure to Withdraw from the Record** an answer which the court refused to permit to be filed was held no contempt in *Turner v. New Farmers' Bank's Trustee*, 102 Ky. 473, 43 S. W. 721, and in *Martin v. Burgwin*, 88 Ga. 78, 13 S. E. 958, the turning over of property in payment of a *bona fide* debt was held a good excuse for non-compliance with a subsequent order to turn the property over to another person.

So also where, pending civil contempt proceedings, the prosecutor

arisen through contemner's own fault or through his own willful acts done with a view to produce such inability.<sup>35</sup> The question whether the excuse set up amounts to an inability to comply with the order of the court is for the court itself to determine.<sup>36</sup>

**6. Suppression of Testimony.** — Where contemner is charged with influencing a witness to absent himself it is no defense that the

agrees with contemner as to a manner of adjusting the damages suffered by him, but later on refuses to permit statements of the damages suffered by him as agreed, contemner may set up such failure as a defense. *Hull v. Harris*, 45 Conn. 545.

**Instances Where Inability to Comply With Order** was held good excuse in contempt arising in supplementary proceedings. *McCartan v. Van Syckel*, 10 Bosw. (N. Y.) 694; *Myers v. Trimble*, 3 E. D. Smith (N. Y.) 607; *Tinker v. Crooks*, 22 Hun (N. Y.) 579.

**Inability to Comply With Alimony Order** is a good defense. *In re Wilson*, 75 Cal. 580, 17 Pac. 698; *Allen v. Allen*, 72 Iowa 502, 34 N. W. 303; *State v. Dent*, 29 Kan. 416; *Russell v. Russell*, 69 Me. 336; *Hurd v. Hurd*, 63 Minn. 443, 65 N. W. 728; *Wright v. Wright*, 74 Wis. 439, 43 N. W. 145; *Wester v. Martin*, 115 Ga. 776, 42 S. E. 81.

**But the Inability Is Sufficient** even though contemner could pay by encumbering or selling his homestead. *Ex parte Silvia*, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58. Nor could he be compelled to seek employment in order to earn money to pay permanent alimony. *Ex parte Todd*, 119 Cal. 57, 50 Pac. 1,071.

And see *Young v. Young*, 35 Misc. 335, 71 N. Y. Supp. 944, where contemner's pecuniary circumstances were held no excuse for his non-payment.

**Inability Must Result From Facts** occurring since the rendition of the judgment where it is for permanent alimony. *Briesnick v. Briesnick*, 100 Ga. 57, 28 S. E. 154.

Consult *Stonehill v. Stonehill*, 146 Ind. 445, 45 N. E. 600; *Leeder v. State*, 55 Neb. 133, 75 N. W. 541; *State v. Cook*, 66 Ohio St. 566, 64 N. E. 567, and *Andrew v. Andrew*, 62

Vt. 495, 20 Atl. 817, on the general principles bearing on contempt proceedings in such cases.

**35.** *McKissack v. Voorhees*, 119 Ala. 101, 24 So. 523. *Ex parte Kellogg*, 64 Cal. 343, 30 Pac. 1,030; *Tredway v. Van Wagenen*, 91 Iowa 556, 60 N. W. 130; *State v. Judge*, 50 La. Ann. 552, 23 So. 478; *Huckins v. State*, 61 Neb. 871, 86 N. W. 485.

**Applies to Alimony Orders** also. *Staples v. Staples*, 87 Wis. 592, 58 N. W. 1,036, 24 L. R. A. 433.

**Bankruptcy of Contemner and Scheduling of Order** for alimony therein as an indebtedness is no excuse. *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; *Young v. Young*, 35 Misc. 335, 71 N. Y. Supp. 944; *Noyes v. Hubbard*, 64 Vt. 302, 23 Atl. 727, 33 Am. St. Rep. 928, 15 L. R. A. 394.

But see *In re Van Orden*, 96 Fed. 86, where unpaid monthly installments of alimony awarded by the decree for divorce were held provable debts in bankruptcy.

**Order for Counsel Fees** cannot be defeated by a reconciliation or settlement of the suit by the parties. *People v. District Court*, 21 Colo. 251, 40 Pac. 460; and see *Aspinwall v. Sabin*, 22 Neb. 73, 34 N. W. 72, 3 Am. St. Rep. 258, to the same effect.

**36.** *Tindall v. Wescott*, 113 Ga. 1, 114, 39 S. E. 450.

**Hunger Is no Excuse for Breaking From Jury Room.** — In contempt proceedings against jurors who, after being sent out to deliberate upon a verdict, released themselves without the consent of the justice of the peace, and without arriving at a verdict, it is no defense that they were hungry, or that the place assigned them for their deliberations was not comfortable or well adapted to the purpose. *Murphy v. Wilson*, 46 Ind. 537.

witness was not under subpoena,<sup>37</sup> but it has been held that where the contempt proceeding is based on an interference with the court's process, the contemner may show that the subpoena was issued in blank.<sup>38</sup>

**7. Want of Notice.** — **A. IN GENERAL.** — It has been held that an absent witness cannot be punished for contempt unless he has been properly subpoenaed.<sup>39</sup> And where the statutes require a demand as a prerequisite for a proceeding for contempt for non-compliance with an order, contemner may show failure to make it in defense.<sup>40</sup> So also where the statute requires service of an order of court, such service must be made.<sup>41</sup>

**B. INJUNCTIONAL OR MANDATORY ORDERS.** — Where the contemnors of an injunctive<sup>42</sup> or mandatory<sup>43</sup> order have actual knowledge of its issuance and contents, it is no defense that they were not served with a copy of it. But contemner may show in defense that his acts which are alleged to have been in violation of such an order were done previous to the issuance of the order,<sup>44</sup> or where they were done after an order for the issuance of the order, that the issuance of the order was made conditional upon the doing of some additional act on the part of the moving party.<sup>45</sup>

37. *Montgomery v. Palmer*, 100 Mich. 436, 59 N. W. 148.

See also *State v. Tisdale*, 41 La. Ann. 338, 6 So. 579; *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450.

38. *Dobbs v. State*, 55 Ga. 272.

39. *State v. Trumbull*, 4 N. J. L. 156, 7 Am. Dec. 576.

40. **An Assignee for Benefit of Creditors** cannot be punished for contempt in failing to obey an order requiring him to appear and file his account, unless the order was served upon him personally, service by mail being insufficient. *In re Seibert*, 30 Misc. 680, 62 N. Y. Supp. 513.

**An Administrator in Contempt** proceedings against him for failure to turn over money pursuant to statute, which made it obligatory for him to do so after a demand, may show in defense that no demand was made on him. *Haines v. People*, 97 Ill. 161; and also *In re Ockershausen*, 59 Hun 200, 13 N. Y. Supp. 396, to same effect.

**Demand for Payment of Alimony.** Where the statutes make a personal demand necessary, it must be shown, before contemner can be punished for contempt. *Edison v. Edison*, 56 Mich. 185, 22 N. W. 264.

41. *Hennessy v. Nicol*, 105 Cal. 138, 38 Pac. 649.

42. *People v. District Court*, 19 Colo. 343, 35 Pac. 731; *Ex parte Stone*, (Tex. Crim. App.), 72 S. W. 1,000; *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413; *Ramstock v. Roth*, 18 Wis. 548; *In re Lennon*, 166 U. S. 548.

**Extreme Delay in Service Is no Excuse.** — Where defendant is apprised of the existence of an injunction, he must obey it, even though service may have been improperly delayed to such an extent as to constitute adequate ground for a dissolution. *Howe v. Willard*, 40 Vt. 654.

43. *Lewis v. Singleton*, 61 Ga. 164; *People v. Rice*, 80 Hun 437, 30 N. Y. Supp. 457.

44. **Obtaining Possession of Child** in anticipation of divorce suit about to be filed is not contempt of a subsequent order awarding custody to the plaintiff. *Alverson v. Judge*, 105 La. 273, 29 So. 705.

45. **Conditional Granting of Injunctive Order.** — Where the court orders that an injunction should issue upon the filing of the bill, the order is conditional, and notice of the filing of the order before the filing of the bill is not such a notice of the injunc-

**8. Defensive Evidence to Contemptuous Publications.** — In contempt proceedings for the publication of contemptuous language concerning a court with reference to a matter pending before it, contemner cannot gainsay the plain, unmistakable meaning of the language which he has used,<sup>46</sup> nor can he successfully claim as a defense that the matter was published in his newspaper without his knowledge or privity,<sup>47</sup> though it has been held that where contemner is merely an innocent distributor of the paper containing the article, he can show that fact in excuse.<sup>48</sup> But where the language is susceptible of two interpretations, or constructions, contemner may disavow a contemptuous intent,<sup>49</sup> and where the publication occurred without his previous knowledge he may show that fact in mitigation.<sup>50</sup> And where the contemptuous publication is charged to be an inaccurate account of proceedings had in court, contemner may show that his published account was in fact accurate.<sup>51</sup> So also where a publisher is charged with contempt, in having published an

tion as will make the enjoined person guilty of a contempt for its violation, where his alleged acts of violation occur before the filing of the bill. *Winslow v. Nayson*, 113 Mass. 411.

Where an injunction is not to take effect until a bond is executed, acts in violation of it prior to the execution of the bond do not constitute a contempt. *State v. Irwin*, 30 W. Va. 404, 4 S. E. 413. And see also *Clarke v. Hoopes*, 2 Hen. & M. (Va.) 23.

But it was held in *Burr v. Kimbark*, 29 Fed. 428, that where defendant was present in court at the time when the injunction was granted, subject to the filing of the bond, and the form of the bond was exhibited to him, with the statement that it would be filed as soon as signed by the sureties, and was filed the same day, the defendant could not excuse his violation of the injunction on the ground that he was ignorant of the filing of the bond.

46. *Fishback v. State*, 131 Ind. 304, 30 N. E. 1,088. *In re Chadwick*, 109 Mich. 588, 67 N. W. 1,071.

**Where Language Offensive Per Se.** — Where matter spoken or written is of itself necessarily offensive and insulting, the disavowal of an intention to commit a contempt may tend to excuse, but it cannot, and will not, justify the act. *In re Woolley*, 11 Bush (Ky.) 95.

And see *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445,

70 Am. St. Rep. 280, 44 L. R. A. 159, to same effect, where the effect of the publication was to affect or obstruct the administration of justice in a pending suit, regardless of the publisher's intent.

**Advice of Counsel as to the Alleged Contemptuous Publication**, see note *supra* 24.

47. *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528.

48. **Innocent Loaner of the Contemptuous Paper.** — In *McLeod v. St. Aubyn*, 1899, App. Cas. 544, it was held that where the person charged with publishing a contempt of court was neither the printer, publisher nor writer of the scandalous matter, but had merely in an innocent manner loaned the paper containing the publication to a friend, without knowledge of its contents, he was neither constructively nor necessarily guilty of contempt.

49. *In re Chadwick*, 109 Mich. 588, 67 N. W. 1,071.

50. *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787.

51. **Contemner May Show That His Report Was Accurate.** — In contempt proceedings under a statute making it a contempt to publish a grossly inaccurate report of court proceedings, contemner may show that his report was accurate. *In re Robinson*, 117 N. C. 533, 23 S. E. 453, 53 Am. St. Rep. 596.

account of court proceedings contrary to an order not to do so, it is held that he may show in defense that his account was a true report of such proceedings.<sup>52</sup>

**9. Burden of Proof.** — A. ON PART OF PROSECUTION. — The burden of proving contemner guilty of the contempt with which he is charged is upon the prosecution.<sup>53</sup>

B. ON PART OF CONTEMNER. — But where contemner admits the acts constituting the alleged contemptuous conduct, and relies on other facts to excuse such acts, the burden is on him to establish such other facts.<sup>54</sup>

**10. Degree of Proof.** — A. IN GENERAL. — It is generally held in contempt proceedings that the alleged contemner must be proved

In *McClatchy v. Superior Court*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691, the court held that in a contempt proceeding for publishing comments on a judge who had stated from the bench that the publisher's report of evidence produced the day before in his court was grossly inaccurate, the contemner could show that his account was a correct report of the actual testimony, notwithstanding that the court reporter had testified on the part of the prosecution that the judge's version was correct, and that such reporter's notes were placed in evidence; since the gravamen of the contempt was the alleged false character of the publication, and the wrongful intent of the publisher in bringing the court into contempt, thereby interfering with the orderly administration of justice in the cause on trial.

**52.** *In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755.

**53. Burden of Proving Violation** of an injunctive order is on the prosecution. *Verplank v. Hall*, 21 Mich. 469; *Accumulator Co. v. Consolidated E. S. Co.*, 53 Fed. 796.

**In Supplementary Proceedings** the plaintiff must establish that the judgment defendant has the money or means before he can be ordered to pay the judgment or be committed for contempt in the alternative. *Peters v. Kerr*, 22 How. Pr. (N. Y.) 3.

**54. Contempt in Not Paying Alimony.** — In contempt proceedings to enforce payment of a monthly allowance by the divorced husband, he can

only purge himself by showing to the satisfaction of the court his inability to obey the order, and that such disability has not been caused by his own act for the purpose of avoiding payment. *Ex parte Spencer*, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; *State v. Cook*, 66 Ohio St. 566, 64 N. E. 567; *State v. Smith*, 17 Wash. 430, 50 Pac. 52.

Where the husband fails to comply with an order for payment of temporary alimony, the burden is on him to satisfy the court, by a full and fair showing of his financial condition and resources, that his failure to obey the order is due solely to his inability to do so. *Hurd v. Hurd*, 63 Minn. 443, 65 N. W. 728; *Deen v. Bloomer*, 191 Ill. 416, 61 N. E. 131.

**Personal Disqualification of a Magistrate**, in order to invalidate his commitment of a party for contempt, must be established by the contemner, and it is not incumbent on the magistrate to prove a negative. *Call v. Pike*, 68 Me. 217.

**Burden Is on Sheriff** in contempt proceedings for failing to return an execution according to the requisition of the statute, to excuse his default. *Wilson v. Wright*, 9 How. Pr. (N. Y.) 459.

**"Extraordinary Emergencies"** must be shown by contemner where an injunction allows the acts complained of under such an emergency. *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 105, 21 Atl. 182.

**Inability to Produce Certain Books** of a corporation at the taking of a deposition must be shown by contem-

guilty beyond a reasonable doubt,<sup>55</sup> though some of the courts have held that the proof is sufficient to convict him if it be clear,<sup>56</sup> or clear and satisfactory,<sup>57</sup> or merely satisfactory,<sup>58</sup> or to a reasonable certainty.<sup>59</sup> And it has been held, in a purely civil contempt proceeding, that the proof necessary to determine the amount of the fine or indemnity need only conform to that required in civil actions for

ner in order to excuse his failure to produce them. *Fenlon v. Dempsey*, 50 Hun 131, 2 N. Y. Supp. 763.

**55. Violations of Injunctive Orders** must be proved beyond a reasonable doubt in order to convict contemner. *Jessup & M. P. Co. v. Ford*, 7 Del. Ch. 226, 44 Atl. 778; *Hydock v. State*, 59 Neb. 296, 80 N. W. 902; *Potter v. Low*, 16 How. Pr. (N. Y.) 549; *State v. Davis*, 50 W. Va. 100, 40 S. E. 331; *Whipple v. Hutchinson*, 4 Blatch. 190, 29 Fed. Cas. No. 17,517; *Accumulator Co. v. Consolidated E. S. Co.*, 53 Fed. 796; *Schlicht H. L. & P. Co. v. Aeolipyle Co.*, 121 Fed. 137.

**Where in Defamatory Publications Concerning the Court** there is any doubt as to the meaning of the defamatory article, the contemner, upon disavowing evil intent, is entitled to the benefit of the doubt. *People v. Stapleton*, 18 Colo. 568, 33 Pac. 167, 23 L. R. A. 787.

**Where Perjury Is Basis of Contempt.**—In *Johnson v. Austin*, 76 App. Div. 312, 78 N. Y. Supp. 501, which was a contempt proceeding based on contemner being insolvent at the time of executing and justifying to a bond to discharge a mechanic's lien, it was held that his insolvency must be proved beyond a reasonable doubt and that he was guilty of perjury.

**Rule in Federal Courts Stated.** In *U. S. v. Jose*, 63 Fed. 951, which was a proceeding for interference with property in the possession of a federal receiver, it was held that accusations for contempt must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the accused, and that every element of the offense, including a criminal intent, must be proved by evidence or circumstances warranting an

inference of the necessary facts, otherwise the contemner must be acquitted.

**Violation of Order for Bankrupt** to turn over money or property to his trustee must be established by evidence which satisfies the court beyond a reasonable doubt that the bankrupt had the ability to comply with the order. *Boyd v. Glucklich*, 116 Fed. 131. *In re Gerstel*, 123 Fed. 166.

**56. Contempt for Breach of an Injunction** must not be punished unless the guilt of contemner be clearly established. *Probasco v. Probasco*, 30 N. J. Eq. 61. *Celluloid Mfg. Co. v. Chrolithian C. & C. Co.*, 24 Fed. 585, but see preceding note.

**57. Contempt for Having Made an Agreement** to influence a decision of the court must be established by clear and satisfactory proof. *In re Buckley*, 69 Cal. 1, 10 Pac. 69.

**Contempt for Failure to Pay Over Money** ordered to be paid must be proved by evidence showing clearly and satisfactorily that the contemner has the money within his power. *Warren v. Rosenberg*, 94 Wis. 523, 69 N. W. 339.

**58. Violation of Injunctive Order** in divorce suit must be made out to satisfaction of the court. *State v. Matthews*, 37 N. H. 450.

**Violation of Order Enjoining Maintenance of Liquor Nuisance** is sufficiently proved by circumstantial evidence, if it will satisfy any unprejudiced person that the order of the court has been violated. *Grier v. Johnson*, 88 Iowa 99, 55 N. W. 80.

**59. Violation of Injunctive Order** must be established with reasonable certainty. *Verplank v. Hall*, 21 Mich. 469.

**Violation of Mandatory Order Must be Shown** with reasonable certainty. *Ketchum v. Edwards*, 153 N. Y. 534, 47 N. E. 918.

damages.<sup>60</sup>

**B. DISTINCTION IN CRIMINAL AND CIVIL CONTEMPTS.** — It has, however, been stated that the true rule is that where the contempt is a criminal contempt, and the proceeding for its commission is punitive in character, contemner must be proved guilty beyond a reasonable doubt, but that where the contempt is a civil contempt, and the proceeding for its commission is purely remedial in character, the proof of contemner's guilt need only be clearly and satisfactorily established.<sup>61</sup>

**11. Sufficiency of Proof.** — **A. DIRECT CONTEMPTS.** — Where the contempt consists of an insult to the dignity or respect due to the court, the court which was thus insulted is the judge of what is due to itself, and to the cause of public justice,<sup>62</sup> and in such cases where spoken words are necessarily insulting, it need not take the sworn disavowals of the contemner;<sup>63</sup> or where they are not necessarily so, the court may consider the manner of the person using them, and thus determine whether they are in fact contemptuous.<sup>64</sup>

**B. IN CONSTRUCTIVE CONTEMPTS.** — **a. When Conducted on Affidavits.** — Where the proceeding is conducted by way of an order to show cause, the affidavits upon which the order was based are deemed to make a *prima facie* case against the contemner.<sup>65</sup>

**b. When Conducted as a Trial.** — No definite rule can be stated as to what constitutes sufficient evidence to convict or acquit in every contempt proceeding which may arise, other than to say that the facts constituting the elements of the particular contempt charged must be proved by evidence which satisfies the requirements heretofore stated as to the burden and degree of proof.<sup>66</sup>

60. *Dejonge v. Brennehan*, 23 Hun (N. Y.) 332.

61. *Drakeford v. Adams*, 98 Ga. 722, 25 S. E. 833.

62. *Conover v. Wood*, 5 Abb. Pr. (N. Y.) 84.

63. *Henry v. Ellis*, 49 Iowa 205; *In re Woolley*, 11 Bush (Ky.) 95.

64. *Hughes v. People*, 5 Colo. 436.

65. *State v. Mitchell*, 3 S. D. 223, 52 N. W. 1,052.

66. See notes under "BURDEN AND DEGREE OF PROOF."

**Sufficiency of Evidence to Prove Violation of Injunction** against strikers. In *Mackall v. Ratchford*, 82 Fed. 41, the act of a large body of striking miners marching along the highway and taking positions alongside the road during three days while the working miners were going to or coming from their work, was held

sufficient to show a contemptuous violation of an injunction restraining interference with the operation of the mine.

And see *U. S. v. Haggerty*, 116 Fed. 510, for an instance of speechmaking meetings near the mine, which were held to violate a similar injunctive order.

**Source of Notice of Injunctive Order Is Immaterial.** — In *Murphy v. Harker*, 115 Ga. 77, 41 S. E. 585, it was said: "If a person be informed that an injunction or restraining order has been issued against him, he is bound to obey it from the time he receives the notice. It is immaterial from what source he derives the information, so long as it is from a source which is entitled to credit; and if he receives the notice from such a source, and also receives information



which clearly and plainly indicates what is the act from which he must abstain, he is bound to obey the order of the court, whether he is ever served with the writ or not; and a refusal or failure to comply with the order of the court, whatever it may be, under such circumstances, is as much a contempt as if the defendant has been personally served by the sheriff with the writ. This proposition is too well settled now either to require extended discussion, or to admit of serious question."

**Telegraphic Notice of Restraining Order.** — In the case of *State v. Knight*, 3 S. D. 509, 54 N. W. 412, 44 Am. St. Rep. 809, contemner attempted to justify his violation of an order restraining a mortgage sale on the ground of want of knowledge of such order, although he had received an unofficial telegram from the judge who made the order, announcing that it was made; but the court held that in the absence of evidence that he did not know that the party whose name was attached to the telegram was the judge, and of efforts to ascertain that fact, the telegram was notice.

**Knowledge Through Attorneys Who Were Present Is Sufficient.** *Hawks v. Fellows*, 108 Iowa 133, 78 N. W. 812.

**Knowledge of General Officers of a Railroad Company Is Sufficient.** *Rochester H. & L. R. Co. v. New York L. E. & W. R. Co.*, 48 Hun (N. Y.) 190.

But see *Ex parte Stone*, (Tex. Crim. App.), 72 S. W. 1,000, for an instance of facts which did not show notice, although contemner was one of many ticket brokers who had been restrained from selling certain railroad tickets.

**Sufficiency of Acts Obstructing Service of Writ on Municipal Body.** A writ of *certiorari* was served on the clerk of a municipal body while in session, under circumstances that showed satisfactorily that members of that body understood its general purport. Some members of the body assaulted the clerk while he was about to read the writ and drove him from the room, and another person was put in his place. It was announced that

the writ was from the supreme court. In the scuffle the writ was lost or destroyed. The court held that the members who took a prominent part in the proceedings which interfered with the reading of the writ were guilty of contempt. *In re Taylor*, 62 N. J. L. 131, 40 Atl. 691.

**Proof of Violation of Injunctive Order.** — In contempt proceedings for violation of an injunctive order there must be proof tending to establish contemner's connection with the act complained of; suspicious circumstances merely, if unexplained, may be in some cases sufficient, but are insufficient when they are met by positive and explicit testimony explaining them, and fully clearing contemner from all complicity with the persons doing the act, and from prior knowledge of intent to commit it. *Slater v. Merritt*, 75 N. Y. 268.

**Must Not Only Show Technical Violation of Injunctive Order**, but also tendency to impede or prejudice rights of opposing party. *McEvoy v. Gallagher*, 107 Wis. 331, 83 N. W. 633.

**Suspicious Conduct of Court Officer** under the Minnesota statute authorizes an inference against him which may be taken into consideration by the court, where the contemner fails to explain such suspicious conduct. *State v. O'Brien*, 87 Minn. 161, 91 N. W. 297.

**Violation of Order to Pay Money.** In *Smith v. Smith*, 92 N. C. 304, the court held that where contemner did not show his inability to borrow the required amount, and on the contrary, showed that he had some personal estate which he claimed as exempt, his showing was insufficient.

In *Warren v. Rosenberg*, 94 Wis. 523, 69 N. W. 339, a commitment for failure to turn over money was not sustained where contemner absolutely denied that he had either money or property of the firm within his power, and the only evidence to the contrary was the inference arising from the fact that about two years previous to such time the firm had been possessed of a large amount of property, the disposition of which had not been satisfactorily accounted for.

**Time of Order in Supplementary**

### III. TESTIMONY WHICH MAY BE COMPELLED.

**1. Nature of Right to Compel Testimony.**—The summary enforcement of an answer from a witness by means of a commitment for contempt is generally recognized as an exercise of the judicial functions of the body or court exercising it,<sup>67</sup> though it has also been claimed that it is merely an exercise of an administrative power to enforce a law, which, if enforced, must be enforced at once.<sup>68</sup>

**Proceedings** must be definitely shown in contempt proceedings arising out of such proceedings. *Benbow v. Kelom*, 52 Minn. 433, 54 N. W. 482.

**Liability of Officer for Acts of Corporation.**—The mere fact that a man holds an office in a corporation is not sufficient to punish him for contempt for failure or refusal of the corporation to comply with an order of the court. *Hughson v. People*, 91 Ill. App. 396.

**Where Rescue Is Treated as a Contempt**, the sheriff's return of that fact is conclusive of contemner's guilt. *State v. Ackerson*, 25 N. J. L. 209.

*Burns v. Superior Court*, (Cal.), 73 Pac. 597; *In re Sims*, 54 Kan. 1, 37 Pac. 135, 45 Am. St. Rep. 261, 25 L. R. A. 110; *Brown v. Morris C. & B. Co.*, 27 N. J. L. 648; *In re Mason*, 43 Fed. 510.

**Power to Compel Testimony Is Judicial in Character.**—It was held in *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, 1 Am. Rep. 851, that an inquiry by a legislative committee in regard to bribery charges was judicial in its nature.

In *Lowe v. Summers*, 69 Mo. App. 637, the court, in discussing the distribution of the legislative, judicial and executive powers, said: "It has been found, however, impracticable, if not impossible, always to observe and enforce the strict limit of these respective powers; they become in many cases necessarily blended."

In *Interstate Commerce Com. v. Brunson*, 154 U. S. 447, the court in discussing the power of the Interstate Commerce Commission to compel the giving of testimony before it, said that if the testimony of Wright related to the matter under investigation, and the matter was one which the commission was legally entitled to investigate, and the witness was not excused on some personal

ground, the witness was obliged to testify.

In *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502, it was said: "The city council is not a legislature. It has no power to make laws, but merely to pass ordinances upon such local matters as the legislature may commit to its charge, and subject to the paramount control of the legislature. Neither branch of the city council is a court, nor, in accurate use of language, vested with any judicial functions whatever. Nor are its members chosen with any view to their fitness for the exercise of such functions. To allow such a body to punish summarily by imprisonment the refusal to answer any inquiry which the whole body, or one of its committees, may choose to make, would be a most dangerous invasion of the rights and liberties of the citizen."

In *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108, it was held that the power to punish for contempt belongs exclusively to the courts, except when constitutionally conferred on other bodies or tribunals; that to adjudge a refusal to answer a question a contempt, the tribunal must determine its materiality, and whether the witness is bound to answer, and hence that the power is judicial.

<sup>68.</sup> In *re Davis*, 58 Kan. 368, 49 Pac. 160, it was said: "The claim that a judgment of imprisonment as for a contempt is not an exercise of judicial power is sufficiently answered by the proposition that it is essentially a punishment for an offense against the public."

In *re Clark*, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242, the court, in drawing the distinction between the right to deal summarily with a witness who refuses to testify and a direct contempt, said in reference to

**2. What Courts, Officers or Bodies May Compel Testimony.**—A. COURTS.—The power to compel a witness to answer lawful questions is inherent to all courts of record,<sup>69</sup> and has been recognized as also belonging to courts not of record.<sup>70</sup> Under the common law, courts which were not of record were not allowed to commit for direct contempts, though inferior courts of record were allowed to do so.<sup>71</sup> The powers of justices of the peace to commit witnesses who refuse to testify have generally been regulated by statute in the several states. Some of the courts, however, have recognized an inherent right in them to punish for contempt,<sup>72</sup> though the right has been expressly denied in a case directly involving the issue.<sup>73</sup>

a witness who had refused to testify before the grand jury thus: "When he refuses to testify the judge may require him to answer or stand committed; there is no trial of such witness; he is not committed as a punishment, but to enforce a particular duty—and no evidence need in such case be taken. Whart. Crim. Pl. & Pr., §917. And when this power of compulsion is exercised by a court of justice, it is naturally held that the exercise should conform, as far as practicable, to the analogies of judicial proceeding. But it is also true that the power itself, while essential to judicial proceedings, is not distinctly a judicial power; it may be exercised by administrative as well as by judicial officers, and is in its essence, so far as it can be called distinctive of any department, distinctively an administrative power. The principle on which the power rests is, that when immediate enforcement of law is essential to its execution, the state cannot permit a citizen to obstruct, by his disobedience, such immediate execution of law, and has the power to invest the officer charged with the administration of law, whether he be a judicial or administrative officer, with authority to compel, in such case of emergency, immediate obedience in the manner prescribed by law. The real nature of the power to compel a citizen to answer a proper question, when a refusal to answer obstructs the necessary, immediate execution of law, has been obscured by the habit of calling every such refusal a contempt. It is a contempt, in the sense that every open defiance of law is a contempt of the authority of the state; it is a

contempt of court when done in the course of a judicial trial; but the summary enforcement of an answer is not an exercise by the court of its judicial power to punish contempt of court as a criminal offense, but of its administrative power to enforce a law, which, if enforced at all, must be enforced at once." See also *De Camp v. Archibald*, 50 Ohio St. 618, 35 N. E. 1,056, 40 Am. St. Rep. 692, to same effect.

69. *In re Abbott*, 7 Okla. 78, 54 Pac. 319; *Com. v. Willard*, 22 Pick. (Mass.) 476; *Holman v. Austin (City)*, 34 Tex. 668.

70. *People v. Sheriff*, 7 Abb. Pr. (N. Y.) 96, but also see *In re Watson*, 3 Lans. (N. Y.) 408, where it was held that the surrogate court not being a court of record, could not punish as for a criminal contempt except for interruptions to business during judicial proceedings, nor enforce civil remedies by proceedings as for contempt.

71. See *Rhinehart v. Lance*, 43 N. J. L. 311, 39 Am. Rep. 592, for an exhaustive review of the English authorities on the powers of inferior courts of record and courts not of record in relation to committing for contempt *in facie curiæ*.

72. *Hill v. Crandall*, 52 Ill. 70; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502; *Burnham v. Stevens*, 33 N. H. 247; *In re Cooper*, 32 Vt. 253.

Justice of peace may commit for refusal to answer pertinent and proper question as well as a refusal to be sworn. *Rutherford v. Holmes*, 66 N. Y. 368.

73. *Rhinehart v. Lance*, 43 N. J. L. 311, 39 Am. Rep. 592.

B. GRAND JURIES. — The punishment of contumacious witnesses before the grand jury is also as a general rule regulated by statute, but where it is not so regulated, the practice is for the grand jury to report the refusal of the witness to the court for an order in the matter.<sup>74</sup>

C. LEGISLATIVE BODIES. — a. *Congress and State Legislatures.* The power of compelling witnesses to answer questions can also be exercised by congress<sup>75</sup> and state legislatures,<sup>76</sup> though it has been held that a legislative committee has no implied power to commit a recalcitrant witness, and can only report his conduct to the main body for action.<sup>77</sup>

74. *Newsom v. State*, 78 Ala. 407; *In re Gannon*, 69 Cal. 541, 11 Pac. 240; *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961; *Heard v. Pierce*, 8 Cush. (Mass.) 338, 54 Am. Dec. 757; *People v. Hackley*, 24 N. Y. 74; *In re Taylor*, 8 Misc. 159, 28 N. Y. Supp. 500; *Ex parte Harris*, 4 Utah 5, 5 Pac. 129.

May Be Empowered by Legislature to Punish obstinate witness without intervention of the court. *In re Clark*, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242.

75. Power of Congress to Punish Refractory Witnesses. — In *In re Chapman*, 166 U. S. 661, a witness was compelled to testify before a senatorial committee, as to whether certain United States senators had dealt in certain stocks on the stock exchange.

No person can be punished by either house of congress for contumacy as a witness, unless his testimony is required in a matter into which that house has jurisdiction to inquire, and neither possesses general power of making inquiry into private affairs of a citizen. *Kilbourn v. Thompson*, 103 U. S. 168.

76. Power of Legislative Bodies to Punish Recalcitrant Witnesses. Legislature may punish for refusal to testify at investigation of conduct of one of its members under published charge of bribery. *Ex parte Lawrence*, 116 Cal. 298, 48 Pac. 124; *Ex parte McCarthy*, 29 Cal. 395.

House of representatives of Kansas can compel witnesses to attend and testify before one of its committees on an election contest. *In re Gunn*, 50 Kan. 155, 32 Pac. 470, 948,

19 L. R. A. 519. And the same right was upheld in a bribery investigation in *In re Davis*, 58 Kan. 368, 49 Pac. 160.

*In re Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676, it was held that the house of representatives had power under the constitution to imprison for contempt, but that the power was limited to the cases expressly provided by the constitution, or to cases where the power is necessarily implied. And see *Lowe v. Summers*, 69 Mo. App. 637, to same effect.

*People v. Keeler*, 99 N. Y. 463, 2 N. E. 615, 52 Am. Rep. 60, punishing witness for contempt of committee to investigate affairs of public office. See also *Briggs v. MacKellar*, 2 Abb. Pr. (N. Y.) 30.

The power of a legislative committee to examine witnesses in a contest for membership therein was also recognized in *Ex parte Dalton*, 44 Ohio St. 142, 5 N. E. 136, 58 Am. Rep. 800.

It was held in *In re Falvey*, 7 Wis. 630, that a legislative committee had power to compel testimony at an investigation of bribery charges.

77. Power of Legislative Committee or Commission After Adjournment. — In *In re Davis*, 58 Kan. 368, 49 Pac. 160, a joint legislative committee appointed to investigate bribery charges and empowered to sit after adjournment of the legislature, was held to have the power to subpoena witnesses, but not the power to enforce them to testify by means of contempt proceedings, unless the legislature should be convened in special session, notwith-

b. *Municipal Bodies*. — As to municipal legislative bodies, it is said that they have the same rights to examine witnesses as a state legislature, except that their powers are limited by their charters.<sup>78</sup>

D. ADMINISTRATIVE OFFICERS. — Various administrative officers, such as county commissioners, police boards, boards of pardon, and coroners, are often given by statute the power to commit witnesses who refuse to testify in investigations laid before them,<sup>79</sup> but the mere fact that an officer is given power to examine persons under oath does not imply that such officer can commit such person for a refusal to testify, since the latter power must be clearly given by

standing that a previous general law had conferred on legislative committees the same powers with reference to obtaining evidence as is held by district courts.

But see *People v. Learned*, 5 Hun (N. Y.) 626, where an investigating commission created by a concurrent resolution of the senate and assembly to investigate the affairs of the canals of the state, and given power to require the attendance of witnesses, was held authorized to commit a recalcitrant witness, the power to do so being fairly implied from the scope and purpose of the commission.

**How Punished When Before a Joint Committee.** — In *In re Falvey*, 7 Wis. 630, the court said: "But it is objected that, if the investigation is had by a joint committee, a witness, in refusing to appear before a committee thus constituted, or in refusing to answer questions put by such a committee, is not guilty of a contempt of either house of the legislature, but is guilty of a contempt of the joint committee, or in other words, of the legislature, which, it is contended, is an absurdity in its terms. How, it is asked, can a witness be punished for this double offense? By which house of the legislature? Or will both houses assume jurisdiction, and punish twice for the same contempt? Under the constitution, it is insisted, the power to punish for a contempt is vested exclusively in each house acting separately, and not jointly. As a general proposition, this, probably, will not be denied; and yet it is not universally true. Suppose the legislature assembled in joint con-

vention, as by the law of this state it is required to do, for the purpose of choosing United States senators, or regents of the university, has it not the power, when thus assembled, by the parliamentary law, the law of self-preservation, to punish, as for a contempt, any person guilty of disorderly and riotous conduct which would interrupt or disturb its deliberations? Manifestly it would have. In the present case, however, we are relieved from any difficulty attending this question, by the act of the legislature, approved February 3, 1858. That act expressly makes the refusal of a witness to appear and testify before the joint committee a contempt of the house whose process has been disobeyed. The exigency of the *subpoena* not only required the witness to appear, but also to answer any question pertinent to the matter of inquiry before the committee, and refusal to answer such question is made a breach of the privileges of the body issuing the *subpoena*."

<sup>78</sup>. *In re Dunn*, 9 Mo. App. 255.

In *People v. Van Tassel*, 64 Hun 444, 19 N. Y. Supp. 643, which arose through a witness refusing to produce books and papers before a municipal committee, it was held that where the power to punish for contempt is derived from the charter of a municipal corporation, the power cannot be extended beyond the limit therein stated.

<sup>79</sup>. *In re Clark*, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242.

**Coroner May Commit a Witness** who refuses to answer a pertinent question. *Com. v. Higgins*, 5 Kulp (Pa.) 269.

statute.<sup>80</sup>

E. **NOTARIES PUBLIC.** — No general rule can be stated as to the power of a notary public to commit a witness who refuses to answer questions while his deposition is being taken, since some of the courts hold that where the statute authorizes him to do so, he has the right,<sup>81</sup> while other courts are equally emphatic in holding that his duties when taking a deposition are not judicial,<sup>82</sup> and that he cannot commit a recalcitrant witness.<sup>83</sup>

F. **REFEREES AND COMMISSIONERS.** — The power of referees and commissioners in regard to committing witnesses for refusal to testify is largely a matter regulated by statute. As a general rule a referee<sup>84</sup> or commissioner appointed merely to take testimony acts merely as an adjunct to the court, but where in addition to taking the testimony he is to offer an opinion thereon, then it is said that he may punish the recalcitrant witness without further aid from the court.<sup>85</sup>

3. **Who May Be Compelled to Testify.** — A. **COMPELLING ATTENDANCE BY MEANS OF ATTACHMENT.** — a. *In General.* — A person who refuses to obey a properly issued and lawfully served subpoena<sup>86</sup> or order for his appearance before a referee to give his deposition,<sup>87</sup>

80. *Noyes v. Byxbee*, 45 Conn. 382.

81. *Ex parte Priest*, 76 Mo. 229; *Dogge v. State*, 21 Neb. 272, 31 N. W. 929; *De Camp v. Archibald*, 50 Ohio St. 618, 35 N. E. 1,056, 40 Am. St. Rep. 692; *In re Rauh*, 65 Ohio St. 128, 61 N. E. 701.

82. *In re Huron*, 58 Kan. 152, 48 Pac. 574, 62 Am. St. Rep. 614, 36 L. R. A. 822; *Courtney v. Knox*, 31 Neb. 652, 48 N. W. 763. But see also *People v. Rathbone*, 145 N. Y. 434, 40 N. E. 395, to the contrary effect.

83. **Powers of Notary Public to Commit.** — In *Burns v. Superior Court*, (Cal.), 73 Pac. 597, a statute authorizing a notary public, when taking a deposition in a case pending in the domestic courts, to punish a recalcitrant witness, was held unconstitutional, as attempting to confer judicial power upon a ministerial officer. For a further discussion of the subject see also *Lezinsky v. Superior Court*, 72 Cal. 510, 14 Pac. 104, and *Clifford v. Allman*, 84 Cal. 528, 24 Pac. 292. The power was denied in *Burt v. Pyle*, 89 Ind. 398, even though the statute authorized the notary to compel the attendance of the witness.

*In re Huron*, 58 Kan. 152, 48 Pac. 574, 62 Am. St. Rep. 614, 36 L. R. A. 822, the court, in holding that a notary could not commit a witness who refused to be sworn, overruled a long line of cases to the contrary.

84. *Keller v. Goodrich Co.*, 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88; *State v. Barclay*, 86 Mo. 55; *In re Haldron*, 10 Mont. 222, 25 Pac. 101; *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493; *Burnett v. Phallon*, 19 How. Pr. (N. Y.) 530; *Smith v. Belford*, 106 Fed. 658.

85. *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69.

86. **Absence of Actual Loss by the Disobedience Is Immaterial.** Where a person is in contempt in refusing to obey a subpoena, the court may impose a fine upon him although no actual loss or injury has been occasioned to the party at whose instance the subpoena was issued. *People v. Brown*, 46 Hun (N. Y.) 320.

87. **Compelling Party to the Action to Testify by Deposition.** In *In re Rauh*, 65 Ohio St. 128, 61 N. E. 701, it was held under the Ohio statutes that an adverse party is not exempt from testifying by a deposition, but that the question

or to testify in supplementary proceedings,<sup>88</sup> or on examination *de bene esse*,<sup>89</sup> is guilty of a contempt.

b. *Procedure to Punish.*—Such disobedience of a subpoena or similar order being an indirect contempt,<sup>90</sup> the proceedings for its punishment must be formally instituted,<sup>91</sup> and facts adduced on the hearing showing the alleged contemner to be guilty of the contempt charged.<sup>92</sup> The contemner, on the other hand, may establish in defense any facts or circumstances showing that his disobedience did not constitute a contempt of the court or body issuing the subpoena or order,<sup>93</sup> or that the statutory provisions in regard to the issuance

whether such a deposition could be used must depend upon the judgment of the court when it is offered in evidence.

**But Right Not Inherent Under Foreign Commission.**—The court from which is issued a subpoena requiring witnesses to appear before the commissioner named in a foreign commission, has no inherent power to compel the witness to attend and testify. *In re U. S. Pipe Line Co.*, 16 App. Div. 188, 44 N. Y. Supp. 713.

**88. Attendance at Court No Excuse to Disobedience of Process on Supplementary Proceeding.**—In *Page v. Randall*, 6 Cal. 32, it was held in a contempt proceeding arising from supplementary proceedings, that attendance upon any court as a witness, juror or party only exempts the person so in attendance from arrest in a civil action, but not from obeying any ordinary process of a court.

**89. Ex parte Peck**, 3 Blatchf. 113, 19 Fed. Cas. No. 10,885.

**90. Disobedience of Subpoena Is Indirect Contempt.**—In *State v. Anders*, 64 Kan. 742, 68 Pac. 668, disobedience of a subpoena was held to be an indirect contempt and hence not punishable summarily without formally instituted proceedings.

**91. Preliminary Proceedings Where Subpoena Disobeyed.**—In *In re Haines*, 67 N. J. L. 442, 51 Atl. 929, it was said: "There is no power in the court of quarter sessions to take a witness alleged to have failed to obey a subpoena into custody upon a mere verbal statement in open court that he has been served and has failed to appear. The court has no power to issue a *capias*

in such a case, except upon proof in open court or by affidavit duly filed. Then it is questionable whether the court should do more than make a rule to show cause in the first instance. Compulsory process should be used with discretion, and never be used unless it is apparent that ordinary methods will be inefficacious."

**92. Venue of Disobedience to Subpoena.**—The disobedience of a subpoena requiring a witness to attend is committed in the county where the court is sitting, although the subpoena was served in another county. *People v. Mead*, 92 N. Y. 415.

**93. Witness Fees Must Be Prepaid.**—In *Atwood v. Scott*, 99 Mass. 177, 96 Am. Dec. 728, it was held that a witness in a civil case is not bound to attend court after the time for which his fees had been paid or tendered to him.

**Evidence of Witness Must Not Be Merely Cumulative.**—An attachment for an absent witness is properly refused when his evidence is merely cumulative and no prejudice could have resulted from his absence. *St. Louis & S. F. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971.

**Excuse for Non-appearance.**—In *Gibbs v. Prindle*, 9 App. Div. 29, 41 N. Y. Supp. 132, it was held a sufficient excuse to contempt proceedings for failure to appear in supplementary proceedings where the contemner, who was a woman, was served at 10.30 a. m. with the order to appear for examination in a village three miles away at 2 p. m., and she showed that she was ill and temporarily without means of conveyance.

**Effect Where Both Parties Fail to**

or service of the subpoena or order had not been complied with,<sup>94</sup>

**Attend.**—A party who fails to appear pursuant to process requiring his attendance will not be punished for contempt where his opponent also failed to appear on the appointed day. *Cardiner v. Peterson*, 14 How. Pr. (N. Y.) 513.

**Effect of Sworn Disavowal of Contemptuous Disobedience.**—In *Wilson v. State*, 57 Ind. 71, where respondent who was attached for disobeying a subpoena, filed a written statement under oath denying the facts constituting the alleged contempt and disclaiming any intention of disobeying the process of the court, it was held that the court could not subject respondent to an oral examination or hear evidence *aliunde* for the purpose of disproving his statement and establishing the contempt.

The same ruling was substantially made in *Burke v. State*, 47 Ind. 528.

**94. Subpoena Must Be Formally Prepared.**—In *Horton v. State*, 112 Ga. 27, 37 S. E. 100, it was held that a subpoena commanding the presence of a person in court as a witness is a judicial writ, and to be valid must, where there is a clerk, be signed and issued by such clerk; hence the signing of the clerk's name by the attorney for a defendant in a misdemeanor case under a general direction from the clerk to "prepare" the subpoenas in the case, could not form the basis for compelling a witness named therein to attend after service of such a subpoena.

**Statutory Proceedings Preliminary to Subpoena Must Be Complied With.** In *Chambers v. Oehler*, 107 Iowa 155, 77 N. W. 853, the court held that under a statute authorizing the issuance of a subpoena on the application of any person having a cause or other matter pending in the court wherein the subpoena is issued, a subpoena issued by a justice of the peace where there was no action pending before him as named in the application, was void, and hence the person thus summoned was not guilty of contempt in refusing to obey it.

**Subpoena Must Be Served Within State and by Proper Officer.**—In *State v. Huff*, 161 Mo. 459, 61 S. W.

900, 1,104, the court, in holding that the return did not authorize the issuance of an attachment, said: "It seems a singular statement, indeed, to make, that 'Fadie was duly served with subpoena.' The opinion has generally prevailed that the process of any court was valueless and void when served outside of the state in which process issued. *State v. Butler*, 67 Mo. 59; *Wilson v. Railroad Co.*, 108 Mo. 588, 18 S. W. 286, and cases cited; *Murfree, Sher.* §§ 114a, 849. And mere notice, not according to law, is no notice at all. *Wilson's Case*, 108 Mo. loc. cit. 598, 18 S. W. 286; *Murfree, Sher.* § 849. You will observe that this return on the subpoena does not mention any state in which the service was had, but it does say it was served in 'Calhoun county.' As judicial notice will be taken of the fact that we have no such county in this state, we must presume that service was had either in Arkansas or in some other state; and this, under the authorities, renders such service of the subpoena a nullity. And you will also observe that the service is made by 'Spec. Deputy,' in his own name, which, had the service been otherwise good, would have made it bad. *Murfree, Sher.* §§ 843, 856. The invalidity of such a return has been thus held in this state."

**Requisites for Attachment Against Witness.**—In *State v. Trumbull*, 4 N. J. L. 156, 7 Am. Dec. 576, which was a motion for an attachment against an absent witness, it was said: "The facts ought to be clear and strong, to justify a party in pursuing this remedy, or the court in granting it. Two facts are especially necessary. (1.) That the process be strictly and legally served. Here there is a defect in the proof of the service. It does not appear where the subpoena was delivered. It might have been where the defendant was not bound to yield it obedience; out of the jurisdiction of the court; out of the limits of the state. But, in the second place, mere service of the process is not enough. It must also appear that the disobedience was of



or that the court or body issuing such subpoena or order had no jurisdiction of the proceeding in which it was issued,<sup>95</sup> or authority to issue the subpoena or order.<sup>96</sup>

**B. COMPELLING WITNESS TO BE SWORN.** — a. *In General.* — The refusal of a witness to be sworn or affirmed during the progress of a judicial hearing is a contempt,<sup>97</sup> notwithstanding that his refusal may be based on an assertion of a privilege from testifying,<sup>98</sup> or on the ground of conscientious scruples against being sworn on that particular day.<sup>99</sup> The question whether a witness should be sworn or affirmed is generally regulated by statute, but where it is not so regulated it is held that one desiring to be affirmed instead of being sworn must bring himself clearly within the rule allowing such affirmations.<sup>1</sup>

such a nature as to indicate a design to contemn the process and authority of the court."

**Defensive Matters on Part of Witness.** — In *In re Haines*, 67 N. J. L. 442, 51 Atl. 929, a conviction of contempt for disobedience of a subpoena was set aside where it was shown that the subpoena itself was not good; that it was not properly served, that no affidavit or other proof had been had before the issuance of the bench warrant; that contemner was not proved in the contempt proceedings to have been guilty of any contempt by any witness other than his own testimony which he was compelled to give.

**95. Preliminary Showing for Subpoena De Bene Esse.** — In *Ex parte Peck*, 3 Blatchf. 113, 19 Fed. Cas. No. 10,885, it was said: "It appears that the subpoena in this case was issued without any preliminary evidence having been given before the commissioner, showing this to be a case in which *de bene esse* examination could be lawfully had. The want of such proof is a vital objection to the issuing of an attachment. The attendance of the witness cannot be exacted by the high compulsory writ of attachment, unless the magistrate has clear cognizance of the matter."

**Supplementary Proceedings Must Be Based on Proper Facts and Affidavit.** — In *Kennedy v. Weed*, 10 Abb. Pr. (N. Y.) 62, it was said: "The order supplementary must be predicated upon the fact that an execution has been issued on a specified and existing judgment, and returned

unsatisfied in whole or in part. But when no such fact exists, the judge possesses no power to make the order for the examination of a party, or if made upon an affidavit specifying a judgment which has no existence, he can have no power to enforce obedience to its requirements."

**96. Board of Supervisors Cannot Compel Attendance** by subpoena, but when the witness is before them they may commit him for refusing to answer a proper question until he answers it. *In re Sup. of Poor of Westchester*, 6 App. Div. 144, 39 N. Y. Supp. 878.

**97. Goodman v. People**, 90 Ill. App. 533.

**98. Refusal to Be Sworn.** — The refusal of a person, called as a witness, to be sworn in a case on trial, is a contempt notwithstanding that the reason of the witness for such refusal is an assertion that his testimony would have a tendency to criminate him.

**99. Conscientious Scruples as to the Day No Excuse.** — In *Stansbury v. Marks*, 2 Dall. (Pa.) 213, a Jew who refused to be sworn as a witness in a cause tried on a Saturday, because it was his Sabbath, was fined as for contempt.

See also *Simons v. Gratz*, 2 Pen. & W. (Pa.) 412, 23 Am. Dec. 33, where the affidavit of a Jew, who was one of the plaintiffs, that he could not appear in court on Saturday from conscientious scruples, and the cause could not be tried without his assistance, was held no ground for a continuance.

**1. One Not Quaker Cannot Have**

b. *Procedure to Punish.* — The refusal to be sworn, being a direct contempt, is punishable in a summary manner by the court without the necessity for evidence *aliunde*.<sup>2</sup>

C. COMPELLING EXPERT TESTIMONY. — The awarding of extra compensation to experts is generally regulated by statute. But where not so regulated, the weight of authority is that an expert can be compelled to testify without compensation other than his regular fees,<sup>3</sup> though the rule is not uniform;<sup>4</sup> but it has been held that

**Quaker's Privilege.** — In *U. S. v. Coolidge*, 2 Gall. 364, 25 Fed. Cas. No. 14,858, a witness, who was not a Quaker, on being called as a witness refused to be sworn on the ground of conscientious scruples, by reason of having voluntarily made on some previous occasion a solemn declaration not thereafter to take an oath, but the court held that the liberty to affirm was strictly confined to Quakers by the laws and practice of Massachusetts, where the case was being conducted.

**When Witness Is Affirmed Instead of Sworn.** — In *Williamson v. Carroll*, 16 N. J. L. 217, it was said: "*Prima facie*, every witness is to be sworn and all evidence is to be given under oath. But the legislature, with becoming respect and deference to the religious sentiments and opinions of a numerous and highly respectable portion of the community, has provided a substitute for the *sacramental*, or *corporal* oath, for such as are *conscientiously scrupulous* of submitting to that ceremony. But this privilege, by the very terms of the statute, (Rev. Laws 429, § 5,) is to be extended only to such as "shall allege" themselves "conscientiously scrupulous of taking an oath;" and we have no right to extend it to any others, or upon any other terms. But in the case before us, the witness was affirmed, not only without alleging any such scruples, but, on the contrary, without having, or professing to have any — and if, as the fact seems to be, he was so ignorant as not to know the meaning of, or the difference between, being *sworn* or *affirmed*, he could have had no such scruples. If it was proper, then, to admit him as a witness at all (and I think the court did right in admitting him), he ought to have been sworn, unless he

alleged himself conscientiously scrupulous of taking an oath, which he did not do."

2. See *supra* I.

3. **The Services of Its Citizens as Witnesses** may be required by the state in the exercise of its sovereignty. *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611.

In *Rathbone v. Neal*, 4 La. Ann. 563, 50 Am. Dec. 579, fees of an expert for examining and reporting on an account were not allowed.

**Physicians and Experts.** — A physician and surgeon cannot refuse to testify upon ground that his answer will be expert evidence and that he has not been paid as an expert witness. *State v. Teipner*, 36 Minn. 535, 32 N. W. 678. See also *North Chicago St. R. Co. v. Zeiger*, 182 Ill. 9, 54 N. E. 1,006, 74 Am. St. Rep. 157, to the same effect *re-affirming*.

*Dixon v. People*, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116, where the authorities are exhaustively reviewed.

**Need Not Prepare Specially or Make Post-mortems.** — A physician who testifies on behalf of the state in a criminal case cannot demand extra compensation before testifying, but he cannot be required to make any examination or preliminary preparation, nor be compelled to attend and listen to the testimony, that he may be better enabled to testify as an expert. *Flinn v. Prairie Co.*, 60 Ark. 204, 29 S. W. 459, 46 Am. St. Rep. 168, 27 L. R. A. 669.

Though a physician may be compelled to testify as to the result of a post-mortem examination made by him, he cannot be compelled to make such an examination. *Summers v. State*, 5 Tex. App. 365, 32 Am. Rep. 573.

4. *England.* — In *re Working Men's Mut. Soc.*, 21 Ch. Div. 831,

where he submits himself as an expert he cannot refuse to answer any particular question after having, without objection, answered others.<sup>5</sup>

**D. COMPELLING AFFIDAVITS FROM UNWILLING AFFIANTS.** — a. *In General.* — It has been held that an unwilling affiant cannot, in absence of statutory provisions therefore, be compelled to make an affidavit for use on the hearing of a motion.<sup>6</sup> In several states, however, statutory provisions have been enacted under which such affidavits may be compelled.<sup>7</sup>

*United States.* — *Ex parte* Roelker, 1 Spr. 276, 20 Fed. Cas. No. 11,995.

*Colorado.* — *County Com'rs v. Lee*, 3 Colo. App. 177, 32 Pac. 841.

*Indiana.* — *Buchman v. State*, 59 Ind. 1, 26 Am. Rep. 75 (rule changed by statute in Ind.)

*Massachusetts.* — *Clark, Petitioner*, 104 Mass. 537.

*New York.* — *People v. Montgomery*, 13 Abb. Pr. (N. S.) 207.

*Pennsylvania.* — *Allegheny Co. v. Watt*, 3 Pa. St. 462; *Northampton Co. v. Innes*, 26 Pa. St. 156.

5. *Wright v. People*, 112 Ill. 540.

**6. Unwilling Affiant Cannot Be Compelled to Make Affidavit.** — In *Bacon v. Magee*, 7 Cow. (N. Y.) 515, the New York Supreme Court in passing on an application to grant a rule compelling a party to make affidavit to be used on the hearing of a motion, said: "We are not aware of any precedent for such a rule, though there must have been frequent occasion for it. The uniform course in relation to those summary applications has been to trust to voluntary affidavits; and the want of a power to coerce them has often been urged in argument without contradiction, as a defect in this kind of proceeding. We do not think that we have power to make the rule applied for."

**Rule in Federal Court.** — In *Crenshaw v. Miller*, 111 Fed. 450, the petitioner for a receiver prayed the court to appoint a special master commissioner to take the affidavits of some persons who were unwilling to make voluntary affidavits, the court said: "An affidavit is usually understood to be a voluntary statement. Ordinarily, when witnesses are compelled to testify, the proceeding is not *ex parte*; both parties to the suit are

permitted to propound questions. No authority is submitted to me by counsel where the court or a judge has delegated authority to a commissioner or officer to require persons to make affidavits. There is no statute of the United States authorizing such procedure. A commissioner appointed for such purpose could only proceed by propounding questions or permitting counsel to propound them. This would be in effect taking a deposition, and, of course, to make it legal, the notice required by law should be given. The distinction between an affidavit and a deposition is that the former is *ex parte* and voluntary, and the latter is made after notice, and is compulsory. An affidavit is a voluntary, *ex parte* statement. formally reduced to writing and sworn to or affirmed before some officer authorized by law to take it. If the witness is subpoenaed, sworn, and required to answer, his evidence reduced to writing is his deposition, and it could only be legally taken on notice with the right of cross-examination. In Iowa, and perhaps in other states, there is a statute providing a mode for obtaining affidavits in pending cases by issuing a subpoena for the witness, and, if he fails to make a full affidavit of the facts known to him, his deposition is taken *ex parte* and used as an affidavit. *Dudley v. McCord*, 65 Iowa 671, 22 N. W. 920."

7. *Chambers v. Oehler*, 107 Iowa 155, 77 N. W. 853; *Pierie v. Berg*, 7 S. D. 578, 64 N. W. 1,130.

**History and Object of the Statute.** The case of *Brooks v. Schultz*, 3 Abb. Pr. (N. S.) (N. Y.) 124, sets forth the history and objects of the New York statute authorizing the court to appoint a referee to take, for the

b. *Procedure to Obtain Affidavits.* — In the states where the compelling of such affidavits is authorized, it is held that the application for an order compelling the making of such an affidavit or *ex parte* deposition should show the precedent facts under which the proceeding is allowable, such as the pendency of a motion, proceeding or suit; the fact of the unwilling affiant having knowledge of matters which are necessary at the hearing of the proposed motion or proceeding, and his unwillingness to make an affidavit to such facts.<sup>8</sup>

purpose of a motion, the affidavit of any person whose affidavit is needed, but who refuses to make it. See also *Cockey v. Hurd*, 45 How. Pr. (N. Y.) 70.

**Compelling Affidavit of Unwilling Affiant.** — In *State v. Seaton*, 61 Iowa 563, 16 N. W. 736, it was held that a person subpoenaed to appear before a justice of the peace to make an affidavit pursuant to §§ 3,692 and 3,693 of the code must obey the subpoena and give his affidavit or be committed for contempt, notwithstanding the affidavit desired may be of no use as evidence in the case in and of which it is sought, since the justice has full power to pass on the question of the legality and propriety of the affidavit sought. See also to the same effect *Robb v. McDonald*, 29 Iowa 330, 4 Am. Rep. 211; *Dudley v. McCord*, 65 Iowa 671, 22 N. W. 920.

**On Motion for New Trial.** — In *Huston v. Vail*, 51 Ind. 299, the court in passing on the question of compelling a refractory person to make an affidavit as to facts within his knowledge, said: "The court has the same power over an affiant to compel his attendance and require him to make his affidavit, as it has to compel the attendance of a witness in a case, and require him to testify orally. The power of a court cannot be frustrated, nor the ends of justice fritted away, by a stubborn witness or by the misconduct of a party." Citing *Rater v. State*, 49 Ind. 507.

**8. General Proof Required to Obtain Order.** — In *Moses v. Banker*, 34 How. Pr. (N. Y.) 212, the court said: "It is usual to take the affidavit of the attorney applying for the order, as competent and sufficient proof of these matters. But if, on the face of such affidavit, it appeared

either that there was no intention of making or opposing a motion, or that the deposition desired was not necessary, or that the court had no power to order the party whose deposition was desired, to make it, then without doubt the court would be bound to refuse the order. Thus, if such affidavit showed that the motion intended was merely to make an answer more definite and certain, as such motion is to be determined on the pleadings alone, no deposition of a witness could possibly be necessary; or if it appeared by such affidavit that the person whose deposition was required was incompetent, the court would have no authority, under section 401, to authorize his examination; or if, although the attorney in such affidavit swears generally that he intends to make a motion, and that he desires the deposition of a particular person for such motion, it yet appears from other facts set forth in his affidavit that his real object is, under the guise of a motion, to obtain an examination which he otherwise could not get; in all these cases, and perhaps others which do not now occur to me, the court would be bound to refuse the order."

**Requirements of Application.** — In *Erie R. Co. v. Gould*, 14 Abb. Pr. (N. S.) (N. Y.) 279, it was said: "When application is made under this subdivision of section 401, for an order, the papers on which it is applied for should show that the party making the application intends to make or oppose a motion; also that it is necessary for such purpose for him to have the affidavit of some person whom he shall name; and, also, that such person *has refused* to make the affidavit. It is manifest that the party to the action who makes application should know or be

c. *What Facts May Be Shown by the Affidavit.* — The affidavit is limited to the facts necessary to sustain or oppose the proposed motion and cannot be used for the purposes of a "fishing" examination.<sup>9</sup>

4. *What Testimony Is Compellable.* — A. IN GENERAL. — a. *When Before the Court.* — A witness may be compelled to answer any lawful<sup>10</sup> question which it is not his personal privilege to refuse

advised what sort of an affidavit is necessary, and that it can be made by the person he names; and it is also apparent that before such person can refuse to make it, the same should be drawn and presented to him with a request that he should sign and swear to it, unless, on being applied to, he refuses to make any affidavit at all."

See also *Fisk v. Chicago, R. I. & P. R. Co.*, 3 Abb. Pr. (N. S.) (N. Y.) 430, where the preliminary showing necessary to compel such affidavits is set out in detail with the reasons therefor; and also see *Cockey v. Hurd*, 45 How. Pr. (N. Y.) 70.

**Does Not Apply to "Parties" to Action.** — In *King v. Leighton*, 58 N. Y. 383, the court, in construing the New York statute authorizing the compelling of affidavits for use on motions, held that it did not apply to parties to the action.

**Must Show Affiant's Knowledge.** In *Pierie v. Berg*, 7 S. D. 578, 64 N. W. 1,130, in construing a statute similar to the New York statute, it was held that it must be shown that the proposed affiants were in possession of material facts, since a "fishing" examination is not allowable.

**Must Show Pendency of Action.** In *Chambers v. Oehler*, 107 Iowa 155, 77 N. W. 853, it was held that an affidavit by the claim agent of a railroad, filed with a justice of the peace, stating that the company had a claim whereby it was necessary to have papers served on the 4th of July to get service on defendant in an action named, is not sufficient to authorize the issuance of a subpoena for an affiant under the Iowa statute authorizing the compelling of affidavits from unwilling affiants.

9. *What May Be Required in Such Affidavit.* — The court in *Erie*

*R. Co. v. Gould*, 14 Abb. Pr. (N. S.) (N. Y.) 279, said: "It is true that when the person whose affidavit is sought attends before the referee and is informed of the particular matter as to which he is requested to make a deposition, there is no objection to that form of proceeding, and his statements may be taken down and sworn to in the form of a narrative deposition, or of questions and answers; but as the proceeding is not an ordinary examination of a witness, and as no cross-examination is permissible, it does not seem proper that one of the parties to the action should go into a general examination before the referee, and thus be permitted to procure *ex parte* testimony freed from the tests and explanations of a cross-examination. He is not there for such purpose, but only to obtain an affidavit to be used on a motion, and the affidavit should be limited to the subject of the motion."

10. *Samuel v. People*, 164 Ill. 379, 45 N. E. 728; *Holman v. Austin (City)*, 34 Tex. 668.

**What Constitutes Lawful Question.** — In *Ex parte McKee*, 18 Mo. 599, the court, in defining what constitutes a lawful question an answer to which may be compelled, said: "It is sufficient to say in general terms that so far as the witness himself is concerned, he may lawfully be required to answer any questions which it is not his personal privilege to refuse to answer." And that as all evidence is not privileged, the witness may be required to give it, "even though it may not prove to be relevant or competent in the particular cause in which it is sought to be obtained. The objection to the relevancy or competency of evidence is for the parties litigant to make and not for the witness."

to answer, provided that it is material to the issue,<sup>11</sup> and is in all

11. *Ex parte Zeehandelaar*, 71 Cal. 238, 12 Pac. 259; *Ex parte McKee*, 18 Mo. 599; *In re Morton*, 10 Mich. 208; *In re MacKnight*, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451; *Clapp v. Lathrop*, 23 How. Pr. (N. Y.) 423; *La Fontaine v. Southern Underwriters' Ass'n*, 83 N. C. 132; *Stuart v. Allen*, 45 Wis. 158.

**Question Must Be Material to the Issue.**—*In re Odell*, 6 Dem. Sur. (N. Y.) 344, "The question, which the witness refused to answer, was the following: 'Please look at the paper which I now show you, the first entries of which are under date February 14th, 1882, and say whether it is a copy of your account with the Pacific Bank of this city.' To this question counsel for the executrix objected, whereupon counsel for the contestant stated, as appears by the stenographer's minutes, that he wished an answer to the question 'for the purpose of laying a foundation for attempting to prove that a portion of the rents of Lawrence Odell's' (i. e., the decedent's) 'property went into the private account of Mary J. Odell'—meaning Mary J. Odell, the witness, who is also the executrix of the estate. It appears that the decedent died in March, 1886. Whether, during the four years next preceding his death, the executrix had or had not collected moneys belonging to him is not material to any issue properly raised by the account and the objections thereto."

**Witness Cannot Refuse to Answer on Ground of Immateriality.**—*In Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577. 74 Am. St. Rep. 189, the court held that a witness cannot base his refusal to answer a question on the ground of its being immaterial, where it does not involve self-crimination, or privileged communication, but the witnesses thus refusing were not compelled to do so in the case at bar, the only effect having been that their refusal to testify was considered in the same light as any other refusal to produce evidence within

the power of the party calling the witness.

**Compelling Corporation Secretary to Testify to Profits Earned.**—*In re Dittman*, 65 App. Div. 343, 72 N. Y. Supp. 886, which arose out of a suit in New Jersey, by holders of preferred stock of the Kentucky Distilleries and Warehouse Company for a dissolution of the company, and the winding up of its affairs for the benefit of its creditors, the complaint showed that the Distilling Company of America, having become the owner of about ninety per cent. of the capital stock of the aforesaid Kentucky company, and about the same proportion of the capital stock of various other distilling companies, has combined the business of each of said corporations with its own, and having named the directors and officers of the Kentucky company, so manages and controls its business and disposes of its profits and incumbers its property as to benefit itself to the detriment of the Kentucky company, and that, in point of fact, the directors of the Kentucky company are its agents and servants, and that such diversion of profits and business has rendered the stock of the Kentucky company unmarketable and valueless. The secretary of both companies had an office in New York and had the books of the companies there. The appellate court held that the secretary could be compelled to testify as to the profits earned by the Kentucky company, since the books of account of the company were merely declarations in its favor, and would not be admissible against the plaintiff in this action.

**Compelling Publisher to Testify in Criminal Cases as to Writer of Libelous Article.**—*In Pledger v. State*, 77 Ga. 242, 3 S. E. 320, which was a prosecution for criminal libel against the writer of the libelous article, the court in reviewing the punishment of the proprietor or publisher of the newspaper containing the defamatory matter for refusing to testify in the case, said that he "was a competent witness, and

respects proper,<sup>12</sup> and provided that the court has jurisdiction of the proceeding in which the witness is being examined,<sup>13</sup> and provided that the answer to the question is not exempt on the ground of personal privilege,<sup>14</sup> or as a privileged communication.<sup>15</sup> Where the witness is interrogated in regard to a

if he refused to testify in the case, or to give up the real name of the author of the publication, then he was to be considered the author himself, and was liable to indictment and punishment as such, and might, moreover, be punished for contempt of the court, as any other witness refusing to testify. Code, § 4,522. The court was fully authorized, therefore, to fine and imprison him for his contumacy in refusing to testify against Pledger [the party on trial.]. The fact that he had been indicted for the same offense was not available to shield him from the consequences of disobedience to the precept under which he was brought into court, nor is it to be presumed that he would have been compelled in his testimony to depose to any fact tending to criminate himself. He might have declined to answer any question having such a tendency, and he would have been protected had he insisted upon such a right. He did not wait for an opportunity to make the question; and that he would have had accorded to him every privilege to which he was entitled, we entertain not the slightest doubt. He made no such question, and consequently it was not passed upon by the presiding judge; but apprehending in advance that he might be placed in a perilous position, he refused stubbornly, before the exigency had arisen, to testify at all. He surely merited the punishment he received."

12. *Bradley v. Veazie*, 47 Me. 85; *Clark v. Brooks*, 26 How. Pr. (N. Y.) 254.

**Rule Stated.**—In *Ex parte McKee*, 18 Mo. 599, it was held that a witness could be compelled to give any testimony which was not exempt on the ground of privilege, no matter whether it was relevant or competent, since the relevancy or competency was a question solely for the parties litigant.

**A Proper Question** is said to be any question which a witness may be legally compelled to answer. *In re Clark*, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242.

13. *Ellison v. State*, 125 Ind. 492, 24 N. E. 739; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502; *In re Morton*, 10 Mich. 208; *People v. Cassels*, 5 Hill (N. Y.) 164; *In re Bradner*, 87 N. Y. 171; *Holman v. Austin (City)*, 34 Tex. 668.

**Illustrations.**—Justice of peace having no jurisdiction to try principal case, cannot punish party for refusing to testify therein. *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438.

**Effect of Removal of Cause to Federal Court.**—In *Ex parte Fisk*, 113 U. S. 713, a suit was commenced in the supreme court of New York. During its pendency and before trial, an order was made pursuant to the New York statute for the examination of one of the parties. Pending one of the adjournments of such examination, the case was removed to the circuit court of the United States. Although the practice in regard to such examinations in the federal courts was different to that in the state court, the circuit court ordered the examination to be continued before a master. The party on such further examination refused to be sworn and declined to testify, and was thereafter committed for contempt. The United States supreme court on *habeas corpus* held that on removal of the cause to the federal court, the federal laws became applicable to the case, and hence that the federal court had no power to compel the party to submit to the examination thus prescribed by the New York state laws.

14. *Ex parte Senior*, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133.

15. See article "PRIVILEGED COMMUNICATIONS."

matter which is not pertinent to the issues in the case, the court cannot compel the witness to answer, since in doing so it would be acting without jurisdiction.<sup>16</sup>

b. *When Before the Grand Jury.* — The grand jury being considered an adjunct of the court, the same rules apply as to what evi-

**16. Where Question Not Pertinent Court Is Without Jurisdiction.** In *Ex parte Zeelandelaar*, 71 Cal. 238, 12 Pac. 259, the court said: "A witness must answer questions legal and pertinent to the matter in issue." (Code Civ. Proc., § 2,065.) It is his right 'to be examined only as to matters legal and pertinent to the issue.' (*Id.* § 2,066.) Such being his right, we think it follows that the refusal to answer a question not pertinent to the issue was no contempt, and that the order adjudging him guilty of a contempt which fails to show that the question was pertinent to the issue is invalid. Conceding, as we do, that the court had jurisdiction of the action on trial, we cannot concede its power to inquire into matters outside of the issues therein. It had the power to order questions pertinent to the issues to be answered, but it had not the power to order questions not pertinent thereto to be answered. As to matters not in issue it had no jurisdiction."

**Refusal to Answer Improper Questions No Contempt.** — In *Holman v. Austin (City)*, 34 Tex. 668, it was said: "If the question be 'improper'; if the court interrogate a witness about a matter over which it has no jurisdiction, and about which it has no right to inquire, the refusal of the witness to answer the interrogatory is no contempt of court, and any order or decision which punishes the refusal to answer as a contempt, is void."

**Seeking Editor's Informant in Contempt Proceedings Against Editor.** — In *re MacKnight*, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451, the publisher of a newspaper article purporting to be statements of unknown third persons, to the effect that the public and the judge of a certain county, wherein a will contest was pending, were prejudiced,

on being cited for contempt for its publication, he admitted the publication as charged, but on being asked to give the names of the persons making the comments set forth in the article, he refused to do so; whereupon he was adjudged in contempt for such refusal. The appellate court, in holding that he had a right to refuse to give the names of such persons, said: "What fact there was in the charge not admitted, or what relevancy there was in the questions which the prisoner refused to answer, the counsel who acted as *amicus curiae* was unable to explain, and we have been unable to ascertain. It is provided in §§ 659 and 660 of the Code of Civil Procedure, that witnesses shall answer questions *legal and pertinent to the matter in issue*. They are not bound to answer questions irrelevant to the issue." (*Ex parte Zeelandelaar*, 71 Cal. 238.)

After the prisoner had admitted the facts set forth in the charge as constituting a contempt, if, then, an inquiry as to the facts outside of that charge was necessary to establish contempt, it follows that no contempt was charged in the proceeding. But suppose the prisoner had answered the question put to him, and said that A made the remarks about the "political situation in Silver Bow county." Would the offense charged, to-wit: the publication of said remarks, have been any more certain, or would the gravity of the offense have been any greater or less than it would have been if B had made those remarks? Suppose, again, the prisoner had answered that A made the remarks, and A had been called and questioned, and said that he got the idea from B; and B had been sent for, and testified that he got the matter from C, and so on *ad infinitum*. How much would this have added to or subtracted from the offense charged against MacKnight, and the punishment due therefor?"



dence may be compelled before it as apply to the court.<sup>17</sup>

c. *When Before Legislative or Similar Body.*—The same general rules are applicable to investigations before legislative and inquisitorial bodies as are applicable to hearings before a court,<sup>18</sup>

**17. Fact That Imprisoned Witness Not Subpoenaed No Excuse for Refusal.**—A witness who is imprisoned under a criminal charge, or sentence, cannot base his refusal to testify before the grand jury concerning his knowledge of gaming, on the mere ground that he has not been summoned by subpoena, where he was brought before the grand jury at their request by order of the court. *Newsom v. State*, 78 Ala. 407.

**Compelling Publisher to Disclose Writer of Libelous Article to Grand Jury.**—*People v. Fancher*, 2 Hun (N. Y.) 226.

**18. Inquisitorial Bodies.**—In *In re Camp*, 7 N. D. 69, 72 N. W. 912, a citizen who did not come within the scope of an examination into state institutions authorized to be made by the state examiner pursuant to a statute which specifically set forth his duties, was committed by the court for refusing to obey the examiner's subpoena and the order of the court, directing him to testify, but the appellate court reversed the commitment on the ground that the examiner acted without authority of law.

**Investigations Before Legislative Bodies.**—Where the body conducting an investigation has no lawful authority to require the witness to testify, he cannot be compelled to testify. *Kilbourn v. Thompson*, 103 U. S. 168.

In *People v. Keeler*, 99 N. Y. 463, 2 N. E. 615, 52 Am. Rep. 60, it was said: "An investigation instituted for the mere sake of investigation, or for political purposes, not connected with intended legislation, or with any of the other matters upon which the house could act, but merely intended to subject a party or body investigated to public animadversion, or to vindicate him or it from unjust aspersions, where the legislature had no power to put him or it on trial for the supposed offenses, and no legislation was contemplated, but the proceeding must

necessarily end with the investigation, would not, in our judgment, be a legislative proceeding, or give to either house jurisdiction to compel the attendance of witnesses or punish them for refusing to attend."

**Extent of Legislative Inquiries.** In *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676, it was said: "The house of representatives has many duties to perform, which necessarily require it to receive evidence and examine witnesses. It is the grand inquest for the commonwealth, and as such has power to inquire into the official conduct of all officers of the commonwealth, in order to impeachment. It may inquire into the doings of corporations, which are subject to the control of the legislature, with a view to modify or repeal their charters. It is the judge of the election and qualification of its members. It has power to decide upon the expulsion of its members. It has often occasion to acquire a certain knowledge of facts, in order to the proper performance of legislative duties. We therefore think it clear that it has the constitutional right to take evidence, to summon witnesses, and to compel them to attend and to testify. This power to summon and examine witnesses it may exercise by means of committees."

**Compelling Editor to Give Name of Informant.**—*Ex parte Lawrence*, 116 Cal. 298, 48 Pac. 124.

*Ex parte McCarthy*, 29 Cal. 395, was a case with almost identical facts, and the court on *habeas corpus* also remanded the petitioner. The *Lawrence Case*, 116 Cal. 298, 48 Pac. 124, was subsequently brought up in the federal court on *habeas corpus* on the ground that the petitioner was deprived of constitutional rights by the decision of the state court, but the federal court refused to review the merits of the question and discharged the writ on the ground that the state court had concurrent jurisdiction

with the limitations, of course, that the questions asked are within the scope of the investigation which is being conducted.<sup>19</sup>

d. *When Testifying at Preliminary, Supplementary or Similar Examination.*—And the same general rules, subject, of course, to the same limitations, are applicable to preliminary,<sup>20</sup> as well as

with the federal court of the constitutional questions involved, and hence remanded the petitioner. See *In re Lawrence*, 80 Fed. 99.

**What Constitutes Material Issue in Legislative Investigation.**—In *Ex parte McCarthy*, 29 Cal. 395, the court said that a good test as to whether the issue before a legislative investigation was material, would be whether a witness testifying falsely in regard to it would have been guilty of perjury. And continuing the discussion it said: "The matter contained in the resolution of Senator Porter was before the senate, and the question or point in issue was whether the charges therein contained were true, and, if true, who were the guilty senators. That all this amounted to an issue within the meaning of the statute against perjury, may be illustrated by a reference to proceedings pending before a grand jury, between which and those under review there is, in our judgment, a perfect analogy."

In *In re Falvey*, 7 Wis. 630, it was held that the legislature could institute an investigation into the truth of an alleged bribery of any of its members or of members of a previous legislature, in regard to the disposal at a previous session of lands granted by congress to the state to aid in the construction of certain railroads, and of bribery on their part in suppressing an investigation as to fraudulent acts of certain railroads in connection with such lands, since such an investigation "might be demanded not only as eminently proper, but as absolutely called for to preserve the good faith and honor of the state."

**19. Question Must Be Within Scope of Investigation.**—In *In re Cole*, 16 Misc. 134, 38 N. Y. Supp. 955, it was held that under a resolution of a common council of a city appointing a committee to "look over all bills from the city surveyor's department, the police and fire board, charity board, school board, city court

and all departments, pertaining to the city," and which empowered the committee "to send for persons and papers and employ counsel and experts," that a witness subpoenaed before it could not be committed for refusing to answer questions as to whether faro tables or roulette wheels were in operation or whether unlicensed saloons were being run in the city, since such questions were beyond the scope of the investigation.

**Scope of Investigation by Board of Supervisors.**—An investigation as to who are railroad commissioners of a certain town for the purpose of enabling the supervisor of the town to determine to whom he should pay certain moneys, is not within the jurisdiction of the board of supervisors, and hence disobedience of their subpoena is not a contempt. *Faulkner v. Morey*, 22 Hun (N. Y.) 379. And see *In re Bradner*, 87 N. Y. 171, to same effect.

**Extent of Investigation to Be Determined by Body Itself.**—In *In re Falvey*, 7 Wis. 630, it was said: "The policy, the expediency of exercising the power, and the manner of conducting the investigation, rest, in my judgment, entirely in the sound discretion of the legislature. For if the legislature have the power to investigate at all, it has the power of choosing how the investigation shall be had; whether by a committee of one house, or by a committee of each house, acting separately, or by committees acting jointly."

**Assertion of Purpose of Legislative Investigation in Resolution Not Conclusive.**—*People v. Webb*, 23 N. Y. St. 324, 5 N. Y. Supp. 855.

**20. Want of Jurisdiction of United States Commissioner.**—In *Ex parte Perkins*, 29 Fed. 900, it was held that the United States Commissioner had no jurisdiction to commit a witness who refused to testify on an examination brought before him upon an affidavit alleging facts which are claimed to constitute an offense

supplementary<sup>21</sup> or similar<sup>22</sup> examinations.

against the election laws of the United States, but which in fact do not.

**21. Immaterial Whether Subpoenaed When Present.**—A witness appearing and being examined in supplementary proceedings, is bound to answer proper questions whether he has been subpoenaed or not. *People v. Marston*, 18 Abb. Pr. (N. Y.) 257.

**Fact That Referee Is Hostile Is No Excuse for Not Testifying.**—In *Tremain v. Richardson*, 68 N. Y. 617, which was a supplementary proceeding before a referee, the fact that the referee was the bitter enemy of the judgment debtor was held no excuse for the debtor refusing to testify, although the judge making the order had told him to present his objections in that respect to the referee, since he should have applied to the court for a change of referees.

**Extent of Examination in Supplementary Proceedings.**—In *People v. Marston*, 18 Abb. Pr. (N. Y.) 257, it was held that where the judgment debtor was shown to have been a member of a firm, his co-partner on examination in supplementary proceedings could be compelled to state amount received by the judgment debtor from the business, and whether the books of the company were within the control of the witness.

In *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493, the New York statute in regard to supplementary proceedings was thoroughly discussed and construed. The court said: "There is no severity or hardship in the law which requires an honest debtor to make a full disclosure to his creditor as to his property, and how it is situated, and an examination which seeks that in behalf of an honest creditor should not be characterized as a fishing excursion. So again, an honest purchaser or other transferee of the debtor's property should not be at all reluctant to explain to a creditor his purchase, and the circumstances of the transfer, as he will thereby, very likely, remove the suspicion of dishonesty, if any exist. The cred-

itor has a right to be informed fully in regard to his debtor's property, and he ought not to be regarded as meddlesome or impertinent in seeking honestly for such information, and there is no doubt in my mind but this 292d section of the code secures this right fully to the creditor, and that he may inquire into any recent transfers of property, both from an examination of the defendant himself, and any party to the transaction or other witnesses."

In *State v. Barclay*, 86 Mo. 55, it was said: "The evident purpose of this whole examination is to determine whether the debtor has property which may be taken in execution. In determining this question the court has a right to be informed, not only that there is property, but where it is and in whose possession it is, and the terms upon which it is held. *Lathrop v. Clapp*, 40 N. Y. 330. Nor does the fact that the relator disclosed real estate in different counties from that where the judgment was entered put an end to all further inquiry. The creditor, it is true, may have executions to different counties, but he is not bound to take them out. If the lands were in the same county it would be the duty of the officer having the execution, to determine, in the first instance, whether the property which the creditor elected to have sold was sufficient. The execution having been returned unsatisfied, the court had the right to make a full and complete inquiry with respect to the debtor's means to discharge the judgment. It was not bound to stop when the creditor thought he had disclosed sufficient property. The creditor had the power to stop the investigation by paying the debt."

**22. Objections to Attendance May Be Waived.**—In *State v. Barclay*, 86 Mo. 55, it was held that it was no defense to contempt proceedings for refusal to answer questions at an examination to discover property, that the debtor was a grand juror at the time of his examination where he appeared at the examination and

e. *When Testifying by Deposition.* — And the same may be said as to witnesses testifying by deposition,<sup>23</sup> save that such witnesses cannot be compelled to answer where the purpose of the deposition is merely to ascertain what his testimony will be, with no purpose of using it on the trial,<sup>24</sup> or where the information sought is im-

based his refusal to answer on other grounds.

**Witness on Discovery Examination Must Testify to His "Belief."** — In *Huguley v. Holstein*, 35 Ga. 271, it was said: "It is a rule of equity pleadings that a defendant, when called on to discover what facts he may know in favor of complainant, must answer 'according to the best and utmost of his knowledge, recollection, information and belief.' " 2 Dan. Ch. Pr. 246 and 256. *Pitts v. Hooper*, 16 Ga. R. 445. The reason is, that if a party believes a fact against his interest, the court and jury may believe it, too. We think the same reason applies in a case where a party is introduced as a witness by his adversary — especially in a case where his memory is so indistinct as in this case."

**Corporation Officer Must Disclose Corporation's Property.** — In *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490, it was said: "There can be no doubt that the property of a private corporation is liable for its debts, and that whether such property is found in the hands of its president or any other person. The possession is immaterial so far as the liability is concerned, for neither the president nor any other officer of the corporation has any right to withhold its property when required to answer the just debts of the corporation."

**23. Officer Taking Deposition Must Have Jurisdiction.** — In examination *de bene esse* before United States commission in suit pending in another district, commission must have jurisdiction to compel answer of witness. *Ex parte Peck*, 3 Blatchf. 113, 19 Fed. Cas. No. 10,885.

**Commitment for Contempt** in refusing to testify before a notary public who has no power to take testimony, is void. *In re Nitsche*, 14 Mo. App. 213; *Burt v. Pyle*, 89 Ind. 398.

**Questions Must Be Pertinent.** — A notary public has power to commit a witness for contempt for refusing to answer questions pertinent to the issue in a case where he is properly taking depositions. *Burnside v. Dewstoe*, 15 Wkly. L. B. (Ohio) 197.

Where an examiner's duties were restricted to taking testimony as to the validity of a sheriff's sale, a witness cannot be committed for refusing to answer questions relating to matters of account. *Laughlin v. Maybin*, 15 Phila. (Pa.) 95.

**Comity Applies to Taking of Deposition.** — On the principle of comity, the courts of the state where a deposition is taken to be used in another state, will exercise their authority, when appropriately invoked, to secure competent testimony, and will assist an officer within their jurisdiction to obtain answers to competent questions. *Keller v. Goodrich Co.*, 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

**24. "Fishing" Examinations Are Prohibited.** — *In re Davis*, 38 Kan. 408, 16 Pac. 790; *In re Pfirman*, 1 Ohio Dec. 180.

**Rule in Federal Courts Before Issue.** — Under court rule 18, a witness in an equity case cannot be compelled to give his deposition before the case is at issue. *Flower v. MacGinniss*, 112 Fed. 377.

But see *In re Merkle*, 40 Kan. 27, 19 Pac. 401, for an instance where the taking of the deposition of a witness, who was not a party, was held allowable although it was in the nature of fishing for evidence of the fraud alleged in the petition.

Under the Vermont statute the deposition of a party to the action may be taken in the same manner as an ordinary witness, regardless of whether the motion of the moving party be proper or improper. *In re Turner*, 71 Vt. 382, 45 Atl. 754.

material.<sup>25</sup>

**B. RIGHT OF WITNESS TO AID OF ATTORNEY.** — A witness is not entitled, as a strict matter of right, to the aid of counsel while being examined before a court or inquisitorial body,<sup>26</sup> and it has been held that the advice of counsel is no excuse for refusing to answer a question,<sup>27</sup> though it has also been held, where the refusal is made in good faith on advice of counsel, that it is proper to allow the witness an additional opportunity to answer before committing him.<sup>28</sup>

**C. LIABILITY OF PERSON OR ATTORNEY ADVISING WITNESS NOT TO ANSWER.** — The general rule is that an attorney may advise his client to do acts which make the client guilty of a contempt, without himself becoming guilty of a contempt, where he acts in good faith with a view to serving the best interests of his client and not with an intent to treat the court disrespectfully or oust it of its lawful jurisdiction,<sup>29</sup> but no general rule can be stated as to his right to advise a mere witness not to testify, although it has been held in a case in the surrogate court of New York that the act of an attorney in advising a witness, who claimed to be his client, to retire and not to testify was an obstruction of the course of justice amounting to a contempt.<sup>30</sup>

**25. Deposition Testimony Must Be Material in Order to Be Compelled.** — *Ladenburg, Thalman & Co. v. Pennsylvania R. Co.*, 66 N. J. L. 187, 48 Atl. 533.

In *Ex parte Jennings*, 60 Ohio St. 319, 54 N. E. 262, 71 Am. St. Rep. 720, which was a proceeding for the taking of a deposition, the court held that a witness could not be compelled to testify to facts irrelevant to the issues in the case, if the disclosures of such irrelevant facts would be injurious to the business of the witness.

**26. Right of Witness to Aid of Counsel.** — In *Reynolds v. Parks*, 2 Dem. Sur. (N. Y.) 399, it was held that a witness attending before a referee for the purpose of giving his deposition was not entitled to the assistance of counsel.

**Right of Witness Before Legislature to Aid of Counsel.** — *Ex parte McCarthy*, 29 Cal. 395.

See also the case of *Brass Crosby's Case*, 3 Wils. (Eng.) 198; *Ex parte Kearney*, 7 Wheat. (U. S.) 38.

**27. Advice of Counsel Not to Answer No Excuse.** — The right to refuse to answer questions rests with

the witness alone, and he exercises it at his personal peril, hence it is no excuse that counsel present during the examination advises him not to answer. *Heerdt v. Wetmore*, 2 Rob. (N. Y.) 697.

Where witness before a legislative investigating committee upon advice of his counsel refuses to answer a question and retires, he is in contempt regardless of the materiality of the question. *People v. Keeler*, 99 N. Y. 463, 2 N. E. 615, 52 Am. Rep. 60.

**28. Practice Where Refusal to Answer Is Based on Advice of Counsel.** — *Clark v. Brooks*, 26 How. Pr. (N. Y.) 254.

**29.** *Ingle v. State*, 8 Blackf. (Ind.) 574; *Wells v. Com.*, 21 Gratt. (Va.) 500; *Powell v. Schenck*, 6 App. Div. 130, 39 N. Y. Supp. 877; *Anderson v. Comptois*, 109 Fed. 971.

**30. Liability of Attorney Advising Witness to Refuse to Testify.** In *Reynolds v. Parks*, 2 Dem. Sur. (N. Y.) 399, a witness, who appeared and was sworn before a referee for the purpose of giving his deposition, was accompanied by his attorney, who claimed to have the

D. WHAT CONSTITUTES REFUSAL TO TESTIFY. — A prevarication or an evasive answer on the part of a witness is considered equivalent to a refusal of the witness to testify.<sup>31</sup>

E. MANNER OF CONDUCTING EXAMINATION OF THE WITNESS. It is immaterial whether the examination of the witness is conducted by the court or by counsel,<sup>32</sup> but questions must be propounded to the witness,<sup>33</sup> and he must be commanded by the court to answer

right to be present in the capacity of a spectator, and also as an attorney for the witness, and one of the parties to the proceeding. The referee denied his right to be present in any capacity, and held that the witness must make his deposition without the aid of counsel. Thereupon the attorney advised the witness to retire with him from the office of the referee in spite of a direction of the referee for the witness to remain. The surrogate court, upon application to punish the attorney for contempt, held that his conduct "in advising the witness to leave the presence of the referee, and to refuse to give his testimony, was calculated to impede the due course of justice, and was in contempt of the authority of this court."

See notes *supra*, to the effect that the witness has no strict right to the aid of counsel.

**Person Inducing Witness to Absent Himself Is in Contempt.** — The case of *Montgomery v. Muskegon Booming Co.*, 104 Mich. 411, 62 N. W. 561, is an instance where a person was convicted of contempt in that he had induced a witness to absent himself from the trial, although the witness had not been subpoenaed.

See also *Com. v. Willard*, 22 Pick. (Mass.) 476, where the authorities were reviewed as to the common law liability of a person who counsels or advises the commission of a crime.

**31. Prevarication or Evasive Answers Are Equivalent to Refusal to Testify.** — In *Berkson v. People*, 154 Ill. 81, 39 N. E. 1,079, a judgment debtor who was ordered to appear before a master and submit to an examination, as the master should direct, in relation to his business and property and the situation and disposition thereof, was committed to

jail for contempt in that he had contumaciously refused to testify honestly, fairly and truthfully in relation to the disposition and existence of his property.

So also *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1,065, 64 N. W. 299, in a similar proceeding, the court in holding that it had a right not to be deceived by untruthful statements or to be satisfied by evasive or prevaricating answers of a witness, said: "Prevarication by a witness has the same effect upon the administration of justice as a refusal to answer. To the same effect it puts the witness in the position of standing out against the authority of the court, and thwarts the court in its effort and purpose of doing justice between the parties. It is contumacy. It is direct contempt of the authority of the court." And, continuing, the court said: "Whether the petitioner's answers were untruthful, evasive, or prevaricating, so as in effect to amount to a refusal to answer and to give the discovery called for; or whether it was fairly within his ability to make the discovery required of him; whether his conduct was innocent or contumacious — were questions which the exigency of the case required the circuit court to determine. The power to determine is jurisdiction. The correctness or justice of the determination of these questions by the circuit court is not open for consideration here. That determination is conclusive in this proceeding." Citing *State v. Sloan*, 65 Wis. 647, 27 N. W. 616; *People v. Liscomb*, 60 N. Y. 559.

**32.** *Clark v. Brooks*, 26 How. Pr. (N. Y.) 254.

**33. Some Question Must Be Propounded.** — It was held in *Briggs v. Matsell*, 2 Abb. Pr. (N. Y.) 156, it must be shown that some question

them,<sup>34</sup> unless he waives such commands by his refusal before being commanded.<sup>35</sup> But oral commands by the court, or officer conducting the examination, are sufficient, no matter what character of investigation is being conducted.<sup>36</sup> And it has also been held that a witness cannot be compelled to refresh his memory by an outside examination of books or papers not before the court,<sup>37</sup> and that a witness testifying by deposition may refuse to sign an inaccurate

was asked the witness, a general declination to answer any question not being sufficient.

**34. Witness Must Have Been Commanded to Answer.**—In *Burnside v. Dewstoe*, 15 Wkly. L. B. (Ohio) 197, which was a proceeding in the court of common pleas, it was held that in proceedings for the taking of a deposition before a notary public, the mere putting of a question to the witness by the attorney for the party taking the deposition and a failure to answer at the request of the attorney, the notary making no command, request or order to the witness, was insufficient to constitute a contempt on the part of the witness, and hence a commitment therefor was illegal.

**Master Must Rule on Propriety of Question.**—An attachment cannot be issued against a witness for refusing to answer a question put to him on a reference unless the master has decided it to be proper. *Fobes v. Meeker*, 3 Edw. Ch. (N. Y.) 452.

**Examiner Cannot Rule on Admissibility.**—An examiner in an action for infringement of a patent has no power to rule upon the admissibility of testimony, hence the defendant as a witness has a right to apply to the court to pass on the question of admissibility before being compelled to testify. *Roberts v. Walley*, 14 Fed. 167.

**35. But Such Command May Be Waived.**—It is not necessary in order to commit a contumacious witness that he should have been specifically directed by the court to answer some particular question addressed to him, where the object of the refusal was to test the power of the court, and counsel in open court advised the witness to refuse to answer. *Clark v. Brooks*, 26 How. Pr. (N. Y.) 254.

**36. Oral Directions to Judgment**

**Debtor in Discovery Proceedings.**

In *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1,065, 64 N. W. 299, it was held that whether the rulings of the court directing a judgment debtor to make truthful answers as to the whereabouts of his property were considered as oral directions simply, was immaterial since he was bound to obey the oral directions of the court touching the discovery, during its progress, made in open court, when he was present. A refusal to do so was held to be a direct contempt of the authority of the court.

**Practice in Supplementary Proceedings.**—Judgment debtor in supplementary proceedings may be punished for refusing to answer a question in accordance with the oral direction of the referee without having a written order of the referee served on him. *Kendrick v. Waddall*, 88 Hun 518, 34 N. Y. Supp. 976.

**37. Witness Cannot Be Compelled to Refresh His Memory.**—In *In re Dittman*, 65 App. Div. 343, 72 N. Y. Supp. 886, the court said: "As to all of the other questions propounded to the witness, their substantial character was a mere question as to whether the witness would make an examination of the books, and refresh his recollection so as to enable him to answer the questions propounded, of which he had no recollection, except as shown by the books. The witness, by the practical direction of his counsel, refused to make any promise that he would examine the books, or to answer upon that subject. For all practical purposes, therefore, it is clearly apparent that the testimony sought to be elicited was a statement of what the books contained. We know of no power residing in the court to compel a witness to make an outside examination of books and papers not before the court. The witness

transcript of his testimony;<sup>38</sup> likewise that the grand jury when examining a witness need not inform him of his constitutional privilege of not incriminating himself.<sup>39</sup>

**F. PROCEDURE PRELIMINARY TO COMMITTING WITNESS.**—The committing of a recalcitrant witness being the exercise of an inherent power to elicit essential facts from a witness,<sup>40</sup> no evidence is necessary preliminary to committing him,<sup>41</sup> unless the refusal occurs before an adjunct of the court, which must report such refusal to the court for its action thereon, for in that event the court must be advised of all the facts which it would naturally know of its own judicial knowledge if the refusal had occurred in its own

was not commanded so to do by the subpoena which was served upon him. All which that required was that the witness should appear and testify to such facts as rested within his memory, and when that failed he could not be compelled or required to go to outside sources in order to aid his recollection. His full duty was discharged when he gave his recollection in answer to the questions. There was nothing, therefore, in this refusal which justified the order which was made. It is quite true that the witness is secretary of both companies, and had many of the books in his custody or under his control, and many of them were then in the same building in which the examination was being conducted; but they were not before the commissioner, and the witness was under no more obligation to subsequently make an examination of their contents to aid his memory than as though the books were elsewhere, and not under his control."

**38. Right to Refuse to Sign Inaccurate Deposition.**—In *In re Hafer*, 65 Ohio St. 170, 61 N. E. 702, it was held that a witness whose deposition has been taken before an officer by a stenographer and transcribed, cannot be committed for contempt for refusing to sign it, where he claims the transcript of it to be inaccurate, but is willing to sign it when the errors pointed out by him are corrected.

**39. State v. Comer**, 157 Ind. 611, 62 N. E. 452.

**40. Nature of Power Over Recalcitrant Witnesses.**—In *People v. Fancher*, 2 Hun (N. Y.) 226, the court in discussing the nature of the

power to commit a recalcitrant witness said: "Independent, then, of any statute authorizing the court of oyer and terminer to commit a witness for refusing to answer a proper question until answered, that court has ample power at common law to order such a commitment. Such a proceeding is not one to *punish* a party as for a contempt, but the exercise of a power necessarily conferred, to elicit truth, and to administer justice. It was not necessary to bring Mr. Shanks before the court and formally adjudge him to be guilty of a contempt; but, upon his refusal to answer the question which the court adjudged to be proper, it might, by simple rule, have ordered him to be confined until he should answer. After this step had been taken, the court had ample power to punish for the contempt of its lawful authority. The two proceedings are separate and distinct, and the exercise of the one in nowise conflicts with the exercise of the other."

**Deferential Refusal No Excuse.** In *Holman v. Austin (City)*, 34 Tex. 668, it was said: "The refusal of a witness to answer a legal and proper question is a decided contempt; and no matter in what respectful terms or deference of manner the refusal is made, he stands out against the authority of the court, and for that act he may be summarily dealt with by the court as for a contempt."

**41. No Evidence Necessary Before Committing Recalcitrant Witness.** In *re Clark*, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242, in discussing the nature of the right to commit recalcitrant, the court said: "It is true that the right to examine a witness and to



presence.<sup>42</sup> Where the refusal of the witness occurs before an adjunct of the court, and the proceedings against the witness are instituted by an order to show cause, and he shows cause by filing a

compel him to testify belongs to courts of justice, and is an essential part of a judicial proceeding. When he refuses to testify the judge may require him to answer or stand committed. There is no trial of such witness; he is not committed as a punishment, but to enforce a particular duty, and no evidence need in such case be taken."

**42. Procedure Where Occurring Before Grand Jury.**—In *U. S. v. Caton*, 1 Cranch C. C. 150, 25 Fed. Cas. No. 14,758, a witness who refused to answer certain questions before the grand jury and used insolent language toward them, was fined by the court after it had examined several of the grand jurors upon oath as to the facts.

In *People v. Kelly*, 24 N. Y. 74, which was a commitment for refusing to testify before the grand jury, the court said: "It is further urged on the part of the relator that the conviction is erroneous because it does not appear that the contempt was committed in the presence of the court, and that there was no proof by affidavit, as required by the statute. (2 R. S., p. 535. §§ 2, 3.) It appears by the record returned, that, the relator and the grand jury being present in open court, it was stated on the part of the jury that the relator had declined to answer the inquiry touching the disposition of certain moneys which had come to his hands—basing his refusal upon the constitutional provision. The question being thus presented for the determination of the court of sessions, it held that the constitutional provision did not apply, and the relator was thereupon directed to answer the interrogatory as required by the grand jury. It is not to be understood that the order was to proceed with the examination on the spot. What was said was for the purpose of settling the rights and duties of the witness and of the jury, when they should be again convened in the grand jury room. The witness might have postponed his election whether

he would obey or not, until the examination before the jury was resumed; but he chose, as was doubtless the most convenient course, to declare his determination at once. He thereby waived the formality of having the question repeated in the jury room, and the court was at liberty to act, as it did, upon that waiver. The refusal of the prisoner to give testimony in answer to the contested question was made in the face of the court. If such refusal was a contempt, such contempt was committed "in the immediate view and presence of the court;" and it was authorized by the statute to act without further evidence. But if it were necessary to proceed under the other branch of the statute, and to prove to the court the transaction before the grand jury, the conviction would not be even erroneous. The relator and the jury being present, the latter reported the particulars of the contumacy of the relator, including his reasons for refusing to answer. It does not appear that it was denied by him, or that he asked for time to refute what was alleged against him. On the contrary, when informed that it was his duty to answer, he, as the record states, still refused to answer. The whole of these proceedings assume that the statement of the jury was conceded by the witness to be a correct account of what had transpired up to that time. The appearance of the relator before the court must have been gratuitous; for there is no statement that any notice had been given or any process issued. His voluntary appearance and his persistence in the course which it was alleged he had taken before the grand jury were an implied admission of the facts, and a waiver of further time to defend himself. It is apparent that the question was presented in a manner somewhat informal; but it was assented to by the parties, in order to have a prompt determination of the constitutional question involved."

**Procedure to Commit Where In-**

**Interrogatories Ancillary to Pleadings Refused.**—In *Stuart v. Allen*, 45 Wis. 158, the court said: "The course to be pursued by the commissioner in the examination of a party previous and ancillary to the pleadings in the cause, in place of and as a substitute for a bill of discovery proper, where the proper order is obtained, and the interrogatories and proper questions to be propounded, and their materiality to the proposed issue, are settled and determined beforehand, and such party refuses to answer them, or any of them, would seem to be plain; for it is clearly and directly a contempt of the court granting such order, and so directing; and, upon the report of such refusal by the commissioner, unless the questions objected to are waived by the opposite party, the court would at once punish for the contempt."

**Procedure Where Deponent Refuses to Testify Before Officer Taking Deposition.**—In *State v. Lonsdale*, 48 Wis. 348, the court stated the rule as follows: "When the officer taking the deposition of a witness to be used in an action pending in a court of record of this state, reports to the court in which such action is pending that the witness has refused to answer certain interrogatories propounded to him, the court should, on application of the aggrieved party, grant an order that the witness show cause why he should not be required to answer such interrogatories. On the return of the order, if the witness does not admit his refusal to answer, proper interrogatories in that behalf should be served upon him. If it appear by his admission, or by his answer to the interrogatories, or by proof, that he has so refused, the court will decide whether he ought to answer the questions which he has refused to answer; and if it is held that he ought, the court will make an order requiring him to go before the officer and make answer thereto; and in such case the court in its discretion may impose upon him the costs of the proceeding. For disobedience to such order, the court should, on proper proceedings, punish the witness as for a criminal contempt."

The practice here indicated prevails in courts of equity, and does not seem to contravene the provisions of any statute. It is also eminently just to the witness. *Bradshaw v. Bradshaw*, 1 Russ. & Mylne, 358; 2 Dan. Ch. Pl. & Pr., 891, and cases cited; *Stuart v. Allen*, 45 Wis. 158."

**What Must Be Shown to Commit Witness on De Bene Esse Examination.**—In *In re Judson*, 3 Blatchf. 148, 14 Fed. Cas. No. 7,563, the court in declining to issue an attachment against a witness who refused to testify on an examination *de bene esse* before a commissioner, said: "I see no reason why any more stringent obligation should be imposed upon a witness in these outside examinations than is enforced in court. Before the court will adjudge a witness to be in contempt or commit him therefore, it will require more than proof of the fact that he declines to respond to a question. It will inquire whether the question is relevant and material to the case or hearing (1 Greenl. Ev., § 319); and also whether the witness is legally exempt from answering it. No contumacy can be imputed to him until these points are determined. The law gives no color to the practice, which not infrequently intrudes upon judicial proceedings, of besetting a witness with impertinent inquiries, calculated to pry into his private affairs, or into his own character or that of other persons, or to subject him to personal liability, when the inquiries are not shown to have a legitimate bearing upon the cause on trial; and it is guarded in coercing answers to questions when their materiality is not clearly manifest. In this case, the court will not suspect any improper motive in the party pushing the inquiry which was resisted by the witness, nor, on the other hand, is it furnished with means to determine that the witness refused to answer from a refractory or contumacious disposition. It is enough to say that the party who invokes the court to order the witness to be imprisoned until he consents to give the testimony demanded, has omitted to prove that such testimony might be relevant and material to the issue

written statement challenging the jurisdiction of the court, he cannot complain that he was not present at the hearing of the order.<sup>43</sup> And where the refusal occurs before a body or official exercising the right to receive the testimony purely by virtue of some enabling statute, the proceedings to punish a recalcitrant witness must conform strictly to the statutory requirements for such proceedings.<sup>44</sup>

in the cause." And see *Ex parte* Peck, 3 Blatchf. 113, 19 Fed. Cas. No. 10,885, to the same effect.

**43. Presence Not Necessary When.** In *In re* Clarke, 125 Cal. 388, 58 Pac. 22, which was a contempt proceeding for failure of an insolvent to answer questions concerning his property, it was held that contemner could not complain that he was not present in person at the hearing, where the proceeding had been instituted by an order to show cause why he should not be punished for a contempt in refusing to appear and answer questions, and he answered the order to show cause by a written statement challenging the jurisdiction of the court.

**44. Procedure When Before Board of Supervisors in New York.**—In *People v. Rice*, 57 Hun 62, 10 N. Y. Supp. 270, the court held that under the New York statute, proceedings to punish a witness for refusing to testify before a committee of a board of supervisors must be instituted and carried on before a judge, and not before a special term of the court.

**Witness Under Foreign Commission Cannot Question Preliminary Proof of Materiality.**—In *In re* Garvey, 33 App. Div. 134, 53 N. Y. Supp. 476, it was said that the proof by affidavit of materiality to require a witness to appear for examination under a foreign commission is rather the formal proof usually called for in mere matters of practice, than that strict legal evidence required in granting attachments, orders of arrest, and similar remedies of a severe character, and, illustrating the rule, it said: "In applying for a commission in this state, it must be made to appear by affidavit that the testimony of the witness sought to be examined is material to the applicant. Code, § 887.

If that affidavit is made by the party, he is only required to state that the testimony of the witness is material, as he is advised by his counsel and verily believes. The affidavit may even be made by the attorney of the applicant, or by his agent, or by any other person cognizant of the facts. *Beal v. Dey*, 7 Wend. 513; *Murray v. Kirkpatrick*, 1 Cow. 210; *Eaton v. North*, 7 Barb. 631; *Johnson v. Lynch*, 15 How. Prac. 199. It has always been the rule that such a bare statement of materiality is *prima facie* sufficient, and that it is not necessary to specify the facts and circumstances which show that the examination of the witness is material and necessary. It certainly is not for the witness to criticise the proof of materiality as defective or insufficient. That should be left to the parties to the action. Even in very much more serious and important matters, as, for instance, in orders of publication, it has been held that a bare statement that the defendants, who were non-residents, "cannot, after due diligence, be found within this state," was sufficient "to call upon the judicial mind to determine whether due diligence had been employed to find the defendants," and consequently that there was jurisdiction to grant the order. *Kennedy v. Insurance Co.*, 101 N. Y. 487, 5 N. E. 774. The same rule has been applied where the jurisdictional facts were stated upon information and belief. *Seiler v. Wilson*, 43 Hun 629; *Belmont v. Corner*, 82 N. Y. 256. It is quite clear, therefore, that the general allegation of materiality made in the affidavit under consideration was sufficient to warrant the issuing of the subpoena, and certainly the witness has thereby been deprived of no substantial right." And see *In re Heller*, 41 App. Div.

G. PUNISHMENT AND DISCHARGE. — a. *Extent of Punishment to Be Awarded.* — The general rule is that a recalcitrant witness may be imprisoned until he consents to answer the questions propounded to him.<sup>45</sup>

b. *When Entitled to Be Discharged.* — Where the proceeding in which the witness was committed is discontinued pending the imprisonment of the recalcitrant witness, he is entitled to be discharged from custody,<sup>46</sup> or where the witness was ordered to pay a fine in

595, 58 N. Y. Supp. 695, to the same effect.

**Procedure to Compel Testimony Before Commissioner Appointed by Foreign Court.** — In *In re U. S. Pipe Line Co.*, 16 App. Div. 188, 44 N. Y. Supp. 713, the court said: "A proceeding to take testimony in this state for use in an action pending in the court of another state before a commissioner appointed by that court is entirely unknown to the common law. In the absence of any statute upon the subject, the court of chancery in this country assumed jurisdiction to compel the giving of testimony by residents of the state to be used in a suit pending in a foreign country by a bill of discovery filed for that purpose. *Mitchell v. Smith*, 1 Paige 287; *Post v. Railroad Co.*, 144 Mass. 341, 11 N. E. 540. That the court of chancery had jurisdiction was not admitted in the English courts; and even where that jurisdiction was exercised it was slow and expensive, but yet, until some statute was passed for the taking of such testimony, no other way was known to procure it. The whole proceeding is statutory in its nature, and the well-settled rule applies that where a remedy or proceeding is created by statute, it can be exercised in no other way than that prescribed in the statute, and, if the statute prescribes any particular mode of enforcing the remedy which it gives, that mode is exclusive, and the remedy must be sought in that way, and can be pursued in no other way. *Suth. St. Const.* §§ 391, 392, 399; *Dudley v. Mayhew*, 3 N. Y. 9."

In *In re Searls*, 155 N. Y. 333, 49 N. E. 938, it was held that a justice of the supreme court who had issued a mandate requiring a witness to attend before a commissioner to testify

in an action which was pending in a sister state, could not punish the witness for refusing to answer any particular question, where the witness has otherwise obeyed the mandate.

45. **Terms of Imprisonment.** — In *In re Clarke*, 125 Cal. 388, 58 Pac. 22, it was held that where the object of contempt proceedings is to compel an insolvent to answer concerning his property, he should be imprisoned until he consents to answer, and not for a definite period. See also *French v. Commercial Nat. Bank*, 79 Ill. App. 110.

In *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1,065, 64 N. W. 299, which was a commitment of a judgment debtor for failing to make truthful answers in a proceeding to discover his property, it was said: "When the misconduct consists of an omission to perform some act or duty which is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty. In such case the order or warrant shall specify the act or duty to be performed."

**Construction of New York Statute Relative to Punishing Recalcitrant Witnesses.** — *People v. Fancher*, 2 Hun (N. Y.) 226.

46. **Effect of Discontinuance of Main Proceeding on Commitment of Recalcitrant Witness.** — In *Ex parte Rowe*, 7 Cal. 175, it was held that a witness imprisoned until he answer questions propounded to him is entitled to be discharged where the proceeding in which the questions were propounded has been discontinued.

Where a witness who refuses to answer a question is committed to the common jail until he should sub-

addition to being imprisoned, the court may, during the same term of court, remit that portion of the sentence relating to the imposition of the fine.<sup>47</sup> And where the contumacy occurs before the grand jury,<sup>48</sup> or legislature,<sup>49</sup> the time of imprisonment naturally terminates with the adjournment of such bodies, since their adjournment deprives the witness of an opportunity to comply with the order to testify.

**H. REQUIREMENTS OF COMMITMENT.** — a. *When Refusing to Be Sworn.* — A commitment for refusing to be sworn should show that the witness also refused to be affirmed, where the statute allows him the privilege of doing either.<sup>50</sup>

b. *When Refusing to Testify.* — A commitment for refusing to testify should either state the questions propounded or describe them in such a manner as to indicate their materiality or pertinency to the

mit to answer the question and be discharged by due course of law, he is entitled to be discharged when the proceeding in which the commitment occurred is discontinued, since it deprives him of an opportunity to purge his contempt by answering the question. *In re Hall*, 10 Mich. 210.

**47. Power of Court to Remit Fine and Continue Imprisonment.** In *Ammon v. Johnson*, 3 Ohio Cir. Ct. 263, it was held that where the court had adjudged a recalcitrant witness guilty of contempt and imposed a fine and ordered the witness to be imprisoned until she answers and pays the fine, the court may during the same term of court, and while the action in which she refuses to answer is still pending, and after the imprisonment has commenced, remit the fine and that part of the sentence relating to it.

**48. Term of Imprisonment When Refused Before Grand Jury.** — In *Ex parte Maulsby*, 13 Md. 625, it was said: "There is no doubt of the power of the court to commit until the party answer, or testify, or produce papers before a grand jury. In such a case the commitment is a compulsory process to compel the party to obey the mandate of the court. But if by an event subsequently happening, as by the adjournment of the court, and the discharge of the grand jury, it becomes impossible for him to obey the court's process, it must result from necessity that term of the imprisonment imposed is ended, and that the

party is entitled to be discharged; otherwise the imprisonment would be perpetual."

**49. Extent of Imprisonment by Legislature.** — In *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676, it was held that imprisonment of a witness who refused to testify before a legislative committee, when used merely to coerce his testimony, would be limited by the duration of the session.

**Imprisonment Terminates With Session of Legislature.** — In *In re Davis*, 58 Kan. 368, 49 Pac. 160, it was held that imprisonment for contempt of a branch of the legislature terminates with the session of the legislature.

**50. Commitment Where Witness Declines to Affirm or Be Sworn.** In *Wilcox v. State*, 46 Neb. 402, 64 N. W. 1,072, it was said: "There can be no doubt that where a witness in a court of record, on being ordered to be sworn or affirmed, contumaciously refuses to do either, he is guilty of contempt; but it is not a contempt of court for a witness to decline merely to be sworn by taking the usual oath administered to witnesses, since the statute gives him the right to affirm. The finding of the district judge was insufficient and fatally defective, in that it failed to set forth that Sherman Wilcox refused to be affirmed, as well as declined to be sworn. Presumptions and intendments will not be indulged to support a conviction for contempt of court."

issues,<sup>51</sup> but where the refusal occurs before the grand jury, the commitment need not make the nature of the questions public, since they may be propounded in writing, and be made known only to the officers of the court, the contemner and his counsel.<sup>52</sup> It should show that the witness is imprisoned until he purges himself by consenting to answer the questions propounded to him.<sup>53</sup> But it need not show matters which were not required to be done before committing the witness.<sup>54</sup>

**5. Review.** — A. BY APPEAL OR WRIT OF ERROR. — a. *General Rule as to Contempt.* — Where no excess of jurisdiction appears in

**51. Requirements of Commitment.** An order committing a witness for contempt should either state the questions asked of the recalcitrant, or recite that they and the answers thereto were material and pertinent to the issue. *Overend v. San Francisco Super. Ct.*, 131 Cal. 280, 63 Pac. 372.

In *Wilcox v. State*, 46 Neb. 402, 64 N. W. 1,072, it was held that under the Nebraska statute a commitment for contempt in refusing to testify must set forth the questions asked and refused to be answered.

In *Ex parte Woodworth*, 29 Wkly. L. B. (Ohio) 315, a case in the Ohio court of common pleas, it was held that an order for the commitment of a witness for refusing to answer a question should state facts sufficient to show the pertinency and relevancy of the question, and should also contain a finding that the witness was guilty of contempt.

**Manner of Setting Forth Questions Propounded.** — In *People v. Davidson*, 35 Hun (N. Y.) 471, it was said, in discussing the necessary recitals in a commitment of a recalcitrant witness, that "It was not necessary, we think, to have recited the question *in haec verba*, either in the order or writ of commitment, though that would be the better practice. It was sufficient to describe them as the questions propounded to her and which she refused to answer on that day, and to commit her until she should answer those questions, the refusal to answer which constituted her offense." Hence, the court held a commitment committing the witness "until she shall make answer to such legal and proper interrogatories

as shall be propounded to her as a witness in this cause" is insufficient.

**52. Requirements of Commitment for Refusal to Testify Before Grand Jury.** — *Ex parte Rowe*, 7 Cal. 175.

**53. Setting Forth Imprisonment in Commitment.** — In *Ex parte Renshaw*, 6 Mo. App. 474, which was a commitment of a recalcitrant witness, the court said: "In commitment for contempt, where the imprisonment is intended merely as a punishment for the offense, it is usual for the commitment to specify some definite time, and it should do so whether or not there be a statute fixing the limit of imprisonment for contempt. But it has been long settled that where the design of the imprisonment is not merely or not mainly to punish the contempt, but to compel obedience to an order which the court has a right to make, and for non-compliance with which the contumacious person may be imprisoned, then the commitment should be for so long only as the contumacy shall continue."

Order of commitment should give contemner opportunity to purge himself. See *Billingsley v. People*, 86 Ill. App. 233.

Where a court of oyer and terminer has committed a witness to the county jail for refusing to answer a proper question, the commitment should be "until he may answer." *People v. Fancher*, 4 Thomp. & C. (N. Y.) 467.

**54. When Committed by a Referee.** Where witness is committed for refusing to answer a question before a referee, the papers need not show that an order requiring an answer to the question was made in writing and served on the witness. *Lathron*

a proceeding for contempt, the general rule is that the commitment therein cannot be reviewed by appeal or writ of error.<sup>55</sup>

b. *Refusals to Testify.*—The courts in passing on commitments for refusing to testify have applied the general rule above stated to such commitments,<sup>56</sup> but they have allowed an appeal to be taken

*v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493; *Clapp v. Lathrop*, 23 How. Pr. (N. Y.) 423.

55. *United States.*—New Orleans *v. Steamship Co.*, 20 Wall. 387. *Alabama.*—*Ex parte Hardy*, 68 Ala. 303.

*Arkansas.*—*Bunch v. State*, 14 Ark. 544.

*California.*—*In re Gannon*, 69 Cal. 541, 11 Pac. 240; *Sanchez v. Newman*, 70 Cal. 210, 11 Pac. 645.

*Colorado.*—*Teller v. People*, 7 Colo. 451.

*Connecticut.*—*Tyler v. Hamersley*, 44 Conn. 393, 26 Am. Rep. 471.

*Indiana.*—*Kernodle v. Cason*, 25 Ind. 362.

*Iowa.*—*State v. Dunham*, 6 Iowa 245; *Ex parte Holman*, 28 Iowa 88, 4 Am. Rep. 159.

*Louisiana.*—*State v. Judge*, 31 La. Ann. 116.

*Mississippi.*—*Watson v. Williams*, 36 Miss. 331; *Shattuck v. State*, 51 Miss. 50, 24 Am. Rep. 624.

*Nevada.*—*Phillips v. Welch*, 11 Nev. 187.

*New York.*—*Conover v. Wood*, 5 Abb. Pr. 84.

*North Carolina.*—*State v. Woodfin*, 27 N. C. 199, 42 Am. Dec. 161.

*Texas.*—*Crow v. State*, 24 Tex. 12; *State v. Thurmond*, 37 Tex. 340.

*Vermont.*—*In re Cooper*, 32 Vt. 253.

*Wisconsin.*—*State v. Giles*, 10 Wis. 88.

56. **No Right of Appeal from Purely Criminal Contempt.**—In *People v. Kuhlman*, 118 Cal. 140, 50 Pac. 382, which was a case wherein the coroner had adjudged a witness guilty of contempt in refusing to testify at an inquest, and pursuant to the statute an order had been made by the presiding judge of the superior court that the witness be imprisoned until he should testify, the appellate court held that the order of the superior court was not an appealable order, no matter whether

the case be viewed as within the general category of contempt or as punishment for a misdemeanor, and that if the superior court had no jurisdiction to make the order appealed from, the contemner would have to pursue some remedy other than appeal. Chief Justice Beatty in a concurring opinion directed attention to the fact that the contempt proceeding in this case was strictly criminal in its nature, and that the rule would be different where the proceeding was merely a step in a civil action to enforce a right of a litigant.

**Appellate Practice on Hearing Before Commissioner.**—*In re Dittman*, 65 App. Div. 343, 72 N. Y. Supp. 886, is an illustration of a case in which an appeal was taken. Upon the hearing before the commissioner the witness declined to answer certain questions which were propounded to him, and thereupon the examination was suspended, and the parties asking the question applied to the court at special term for an order directing the witness to answer the questions. The motion was granted and an order directing the witness to answer the questions was entered, and the witness appealed from such order.

**Commitment of Recalcitrant Witness Not Reviewable by Appeal.** In *Ex parte Kearney*, 7 Wheat. (U. S.) 38, which was a commitment by the United States Circuit Court of a witness who refused to answer a certain question, the supreme court in denying a writ of *habeas corpus*, said: "It is to be considered that this court has no appellate jurisdiction confided to it in criminal cases, by the laws of the United States. It cannot entertain a writ of error, to revise the judgment of the circuit court, in any case where a party has been convicted of a public offense. And, undoubtedly, the denial of this authority proceeded upon great principles of public policy and

from an order discharging a judgment debtor who refused to answer questions concerning his property,<sup>57</sup> and also from a decision denying the recalcitrant witness relief on *habeas corpus*.<sup>58</sup>

B. CERTIORARI. — The use of the writ of *certiorari* is usually regulated by the statutes of the several states. *Certiorari* may be used to review commitments for contempt where the nature of the record is such as to make the writ applicable.<sup>59</sup> The writ of *certiorari*

convenience. If every party had a right to bring before this court every case in which judgment had passed against him, for a crime, or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and in some cases, totally frustrated. If, then, this court cannot directly revise a judgment of the circuit court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly? It is also to be observed that there is no question here but that this commitment was made by a court of competent jurisdiction, and in the exercise of an unquestionable authority. The only objection is, not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case. If then, we are to give any relief in this case, it is by a revision of the opinion of the court, given in the course of a criminal trial, and thus asserting a right to control its proceedings, and take from them the conclusive effect which the law intended to give them. If this were an application for a *habeas corpus*, after judgment on an indictment for an offense within the jurisdiction of the circuit court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner. There is, in principle, no distinction between that case and the present; for when a court commits a party for contempt, their adjudication is a conviction, and their commitment, in consequence, is execution, and so the law was settled upon a full deliberation, in the case of *Brass Crosby*, Lord Mayor of London, (3 Wilson 188)."

Appeals under similar state of facts were dismissed. *Jordan v.*

*State*, 14 Tex. 436; *Holman v. Austin* (City), 34 Tex. 668.

57. What Constitutes Appealable Order in Supplementary Proceedings. It was held in *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490, that an order discharging a person having property of the judgment debtor, or who is indebted to him, from process for contempt in refusing to answer questions properly put to him in supplementary proceedings, is a final appealable order affecting a substantial right. See also *Livingston v. Swift*, 23 How. Pr. (N. Y.) 1, to same effect.

58. Appeal from Decision in Habeas Corpus. — In *Ex parte Perkins*, 29 Fed. 900, the United States Circuit Court on an appeal from the district court reversed its decision denying relief in a writ of *habeas corpus* by a witness who was committed for contumacy.

Appeal from Decision of Appellate Justice on Habeas Corpus. In *State v. Seaton*, 61 Iowa 563, 16 N. W. 736, an appeal was allowed to be taken from a decision of one of the justices of the supreme court at Chambers, dismissing a writ of *habeas corpus* which he had granted to a person committed for contempt in refusing to make an affidavit.

59. Commitments for Contempt Were Reviewed by Writs of Certiorari in *Seventy-six L. & W. Co. v. Superior Court*, 93 Cal. 139, 28 Pac. 813; *In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755; *In re MacKnight*, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451; *Ex parte Biggs*, 64 N. C. 202; *Harrison v. State*, 35 Ark. 458.

Right of Review During Term. During the session of the court at which a witness was committed for refusing to answer questions before a grand jury, no other court has power to interfere by *habeas corpus*



has also been used to review the discharge in *habeas corpus* of a recalcitrant witness.<sup>60</sup>

C. HABEAS CORPUS. — a. *In General.* — The writ of *habeas corpus* is ordinarily used to relieve witnesses committed for refusing to answer questions propounded to them. On *habeas corpus* the acts constituting the alleged contempt may be reviewed to ascertain whether they constitute, as a matter of law, a contempt, for if they do not, the court is without jurisdiction;<sup>61</sup> hence it has been held that the

or *certiorari* to inquire into the course of detention. *In re Taylor*, 8 Misc. 159, 28 N. Y. Supp. 500.

**Scope of Review on Certiorari.** In *Vanvabry v. Staton*, 88 Tenn. 334, 12 S. W. 786, the court said: "In reviewing this commitment for contempt upon a writ of *certiorari*, we are limited to an inquiry into the jurisdiction of the court, and, there being no bill of exceptions bringing any of the evidence before us, this inquiry is necessarily limited to that which appears upon the face of the judgment."

In *Phillips v. Welch*, 12 Nev. 158, it was said: "This court, in all the numerous cases brought before it by the writ of *certiorari*, has uniformly held that the inquiry upon the writ could not be extended any further than is necessary to determine whether the inferior tribunal has exceeded its jurisdiction or has regularly pursued its authority."

In *People v. Kelly*, 24 N. Y. 74, it was held that the appellate court, before which the propriety of a commitment for refusal to testify is brought by *certiorari*, or even collaterally on *habeas corpus*, is bound to discharge the prisoner where the act charged as criminal is necessarily innocent, or justifiable, or where it is the mere assertion of a constitutional privilege.

**Certiorari May Be Used as Ancillary to Habeas Corpus.** — *Certiorari* and *habeas corpus* may be severally used as ancillary to each other, and when thus used by the appellate court in contempt proceedings, the duty of the court is to ascertain whether the court below had jurisdiction in the matter and exercised it according to law. *Com. v. Gibbins*, 9 Pa. Super. Ct. 536.

**60. Review of Discharge in Habeas Corpus by Certiorari.** — In

*People v. Hicks*, 15 Barb. (N. Y.) 153, the discharge of a contemner on writ of *habeas corpus* was reviewed in a writ of *certiorari*, the New York statute, however, having provided for such a manner of review.

In *People v. Fancher*, 2 Hun (N. Y.) 226, a witness who refused to testify before the grand jury was committed to the county jail until he should answer; he thereupon sued out a writ of *habeas corpus* before one of the justices of the supreme court, and was discharged upon the hearing of the writ, but the prosecution took out a writ of *certiorari* removing the proceedings to the supreme court, where the whole question was reviewed and the court held that the witness was unlawfully discharged from custody, and thereupon again remanded him into the hands of the sheriff.

In *People v. Learned*, 5 Hun (N. Y.) 626, a writ of *certiorari* was allowed to review the decision of a judge on *habeas corpus* discharging a witness committed for refusing to testify before a legislative commission.

**Whose Duty to Prosecute Certiorari After Discharge on Habeas Corpus.** — In *People v. Hicks*, 15 Barb. (N. Y.) 153, a witness was committed for a criminal contempt in refusing to be sworn and testify in a criminal case, he was discharged on *habeas corpus*, and *certiorari* was thereafter issued, the court said: "In this case the people are the party in whose behalf the *certiorari* was issued, and the district attorney, who is the legal representative of the people in all proceedings relating to crimes in this district, is the proper person to act."

**61.** *Ex parte Irvine*, 74 Fed. 954; *Ex parte Senior*, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133; *In re Dill*, 32

Kan. 668, 5 Pac. 39, 49 Am. Rep. 505; *In re Wood*, 82 Mich. 75, 45 N. W. 1,113; *Ex parte Duncan*, 42 Tex. Crim. App. 661, 62 S. W. 758; *Miskimmins v. Shaver*, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831.

**Use of Habeas Corpus Where Court Without Jurisdiction.**—*Habeas corpus* is available to test contempt proceedings where the commitment is void on account of the court being without jurisdiction of the subject matter, or the parties, or where the court was wholly without power to make the particular order. *In re Popejoy*, 26 Colo. 32, 55 Pac. 1,083, 77 Am. St. Rep. 222; *Ex parte Keeler*, 45 S. C. 537, 23 S. E. 865, 55 Am. St. Rep. 785, 31 L. R. A. 678; *Ex parte Warfield*, 40 Tex. Crim. App. 413, 50 S. W. 933, 76 Am. St. Rep. 727; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1,065, 64 N. W. 299; *In re Swan*, 150 U. S. 637.

**Where Question Claimed as Criminating.**—In *Ex parte Park*, 37 Tex. Crim. App. 590, 40 S. W. 300, 66 Am. St. Rep. 835, it was held that *habeas corpus* is the remedy to revise action of court in committing a witness for refusal to answer a question propounded to him, which the witness refused to answer on the ground that his answer would incriminate himself.

**Scope of Review on Habeas Corpus.**—*In re Clark*, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242, which was a commitment by the justice of the peace, under the statute for refusing to answer before a grand jury, the court said: "If any person is imprisoned under this statute, but not in strict pursuance of its provisions, he may be discharged upon *habeas corpus*. Upon such *habeas corpus* the court may be called upon to decide the following questions: The official character of the grand jurors and justice; the legality of the mittimus on its face; the propriety of the question asked; and if a case can be imagined where the mittimus has been issued after the witness has answered the question, that fact might be at issue. It is difficult to see, and unnecessary now to determine, what other questions could arise."

*In State v. Seaton*, 61 Iowa 563,

16 N. W. 736, the court said: "We cannot, in a *habeas corpus* proceeding, review the order of imprisonment for contempt, and reverse, unless the act constituting the alleged contempt was such that we can pronounce as a matter of law that it was not a contempt."

On *habeas corpus* for commitment for contempt the only questions considered are whether the commitment plainly and specially charges a contempt and whether it was issued by a court officer or body having authority to commit for such a contempt. *Ex parte McKee*, 18 Mo. 599.

In *People v. Sheriff*, 29 Barb. (N. Y.) 622, it was held that on *habeas corpus* in a case of commitment for a contempt, only two questions can be examined; first, as to the jurisdiction of the court or officer making the commitment, and secondly as to the form of the commitment. If the jurisdiction is undoubted and the commitment is sufficient in form and contains the cause of the alleged contempt plainly set forth, the prisoner must be remanded, the court having no power to inquire into the justice or propriety of the commitment.

In *Ex parte Fisk*, 113 U. S. 713, which was a case of a recalcitrant witness, the court, after stating the general principles in regard to the inherent power of the court to protect itself from contempts, said: "When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner."

**Relief Where Part of Series Are Criminating.**—Where a witness is committed for contempt in refusing to answer all of a series of questions on the ground that his answers will tend to criminate, and some of his

legality of the question propounded to the witness may be examined into on *habeas corpus*,<sup>62</sup> though the right to inquire into the propriety<sup>63</sup> or relevancy<sup>64</sup> of the question so propounded has been denied. But mere errors or irregularities in the contempt proceed-

answers would have that tendency, he should not be denied relief on *habeas corpus* because some of the questions did not have such criminalizing effect. *Foot v. Buchanan*, 113 Fed. 156.

**Method of Review for Contempts in Presence of Court.**—In *Brizendine v. State*, 103 Tenn. 677, 54 S. W. 982, which was a commitment for contempt committed by a witness while undergoing cross-examination, the court held that an appeal would not lie from a contempt committed in the presence of the court, and that the remedy against arbitrary and oppressive judgments in such cases is by *habeas corpus*, or by writ of error, or *certiorari*, with *supersedeas* to be granted by the appellate court.

**62. Legality of Propounded Interrogatories May Be Reviewed on Habeas Corpus.**—In *Bradley v. Veazie*, 47 Me. 85, it was held that whether an interrogatory be lawful or otherwise, or whether a commitment be justifiable or not, can be determined only by the supreme court in a writ of *habeas corpus*.

**Pertinency of Question Must Be Shown by Return to Writ of Habeas Corpus.**—In *Ex parte Zeehandelaar*, 71 Cal. 238, 12 Pac. 259, the court, in deciding petitioner's application for writ of *habeas corpus*, said: "In order to show a legal cause for the imprisonment of the petitioner, the return in this case should show that the question which he refused to answer was pertinent to the matter in issue before the court, and as this is not shown by the return, no legal cause for the imprisonment of the petitioner is shown, and he should be discharged."

In *Ex parte Rowe*, 7 Cal. 181, the court in deciding that it could on *habeas corpus* review the legality of the question propounded to the recalcitrant petitioner, said: "The question, what are legal writs, orders and questions, is one of law simply, and is, therefore, often of

the most difficult and complex character. Was it, then, intended that in reference to every such legal question, involving so many interests, there should exist no right of review by another court? Was it intended that in reference to these questions there should exist no power to correct errors and harmonize conflicting opinions? Or was it, on the other hand, intended that the decision of all courts, in cases of contempt, should be subject to the review of every county and district court, and of every single judge of those courts in the state? What efficiency or harmony is there in a system that either allows no remedy against the errors of inferior courts, in a certain class of cases, or allows nearly all the courts of the state, and individual judges of the same, to defeat the judgment of all? If, indeed, this court can never relieve a witness when he refuses to answer an illegal question, then the leading idea of a due subordination of inferior to superior courts is entirely inapplicable to this important class of questions."

**63. Propriety of Questions Cannot Be Impeached on Habeas Corpus.**—In *People v. Cassels*, 5 Hill (N. Y.) 164, it was held that the commitment of a witness for refusing to testify could not be impeached on *habeas corpus* for any supposed error of the justice in requiring the witness to answer an improper question.

A commitment of a witness for refusing to answer a question at the trial of a case cannot be impeached upon *habeas corpus* for any supposed error in requiring the witness to answer an improper question. *People v. Sheriff*, 7 Abb. Pr. (N. Y.) 96.

**64. Relevancy of Question Cannot Be Questioned on Habeas Corpus.** Where a notary taking a deposition decides that a question must be answered and commits the witness for refusing to answer, "it cannot, on an application for a *habeas corpus*,

ings,<sup>65</sup> or insufficiency of the evidence upon which the court has made its findings of fact,<sup>66</sup> will not be examined into on *habeas corpus*. Where the matter which resulted in the imprisonment of the witness was peculiarly within the jurisdiction of the state court, the federal courts will not interfere by writ of *habeas corpus* after a disposition of the question by the state supreme court.<sup>67</sup> Nor will the writ be granted where it appears to the court, on the application therefor, that the court must ultimately remand the contemner.<sup>68</sup>

b. *Procedure at Hearing of Writ.* — Upon *habeas corpus* proceedings the burden is upon the petitioner to show that his restraint is

with any propriety be urged against his *authority* to commit that the evidence demanded was not relevant." *Ex parte McKee*, 18 Mo. 599.

**65. Mere Errors or Irregularities Not Reviewable on Habeas Corpus.** *Ex parte Ah Men*, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263; *Fisher v. McDaniel*, 9 Wyo. 457, 64 Pac. 1,056, 87 Am. St. Rep. 971; *In re Copenhaver*, 118 Mo. 377, 24 S. W. 161, 40 Am. St. Rep. 382.

Where the court had power to commit a witness in any supposable circumstances which might arise in the progress of the cause, then the order of commitment is valid until reversed, however erroneous it may be in the particular circumstance. And *habeas corpus* will not discharge the witness thus committed. *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1,065, 64 N. W. 299.

**Erroneously Imposing Fine Is Not Reviewable.** — In *Ex parte Smith*, 117 Ill. 63, 7 N. E. 683, where the petition for a writ of *habeas corpus* showed that the petitioner was properly before the grand jury, that he refused to answer certain questions propounded to him, that the court thereupon fined him twenty-five dollars, and, on his refusal to pay the fine, ordered him to stand committed to the county jail until the fine and costs should be paid, the appellate court held that if the court erred in imposing the fine, the remedy was by appeal or writ of error and not by the writ of *habeas corpus*, but that if the order had been simply a commitment until the witness answered the questions, a different question would be presented, but did not intimate

what it would do under those circumstances.

**66. Court's Findings of Fact Cannot Be Questioned on Habeas Corpus.** *Ex parte Spencer*, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; *Ex parte Clark*, 110 Cal. 405, 42 Pac. 905; *In re Popejoy*, 26 Colo. 32, 55 Pac. 1,083, 77 Am. St. Rep. 222; *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374.

**67. Writ of Habeas Corpus by Federal Court After Disposition by State Court.** — *In re Lawrence*, 80 Fed. 99, it was held that a federal court will not on a writ of *habeas corpus* discharge a prisoner in custody for contempt for refusing to testify at a state senatorial inquiry as to bribery charges, upon the ground that his detention is contrary to the constitution of the United States, where there has been an inquiry by the state supreme court of the whole question of the legality of the detention, and contempt proceedings which resulted in the imprisonment were matters peculiarly within the exclusive jurisdiction of the state. *Citing Robb v. Connolly*, 111 U. S. 624; *In re Wood*, 140 U. S. 278; *Cook v. Hart*, 146 U. S. 183; *In re Frederick*, 149 U. S. 70; *New York v. Eno*, 155 U. S. 89; *Bergemann v. Backer*, 157 U. S. 655.

**68. Writ Not Granted Where Must Certainly Remand.** — A writ of *habeas corpus* will not be issued to relieve a person committed for contempt where, upon the hearing of the application therefor, it appears that the court must in the end remand the prisoner. *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1,065, 64 N. W. 299.

illegal,<sup>69</sup> and he may impeach the jurisdictional showing made by the commitment by showing that there was an actual want of such jurisdiction.<sup>70</sup>

D. BY WRIT OF PROHIBITION, INJUNCTION OR MOTION. — It has been held that an order to appear before a commissioner in a foreign suit may be reviewed by a motion to quash it,<sup>71</sup> and an order to commit a recalcitrant witness in supplementary proceedings by a writ of prohibition,<sup>72</sup> though an injunction to restrain the carrying out of a commitment for contempt has been refused.<sup>73</sup>

**69. Burden on Habeas Corpus.** *In re Clarke*, 125 Cal. 388, 58 Pac. 22, which was a commitment of an insolvent for refusing to answer questions concerning his property, it was held that upon *habeas corpus* proceedings the burden is upon the petitioner to show that a restraint which is apparently legal is not so.

**70. Impeaching Commitment on Habeas Corpus.** — In *In re Morton*, 10 Mich. 208, it was held on *habeas corpus* that where the petitioner was held by virtue of a commitment fair on its face, and charging him with contempt in refusing to give evidence in a proceeding under the prohibitory liquor law, it is competent to go behind the commitment and show that the court committing him had no jurisdiction of the proceeding in which he was called as a witness.

The record of a commitment for contempt by a notary public for the refusal of a witness to testify is only *prima facie* evidence of the legality of such commitment, and on a hear-

ing on a writ of *habeas corpus*, parol evidence is admissible to dispute such record. *Burnside v. Dewstoe*, 15 Wkly. L. B. (Ohio) 197.

**71. Review by Motion to Quash.** *In re Edison*, 68 N. J. L. 494, 53 Atl. 696, it was held that an order for a subpoena issued by a justice of the supreme court requiring a person to appear and testify before a commissioner, in obedience to a commission issued in a sister state, could be reviewed by the supreme court on a motion to quash the order, without a *certiorari*.

**72. Review by Writ of Prohibition.** — In *State v. Barclay*, 86 Mo. 55, the question whether a referee in supplementary proceedings was authorized to commit a refractory witness, pursuant to the order of the court, was tested by an application for writ of prohibition.

**73. An Injunction Will Not Lie to Restrain the carrying out of a commitment for contempt.** *Sanders v. Metcalf*, 1 Tenn. Ch. 419.

# CONTRACTS.

BY CLARK ROSS MAHAN.

## I. ORAL AGREEMENTS, 512

1. *The Fact of the Agreement*, 512
  - A. *Presumptions and Burden of Proof*, 512
    - a. *In General*, 512
    - b. *Implied Contracts*, 512
    - c. *Joint Contracts*, 512
  - B. *Oral Evidence*, 512
    - a. *In General*, 512
    - b. *List of Articles*, 512
    - c. *Memorandum*, 512
  - C. *Opinions and Conclusions*, 513
  - D. *Res Gestae*, 513
    - a. *In General*, 513
    - b. *Subsequent Declarations*, 515
    - c. *Declarations by Agent*, 515
    - d. *Negotiations by Letter Between Counsel*, 515.
  - E. *Admissions*, 515
  - F. *Circumstantial Evidence*, 515
    - a. *In General*, 515
    - b. *Probabilities*, 517
    - c. *Custom*, 518
2. *The Terms of the Agreement*, 519
  - A. *Oral Evidence*, 519
    - a. *In General*, 519
    - b. *Memoranda, etc.*, 519
    - c. *Direct Testimony*, 520
    - d. *Understanding of Witness*, 520
    - e. *Understanding of Party*, 520
  - B. *Opinions and Conclusions*, 520
  - C. *Res Gestae*, 520
    - a. *In General*, 520
    - b. *Oral Tripartite Agreement*, 521
    - c. *Declarations Subsequent to Fact*, 521
  - D. *Documentary Evidence*, 521
    - a. *Memorandum*, 521
    - b. *Substituted Contract*, 523

E. *Circumstantial Evidence*, 523

a. *In General*, 523

b. *Custom*, 524

c. *Other Contracts*, 524

II. **AGREEMENT PARTLY ORAL, ETC.,** 525

III. **AGREEMENT REDUCED TO WRITING,** 525

1. *The Writing as an Instrument of Evidence*, 525

2. *Matters Affecting the Writing as a Binding Instrument*, 525

A. *General Rule*, 525

B. *Particular Grounds*, 525

3. *Matters as to the Terms of the Contract*, 525

A. *Contradiction by Parol Evidence*, 525

B. *Writing Referring to Other Contracts*, 526

C. *Best and Secondary Evidence*, 526

D. *Original Contract Abandoned*, 526

IV. **MATTERS IN DISCHARGE OF CONTRACTS,** 526

1. *The Breach*, 526

A. *Burden of Proof*, 526

B. *Mode of Proof*, 527

2. *Performance*, 528

3. *Substitution*, 528

4. *Abandonment*, 528

A. *Burden of Proof*, 528

B. *Mode of Proof*, 529

5. *Rescission*, 529

V. **MATTERS IN CONFIRMATION AND SUPPORT OF WRITING,**  
529

CROSS-REFERENCES.

Admissions; Age; Assumpsit;

Bills and Notes; Bonds;

Cancellation of Instruments; Consideration;

Delivery; Documentary Evidence; Damages; Deeds;

Fraud; Fraudulent Conveyance;

Infancy; Insanity;

Parol Evidence; Private Writings;

Rescission.

## I. ORAL AGREEMENTS.

1. **The Fact of the Agreement.** — A. PRESUMPTIONS AND BURDEN OF PROOF. — a. *In General.* — One who relies upon a contract has the burden of showing *prima facie* at least that the minds of the parties met in making it.<sup>1</sup>

b. *Implied Contracts.* — An Implied Contract as Well as an Express One must be established by competent evidence before a recovery can be had thereon, and the burden of proof rests upon the party who seeks to recover thereunder.<sup>2</sup>

c. *Joint Contracts.* — One who brings suit against several defendants jointly must show the existence of a joint contract, or a joint promise express or implied.<sup>3</sup>

B. ORAL EVIDENCE. — a. *In General.* — Where an agreement has not been reduced to writing, the fact of the agreement is properly provable by oral evidence,<sup>4</sup> and by the oral testimony of one of the parties thereto.<sup>5</sup>

b. *List of Articles.* — And where the contract is one for the sale and delivery of chattels, the fact of the agreement may be proved by oral evidence, notwithstanding that there was passed between the parties a writing reciting the sale and enumerating the parcels or articles sold and acknowledging receipt of payment.<sup>6</sup>

c. *Memorandum.* — Nor is oral evidence of the fact of an agreement or contract inadmissible because of the existence of a memo-

1. *Ferguson v. Hemingway*, 38 Mich. 159; *Simonton v. Kelly*, 1 Mont. 363; *Truitt v. Fahey*, 3 Penn. (Del.) 573, 52 Atl. 338.

**Acceptance Must Be Shown.** *Wolfe City Oil Co. v. George*, (Tex. Civ. App.), 30 S. W. 672.

**Contract of Employment Presumed by Proof of Services Rendered and Accepted.** — *Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1,073, 34 L. R. A. 581. See fully "MASTER AND SERVANT."

2. *Richardson v. Hoyt*, 60 Iowa 68, 14 N. W. 122; *Berber v. Kerzinger*, 23 Ill. 286.

See also article "ASSUMPSIT," Vol. II, p. 52.

3. *Sager v. Tupper*, 38 Mich. 258. In an action of assumpsit against two or more parties to recover money paid under a contract subsequently rescinded, the burden is on the plaintiff to show that the money was received under a joint contract or that the parties jointly received the money. *Bacon v. Green*, 36 Fla. 325, 18 So. 870.

4. *Branson v. Kitchenman*, 148 Pa. St. 541, 24 Atl. 61; *Kansas Loan & Trust Co. v. Love*, 45 Kan. 127, 25 Pac. 191; *Alexander v. Moore*, 19 Mo. 143; *Barber v. Hildebrand*, 42 Neb. 400, 60 N. W. 594; *Tisdale v. Harris*, 20 Pick (Mass.) 12.

In an action to recover commission under a contract whereby plaintiff was to procure the purchaser for the defendant's land, it is competent for the purchaser to testify to the fact that it was through the instrumentality and efforts of the plaintiff that he bought the property; but evidence of conversations between the plaintiff and the purchaser in relation to commissions coming to the plaintiff from the defendant is not competent. *Childs v. Ptomey*, 17 Mont. 1,502, 43 Pac. 714.

5. *Haight v. Connors*, 149 Pa. St. 297, 24 Atl. 302.

6. *Stacy v. Kemp*, 97 Mass. 166; *Irwin v. Thompson*, 27 Kan. 643; *Harris v. Johnston*, 3 Cranch (U. S.) 311.



randum thereof which, however, is not intended to, and does not, constitute a permanent memorial thereof.<sup>7</sup>

C. OPINIONS AND CONCLUSIONS. — Whether or not a contract was made between two parties cannot be proved by the mere opinions of witnesses present at the negotiations between the parties<sup>8</sup> and interested in the contract.<sup>9</sup> Nor can a witness state in terms with whom he made a contract, where that is the issue involved, and the answer is merely a conclusion deduced from the facts in evidence.<sup>10</sup>

Acceptance of Proposal. — And it has also been held that a party to a contract cannot state in express terms that he accepted a proposal; but he should state the facts.<sup>11</sup>

D. RES GESTÆ. — a. *In General*. — On an issue as to whether or not an agreement was in fact reached, evidence of what was said,<sup>12</sup>

7. *Hunt v. Reynolds*, 9 R. I. 303; *Tisdale v. Harris*, 20 Pick. (Mass.) 12.

In *Bruce v. Snow*, 18 N. H. 514, the writing set up as the agreement between the parties was not admitted as such by the plaintiff, and there was much conflict in the evidence upon the question whether the plaintiff ever assented to the writing after it was drawn, although it appeared that he requested the defendant to reduce their agreement to writing, and it was held that the court should not, in the first instance, exclude oral evidence to show a verbal agreement differing from the writing and in its terms, but the proper course was to direct the jury to disregard such evidence in case they found that the plaintiff had adopted the writing for his agreement.

In *Thomas v. Nelson*, 69 N. Y. 118, an action to recover rent on an alleged lease for a term of years, the plaintiff offered in evidence a memorandum, signed by himself, stating in substance that he was to give a lease to the defendant for such term, but no rent was specified; and it was held that this did not preclude him from proving the agreement by parol, as the memorandum was not itself the contract.

8. *Goddard v. Garner*, 109 Ala. 98, 19 So. 513. See also *Ives v. Hamlin*, 5 Cush. (Mass.) 534; *Durlacher v. Frazer*, 8 Wyo. 58, 55 Pac. 306, 80 Am. St. Rep. 918. Compare *Sperry v. Baldwin*, 46 Hun (N. Y.) 120.

9. *New England Monument Co. v. Johnson*, (Pa.), 22 Atl. 974.

10. *Farmer v. Brockaw*, 102 Iowa 246, 71 N. W. 246.

On an issue as to whether or not services sued for were rendered under special contract, there being testimony tending to show that the plaintiff had rendered other services not claimed to be under the contract, it is proper for the court to permit the defendant to state whether the services sued for were under the contract or not, his testimony in this respect being a matter of fact and not of opinion. *Jamison v. Weaver*, 81 Iowa 212, 46 N. W. 996. See also *Sweet v. Tuttle*, 14 N. Y. 465.

11. *Cogshall v. Pittsburgh R. M. Co.*, 48 Kan. 480, 29 Pac. 591.

12. *California*. — *Corson v. Ber-son*, 86 Cal. 433, 25 Pac. 7.

*Georgia*. — *Hooks v. Hays*, 86 Ga. 797, 13 S. E. 134.

*Illinois*. — *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401.

*Mississippi*. — Compare *Quine v. Quine*, 9 Smed. & M. 155.

*New Hampshire*. — *Johnson v. Elliot*, 26 N. H. 67; *Atherton v. Tilton*, 44 N. H. 452.

*New York*. — See also *Fredenburgh v. Biddlecom*, 85 N. Y. 196.

*North Carolina*. — *McDonald v. Carson*, 94 N. C. 477.

*Pennsylvania*. — *Kreiter v. Bomberger*, 82 Pa. St. 59, 22 Am. Rep. 750.

In *Dumanoise v. Townsend*, 80 Mich. 302, 45 N. W. 179, an action against the defendants, jointly, to re-

done<sup>13</sup> or written<sup>14</sup> in the presence of the parties is admissible as part of the *res gestae*.

cover an alleged balance due for hauling logs, in which one of the defendants denied liability, it was held that evidence of statements made by such defendant, in the presence of his co-defendant, when they were bargaining for the timber, and for the cutting and hauling of the timber to the mill, admitting his joint liability with such co-defendant, is admissible.

Where it is in issue whether or not labor performed by one party was done on the credit of another or of a third person, evidence of what was said by the workman to the owner about such third person's credit, to the effect that he already owed such workman and that the workman would have nothing to do with him, is admissible as part of the *res gestae*. *Evans v. Montgomery*, 95 Mich. 497, 55 N. W. 362. In this case it was also held that evidence of a statement of the defendant's wife to the plaintiff, after the completion of the work and in the presence of the defendant, that the money was in the bank to pay for it, and that the defendant said nothing, was admissible.

Pending a trade which resulted in a sale of certain property, statements made by a third person, in the hearing of both parties, touching the value of the property in question, formed a part of the *res gestae*, and were admissible in evidence on an issue as to whether or not the property in question was worthless. *Griffin v. Cleghorn*, 63 Ga. 384.

On an issue as to whether or not a testator had made a promise to a servant to pay her for certain work, or whether the real understanding between them was that she should be compensated for those services by a provision in his will, it is error to exclude the testimony of a witness, who often saw and talked with the claimant both before and after the will was made, to the effect that he never heard her make any claim against the testator in his lifetime, or heard her express any dissent from the testamentary provision, or

of another witness that in a conversation with the claimant, the latter said that she was to have the use of a certain sum of money, and that in reply to a statement by the witness that he thought that was more than the testator intended, the claimant said she thought she ought to have it, and that it was given to her because she had stayed and helped in times of need during sickness. *Fredenburgh v. Biddlecom*, 85 N. Y. 196.

In *Davis' Sons v. Sweeney*, 80 Iowa 391, 45 N. W. 1,040, an action upon a contract to take a machine and to execute notes for the purchase price, where the defense was a breach of implied warranty that the machine was suitable for the purpose for which it was intended, it was held proper to admit evidence of declarations by the plaintiff's agent to the defendants at the time of the sale, in regard to the character and excellence, and of his terms for the defendants to take and try it before executing the notes and to return it if it did not comply with the representations.

13. On an issue as to whether or not a proposal had been accepted, testimony of a witness that he would consult with the other party, which he did, and that the latter party agreed to the proposal, and that the witness had communicated this to the former party, who agreed to it, is competent. *Stoddard v. Mix*, 14 Conn. 12.

Where a verbal agreement was made through the intervention of an agent, it is competent to show that the action of the agent was communicated to his principals and that they accepted and ratified the contract as he made it, and undertook to carry it out. "It is only in that way that the assent of both parties to the contract can be shown, and their willingness to be bound by its terms established." *New England Monument Co. v. Johnson*, (Pa. St.), 22 Atl. 974.

14. Memorandum Entered in Book at Time of Making Agreement as

b. *Subsequent Declarations.* — But the fact of an oral agreement cannot be established by evidence of declarations (not admissions against interest) of one of the parties thereto made to a third person and at a period distinctly subsequent to the alleged agreement.<sup>15</sup>

c. *Declarations by Agent.* — Nor is it competent to prove a contract by the declarations or admissions of an agent subsequently made, although the contract was made by the agent.<sup>16</sup>

d. *Negotiations by Letter between Counsel.* — The fact of an agreement may be shown by evidence of the negotiations between counsel for the respective parties by letter and by the subsequent conduct of the parties.<sup>17</sup>

E. ADMISSIONS. — In some cases documents in the nature of admissions by one of the parties to an alleged contract have been held competent to prove the fact of the agreement.<sup>18</sup>

F. CIRCUMSTANTIAL EVIDENCE. — a. *In General.* — Since, as be-

**Part of Res Gestae.** — *Ewing v. Bailey*, 36 Ill. App. 191.

**Letters Passing Between Parties as Part of Res Gestae.** — *New England Marine Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56.

Where it is in issue whether or not the defendant promised the plaintiff to pay a debt due from a third person, evidence that at the time of the alleged promise the defendant gave to the plaintiff an order on another person, covering the amount of the debt, is admissible as a part of the *res gestae*. "It did not, it is true, tend to prove a promise to pay anything other than through the waterworks company unless supplemented by oral testimony; but the giving of the order was a part of the very transaction, which would not be understood without its introduction." *Bond v. McMahon*, 94 Mich. 557, 54 N. W. 281.

15. *Murray v. Cone*, 26 Iowa 276; *McAdams v. Beard*, 34 Ala. 478; *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514.

16. *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 So. 34, where it was said as to such evidence that "Such declarations or admissions are no part of the *res gestae*, but are mere declarations or admissions of a past transaction, and are never competent to prove a fact against the principal of the agent making them." See also *Shiner v. Abbie*, 77 Tex. 1, 13 S. W. 613; *Stone v. North West-*

*ern Sleigh Co.*, 70 Wis. 585, 36 N. W. 248.

A witness may testify to the language of an agent in making an oral contract, because such language is within the agent's authority. But authority to make a contract does not empower an agent at a subsequent time to admit away his principal's rights, and hence such subsequent admissions are not competent to prove the contract. *Idaho Forwarding Co. v. Firemen's Fund Ins. Co.*, 8 Utah 41, 29 Pac. 826, 17 L. R. A. 586.

17. *Dayton v. Dakin*, 103 Mich. 65, 61 N. W. 349.

18. Where a written instrument intended to be a contract is so fatally uncertain as to be void as a contract, still the party desiring to use it may, with proper allegations in his plea, rely upon the parol agreement actually made between the parties and intended to be embodied in the written instrument, except where a contract in writing is required by law, and may introduce the written instrument in evidence as a written admission in part proof of the parol agreement. *Simpson v. Kimberlin*, 12 Kan. 443.

On an issue as to whether or not work done by the plaintiff was performed for, and to be paid by, the defendants or by a corporation, not a party, pay-rolls made out by the plaintiff in the name of the corporation, showing the payment of moneys

fore stated, parol agreements are always provable by parol evidence, resort must necessarily be frequently had to circumstantial evidence;<sup>19</sup> but, of course, such evidence must not be objectionable in

to himself and others engaged in the same work, are competent evidence, as tending to prove that the corporation, and not the defendants, was his debtor. *Phinney v. Bronson*, 43 Kan. 451, 23 Pac. 624.

A letter written by the defendant to the plaintiff and another person as partners requesting them to publish in their newspaper an advertisement of a business of which the defendant was a trustee does not establish the defendant's assent to the publication of the advertisement by the plaintiff alone in his paper. *Strong v. Catlin*, 35 Ala. 607. But after proof that the defendant, on payment being demanded of him, made no objection to the publication, but did object to his individual liability, the letter is admissible evidence, as tending to show his agency in procuring the publication in his own name. *Strong v. Catlin*, 37 Ala. 706.

19. *Heffron v. Brown*, 155 Ill. 322, 40 N. E. 583.

On an issue as to whether or not a contract had been concluded, or a mere negotiation looking to the formation of a contract, whether or not the promisor had given a bond to the alleged promisee, is a circumstance to be shown where the promisee shows that such bond or security was demanded only when contracts on the note of the one alleged were made. *Mobile & B. R. Co. v. Worthington*, 95 Ala. 598, 10 So. 839. In this case it was also held that on an issue as to whether or not a contractor was an independent contractor, or a sub-contractor under the chief contractor, it is proper to show that during the course of the work the latter had given the former instructions and directions about the work.

In *Klopp v. Jill*, 4 Kan. 414, an action for work and labor done, to which the defense was that the work had been done at an agreed price, which had been fully paid, and in which the plaintiff testified that there was no such agreement, it was held competent for the defendant to show

that another person had offered to do the work at what was alleged to be the contract price, and that the defendant told plaintiff that he could have the job at that price, otherwise such third person would have it, such evidence tending to show that a contract had been made, there having been also evidence that the attention of the plaintiff was called to an offer of that kind at the time of making the alleged contract.

**The Actual Value of Services** may be shown in an action on a contract of employment where there is a direct conflict of evidence as to the agreed rate of payment. *Richardson v. McGoldrick*, 43 Mich. 476, 5 N. W. 672. In this case it was also held that a party to an action on a contract of employment is as competent as any other if he know the facts and swear to the agreed rate of payment or to the value of the services.

Evidence that a tenant in common as manager of the joint interest employed his son, then under his control and a member of his family, in and about the common business with the knowledge of and without objection from his co-tenant, is admissible as tending to show a contract between them for the services of the son. *Strother v. Butler*, 17 Ala. 733.

On an issue as to whether or not a purchaser of land bought the same under an agreement with another, whereby the former was to advance the purchase money and hold title to the land as security therefor, evidence of the negotiations between the vendor's agent and the party asserting the agreement leading up to and resulting in the consummation of the sale is admissible to show not only to whom the sale was in fact made, but as well the property included in the sale and intended to be conveyed in pursuance thereof. *Davis v. Hopkins*, 18 Colo. 153, 32 Pac. 70. While conceding the rule that "the fact of a deed being a mortgage in effect may be proved by oral testimony," the grantee ob-

other respects.<sup>20</sup>

b. *Probabilities*. — Thus, on an issue as to whether or not a contract was made as claimed, any circumstances bearing thereon, or any evidence which tends to render that fact probable<sup>21</sup> or improb-

jected to the evidence, and also as to the evidence of the contract of purchase, upon the ground that it varied and contradicted the terms of the contract as evidenced by the deed; but the court said that this objection was based "upon the assumption that the deed contains the contract between the parties; but such is not the fact. The contract of purchase rested entirely in parol, and the deed has nothing whatever to do with it further than to carry it out. The deed is evidence of the final consummation of some contract previously made, but it is not evidence of what the contract was, and has nothing to do with it further than to carry it out. *Trayer v. Reeder*, 45 Iowa 273. The effect of this evidence is to establish an equity superior to and outside of the deed, and in no sense varies or contradicts its terms."

On an issue as to whether or not a grantee of lands which he had reconveyed to his grantor had acquired them under the conveyance to him without consideration and as a trustee for his grantor to reconvey on request, it being shown that at the time of the first conveyance certain bills of sale for personal property had passed from the grantor to the grantee contemporaneous with the conveyance, and that contemporaneous with the reconveyance bills of sale for the same property to the grantor had again passed, it is proper to receive evidence of the surrounding circumstances and statements of the parties at the respective times of the conveyances. *Harris v. Harris*, 67 Cal. 455, 8 Pac. 8.

20. On an issue as to whether or not a mortgagee had entered into a contract with the mortgagor in which he agreed to buy the mortgaged land when sold and hold as trustee and reconvey on payment of the mortgage debt, evidence that the mortgagee had instructed his agent to bid at the sale until the land brought

enough to pay his debt and costs and then to stop bidding is irrelevant. *Coble v. Branson*, 98 N. C. 160, 3 S. E. 715.

On an issue as to whether a judgment creditor, purchasing the debtor's property under execution sale under an agreement with the debtor and other creditors, agreed with the other creditors that he would pay their claims out of the proceeds of the sale, or would pay them only in case subsequent profits of the business were sufficient, evidence of the value of the machinery used in the business is irrelevant. Such evidence has "nothing to do with the question whether there was a contract between the parties in regard to the payment of plaintiff's claim, or of the nature of that contract." *Branson v. Kitchenman*, 148 Pa. St. 541, 24 Atl. 61.

21. In *Tufts v. Chester*, (Town), 62 Vt. 353, 19 Atl. 988, where the issue was whether or not the defendant town was liable on an alleged contract made by its overseer of the poor for the support of a pauper, it was held proper for the plaintiff to testify that in conversations with such overseer, one a year before and another within a year after the making of the alleged contract, the overseer had said that he expected the town would have to, and was willing to pay the plaintiff for her services; and that the remoteness of time did not affect the relevancy of the testimony, but went only to its weight. The court said that "This testimony was admitted as bearing upon the probability of Adams (the overseer) having made the contract claimed by plaintiff, and for this purpose it was admissible; for if he entertained that opinion of the matter then, it was some evidence tending to show that he entertained the same opinion at the time plaintiff claimed the contract was made, and, if he did, it would heighten the probability that he made the contract claimed."

able<sup>22</sup> is relevant, provided, of course, the evidence is not otherwise objectionable.<sup>23</sup>

c. *Custom*.—On an issue as to whether or not an agreement was made, evidence of a custom of one of the parties in respect of

In *Mudgett v. Emerson*, 67 N. H. 234, 30 Atl. 343, 6 Am. St. Rep. 650, where the issue was whether or not the plaintiff performed services for the defendant, expecting pay or without such expectation, it was held proper to receive evidence of the extent of the defendant's farm and the amount of his property. "If the defendant's circumstances were such that he was compelled to employ help in his family, that fact might have some tendency to show whether the plaintiff lived with him as a dependent relative or stranger, or as a hired servant. The larger his farm, the more occasion he would have to employ assistants in carrying it on; and the more help upon the farm, the more occasion he would have for household help if the farm hands were boarded in his family. So the fact whether he was possessed of a large or considerable property, or was a person of moderate means or in straitened circumstances, might bear on the probabilities of his hiring family servants." See *Eaton v. Welton*, 32 N. H. 352.

22. In *Randall v. Preston*, 52 Vt. 198, where the issue was whether or not the plaintiff's intestate had a lien on the defendant's horse for his keep, the defendant was allowed to show that at the time of the claimed contract of lien the intestate was largely indebted to him as tending to render the making of such contract less probable.

In *Shrimpton v. Netzorg*, 104 Mich. 225, 62 N. W. 343, where the issue was whether or not an order for goods was an unreasonable one, hence that it was wholly improbable that the defendant would give such order, it was held competent for him to show that the order as claimed by the plaintiff was grossly disproportionate to the business in which he was engaged by evidence as to the length of time it would take to sell the goods.

In an action against a decedent's

estate for money loaned, for which no written obligation existed, it is proper to show that the claimant was without means and had no money to loan. *Glessner v. Patterson*, 164 Pa. St. 224, 30 Atl. 355. The court said: "The action was to recover for money loaned, and the narrow question was whether the relation of creditor and debtor had existed. Every act and declaration of the plaintiff, and every fact and circumstance which would throw light upon this question, and disclose the true relation of the parties, was important in ascertaining the truth. The possession of a large sum of money by the plaintiff gave color to the statement that a loan had been made, by showing that she had the means with which to make it, and for this purpose testimony as to it was offered; but to affect the credibility of her witnesses, as well as to rebut the presumption of her ownership of the money, if it had been in her possession, it was competent to show that she was without property, and all that she said at that time, or at any other time, in relation to the source from which the money came, it was the right of the defendants to elicit."

23. On an issue as to whether or not an agreement had been made to furnish a specified amount of work, evidence that the party was not furnishing, or at that time likely to furnish, all the work claimed to have been agreed upon is inadmissible. *Owen v. Union Match Co.*, 48 Mich. 348, 12 N. W. 175.

An estimate of the number of printed labels requisite to supply various match factories, based on hearsay and without furnishing data on which it is founded, is not proper testimony of the amount required for that purpose, and its admission, to prove the improbability that a contract would be made for printing so large a number as that claimed to have been agreed on for the defendant's match factory, is error. *Owen*

such transactions is generally held to be irrelevant; in other words, evidence of custom cannot generally be resorted to for the purpose of proving or disproving the fact of an agreement.<sup>24</sup>

**2. The Terms of the Agreement.** — A. ORAL EVIDENCE. — a. *In General.* — The terms of an agreement resting in parol, as well as the fact of the agreement, may be shown by competent parol evidence.<sup>25</sup>

b. *Memoranda, etc.* — And the rule above stated as to proving the fact of an agreement by parol evidence, notwithstanding the existence of a writing in the nature of a memorandum,<sup>26</sup> bill of

*v. Union Match Co.*, 48 Mich. 348, 12 N. W. 175.

**24.** *Hodges v. Richmond Mfg. Co.*, 10 R. I. 91.

On an issue as to whether or not goods furnished to a wife were sold on the husband's credit, evidence of a custom, in the community where the parties resided, for the wife to purchase articles of other dealers of the same nature as those sued for is immaterial. *Clark v. Cox*, 32 Mich. 204. Compare *Fleming v. Hill*, 65 Ga. 247, on an issue as to whether or not the goods sued for were to be paid for by the defendant or by a third person, it was held proper to receive evidence for the plaintiff that on the same date the defendant had gone to another store to buy goods, the same as those sued for, for the purpose of filling an order for third persons with whom he was dealing, and was to pay for the same himself.

On an issue as to whether or not a creditor had agreed with his debtor, to accept a partial payment in full settlement and satisfaction of his debt, evidence that the debtor had made similar settlements with other creditors is irrelevant where the creditor in question is not shown to have had any connection with the other settlements. *Singleton v. Thomas*, 73 Ala. 205.

In an action for procuring property from the plaintiffs at a certain price and selling it to third persons at a higher price, contrary to an agreement with the plaintiffs, evidence that the defendant procured like property from other persons at the same price which he paid the plaintiffs is not admissible for the defendant. *Cutter v. Demmon*, 111 Mass. 474.

On an issue as to whether or not a contract of employment was made with the owner of the business or with a tenant, evidence that another person had been employed therein at the time in question by the owner, who had paid him therefor, is relevant not as tending to show that the contract of employment in question had been made, but as an act of control or proprietorship furnishing some evidence that the services had been rendered for the benefit of the owner. *Wood v. Brewer*, 73 Ala. 259.

**25.** *Stacy v. Kemp*, 97 Mass. 166; *Spragins v. White*, 108 N. C. 449, 13 S. E. 171. And see cases in immediately succeeding notes.

**26.** In *Aguirre v. Allen*, 10 Barb. (N. Y.) 74, it was held that where upon the making of a contract a broker acts merely to bring the parties together, after which the parties negotiate with each other directly, the fact that the broker makes an entry of the contract in his book does not prevent either party from giving parol evidence of the contract. See also *Remick v. Sanford*, 118 Mass. 102.

In *McVicker v. Cone*, 21 Or. 353, 28 Pac. 76, where a written contract was ruled out of evidence, and was allowed to be used by the plaintiff as a memorandum of the terms of the agreement, it was held that the writing could not be regarded as any evidence of the contract of the parties, so as to render the testimony of the plaintiff, to the effect that there were other terms than those contained in the writing, in violation of an Oregon statute prohibiting oral evidence of the terms of an agreement contradictory or additional to

parcels,<sup>27</sup> etc., applies with equal force to parol evidence offered for the purpose of establishing the terms of an oral contract.

c. *Direct Testimony*. — So, too, it has been held that the terms of an oral agreement may be stated by the direct testimony of a witness.<sup>28</sup>

d. *Understanding of Witness*. — And where it is in issue as to what a verbal agreement actually is, a witness present at the negotiation may state what he understood the parties agreed to.<sup>29</sup>

e. *Understanding of Party*. — And on an issue as to the terms of an oral agreement, it has been held proper to permit one of the parties thereto to state how he understood the matter.<sup>30</sup>

B. OPINIONS AND CONCLUSIONS. — The terms of an oral agreement are not susceptible of proof by the opinions or conclusions of a witness.<sup>31</sup>

C. RES GESTÆ. — a. *In General*. — Where the terms of an oral agreement are in issue, it is proper to allow evidence of all the conversations and negotiations between the parties prior to the conclusion of the alleged agreement, as bearing upon their relations, and tending to show the real nature of their agreement.<sup>32</sup> And this rule applies to what was said or done by the authorized agents of the parties at the time of and during the negotiations.<sup>33</sup> But evi-

those expressed in the writing evidencing the agreement.

27. *Stacy v. Kemp*, 97 Mass. 166.

28. *Dutton v. Kneebbs*, 80 Iowa 267; *Bewick v. Butterfield*, 60 Mich. 203, 26 N. W. 881; *Frost v. Benedict*, 21 Barb. (N. Y.) 247.

29. *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Foley v. Abbott*, 66 Ga. 115. See also *Fleming v. Hill*, 65 Ga. 247; *Delano v. Goodwin*, 48 N. H. 203. *Compare Mead v. Hogue*, 49 Iowa 703.

30. *Wheeler v. Campbell*, 68 Vt. 98, 34 Atl. 35. See also *Linsley v. Lovely*, 26 Vt. 123; *State v. Lockwood*, 58 Vt. 378, 3 Atl. 539.

31. See *Barrett v. Wheeler*, 71 Iowa 662, 33 N. W. 230, holding, however, that the reception of such evidence was not prejudicial error because the witness in his answer stated the terms of the contract as he claimed they were.

Where the terms of a parol agreement to insure goods were in issue as to the point at which the risk was to terminate, the agent of the insurer, by whom the contract of insurance was effected, cannot be allowed to testify that if the question had been

asked at the time the contract was made he would have charged a higher premium to cover risk on the goods to the point for which the insured contends. *Mobile Marine D. & M. Ins. Co. v. McMillan*, 31 Ala. 711.

32. *Owen v. Union Match Co.*, 48 Mich. 348, 12 N. W. 175; *Cooper v. Edwards*, 25 Ala. 528; *Browne v. Hickie*, 68 Iowa 330, 27 N. W. 276; *Wash v. Cary*, 17 Ky. L. Rep. 1,066, 33 S. W. 728; *Ray v. Isbell*, 64 Conn. 307, 29 Atl. 538.

In an action on an oral contract, it is proper for the plaintiff to show whether the other party thereto, in a conversation had at the time it was made, said anything as to his general manner of dealing with other people. *Wilcox v. Ney*, 47 Mich. 421, 11 N. W. 225.

33. *Ray v. Isbell*, 64 Conn. 307, 29 Atl. 538.

It is competent for a party to prove the terms of a contract made through his agent with another party by *ex parte* declarations of his agent made to him. *Warten v. Strane*, (Ala.), 8 So. 231. See also *Henkel v. Trubee*, (Conn.), 11 Atl. 722.

Where an agent makes a contract



dence of the secret motives and intentions of the parties is immaterial.<sup>34</sup>

b. *Oral Tripartite Agreement*. — On an issue as to the terms of an oral tripartite contract, evidence of conversations between two of the parties prior to the agreement and in the absence of the third is not admissible.<sup>35</sup>

c. *Declarations Subsequent to Fact*. — Evidence of declarations or admissions of an agent, who made the contract, made after the fact of the contract, as to its terms, are not admissible against his principal to prove such terms.<sup>36</sup>

D. DOCUMENTARY EVIDENCE. — a. *Memorandum*. — A memorandum relating to the terms of a parol contract made at the time by one of the parties,<sup>37</sup> or by his express direction, or by his author-

for his principal and afterwards in an attempted settlement between the parties makes statements with reference to the terms of the contract, such statements may be shown in evidence by the adverse party where parol evidence would be competent. *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.*, 46 Kan. 773, 27 Pac. 118.

34. *Browne v. Hickie*, 68 Iowa 330, 27 N. W. 276.

35. *Green v. Hadfield*, 89 Wis. 138, 61 N. W. 310.

36. *Wash v. Cary*, 17 Ky. L. Rep. 1,066, 33 S. W. 728.

37. *Lathrop v. Bramhall*, 64 N.Y. 365, where the court said: "There can be no valid objection where an oral contract is made to prove that its principal terms were written down and a memorandum made of them and read at the time. The one is not a substitute to the other, and both are properly admissible without violating any rule of law. It is not a case where a valid contract is made in writing which entirely supersedes the oral contract, but one where an oral contract is entered into and a memorandum made at the time as to its general features and characteristics." See also *Hazer v. Streich*, 92 Wis. 505, 66 N. W. 720, where an entry made in the books of one of the parties to the contract by his book-keeper and at his direction and dictation and read over by the book-keeper in the presence of both parties at the time and without dissent was received on proper identification as

evidence of the contract; indeed, in this case it was held that such a memorandum was really an admission of the parties.

In *Conway v. Mitchell*, 97 Wis. 290, 72 N. W. 752, where the issue was as to the terms of an oral agreement, it was held that a written memorandum of agreement, prepared by the plaintiff and submitted to the defendant for his signature, but which was never signed, was properly received in evidence.

In the course of a negotiation for a lease, a paper was partly written by the defendant and handed by him to the plaintiff, and by the latter interlined and returned to the defendant, and was not signed by either of the parties. On an issue as to whether or not the terms of the lease were those mentioned in the paper only, or there were other terms agreed upon outside of it, the paper although unsigned was held admissible in evidence as part of the *res gestae*. "Although this paper was not signed by the parties, and so did not rise to the dignity of a written contract, yet I think it was admissible in evidence. It was a transaction constituting a part of the negotiation out of which the contract emerged. It was a part of the *res gestae*, and as such was, I think, relevant." *Freeman v. Bartlett*, 47 N. J. L. 33.

In *Carstens v. McDonald*, 38 Neb. 358, 57 N. W. 757, the defendant had contracted to sell and deliver to the plaintiff certain property, a portion

ized agent,<sup>38</sup> negotiating the contract, whose contents were made known to the other, although not itself a valid and binding contract, is competent evidence on an issue as to the terms of the contract.<sup>39</sup> And there is authority to the effect

of the purchase price being paid at the time by plaintiff's check. A memorandum of the transaction between the parties, stating the quantity of the property, was made by the plaintiff, at the time, on the face of the check in the defendant's presence. In an action against the defendant for a breach of the contract it was held that the check was competent evidence.

38. *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665, 59 N. E. 995.

In *Flood v. Mitchell*, 68 N. Y. 507, a witness to the negotiations leading up to an oral agreement between the parties was requested by them to reduce the same to writing for them to sign. In an action upon the contract the paper so drawn up, and which had not been signed, was offered in evidence. The witness testified that it contained the agreement as he was directed to draw it, with the exception of two provisions inserted; and it was held that the paper was not admissible as a memorandum of what actually took place, as it appeared that it was not an accurate statement thereof, but only embodied the result and really contained provisions not in the original agreement; and further that it was not competent as a paper drawn by the common agent of the parties, because the authority to draw the paper did not establish that relationship, and it had never been ratified or approved by the parties.

In *Kennedy v. Oswego & S. R. Co.*, 67 Barb. (N. Y.) 169, an action to recover for wood sold by the plaintiff to the defendant, the defendant proved that one of its agents drew a writing setting out the terms of the agreement in relation to the wood, and that he presented it to the plaintiff's agent who made the contract, who said it was correct and wished the plaintiff's name signed instead of his own. It was never signed by either party. It was held

that the memorandum was not competent evidence to show what were the terms of the contract in controversy. The basis of the decision seems to have been that the paper offered was made by the defendant's agent and not by the plaintiff or his agent.

39. Oral evidence in aid of insufficient written evidence of a contract is certainly admissible when the contract is not required by law to be in writing. A writing, drawn up after a contract is concluded by parol, which is meant simply as a memorandum of the transaction and which does not amount to a contract, may be given in evidence concurrently with oral proof of the additional facts and circumstances necessary to constitute a contract and giving effect to the transaction. *Mobile Marine D. & M. Ins. Co. v. McMillan*, 31 Ala. 711, citing *McCotter v. Hooker*, 8 N. Y. 497; *Allen v. Pink*, 4 Mees. & W. 140; *Eden v. Blake*, 13 Mees. & W. 614; *Reuter v. Electric Tel. Co.*, 6 Ell. & Bl. 341; *Lockhard v. Avery*, 8 Ala. 502; *Twidy v. Saunderson*, 9 Ired. (N. C.) 5.

In *Eager v. Crawford*, 76 N. Y. 97, an unsigned paper shown to embody the conversations between the parties during the course of the negotiations leading up to the contract in issue, although not binding upon them, was admitted as part of the transaction and as some evidence upon the question how the parties then understood the transaction.

In *Comstock v. Norton*, 36 Mich. 277, an action to recover the amount of orders drawn on the defendant, by persons managing a lumber camp for him, for the payment of employees, and which the plaintiff claimed to have cashed at defendant's request and on his promise to repay, the defense was that the defendant had made no such arrangement with the plaintiff, and had no concern with the payment of the employees, and

that such a memorandum, which the parties refused to sign, is the best evidence of the terms of the contract.<sup>40</sup>

b. *Substituted Contract*. — On an issue as to the terms of an oral agreement substituted for a previous written agreement, the latter is competent evidence.<sup>41</sup>

E. CIRCUMSTANTIAL EVIDENCE. — a. *In General*. — Again, on an issue as to the terms of an oral contract resort is frequently had to circumstantial evidence, which may be, and frequently is, conclusive, either in affirmance of the terms as asserted on the one hand,<sup>42</sup> or to

that his relations with them were inconsistent with his assuming liability as claimed. The written contract between the defendant and the firm so managing the camp, which contemplated that the defendant would or might look after the employees' wages, was held to be relevant and material evidence for the plaintiff.

In *Mumford v. Whitney*, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60, it was held that where the terms of an agreement were reduced to writing but not signed, and one of the parties takes a copy of the writing to submit to others interested with him in the matter, the other party is not at liberty to read such paper in evidence in a suit subsequently brought in reference to the subject matter of the negotiation, the agreement being inchoate.

In an action to recover for services rendered under a contract for two months named, statements of account for services rendered during the months immediately preceding under the same contract furnished to the defendant and proved by him, are competent for the purpose of showing that the defendant recognized the validity of the contract and his liability thereunder. *Davenport Gas L. & C. Co. v. Davenport*, 13 Iowa 229. "If one party has undertaken to do a particular thing from month to month, and as often as required performs the contract, the opposite party has from such acts good right to presume that as long as he performs his part, the party undertaking will continue to comply."

40. *Williamson v. Hill*, 3 Mack. (D. C.) 100.

41. *Delaney v. Linder*, 22 Neb. 274, 34 N. W. 630; *Bonine v. Deniston*, 41 Mich. 292, 1 N. W. 1,024;

*Chiles v. Jones*, 3 B. Mon. (Ky.) 51. See also *Walker v. Wilmington C. & A. R. Co.*, 26 S. C. 80, 1 S. E. 366.

Where a written contract for the performance of work and labor is subsequently varied by the parties so as to require a greater amount of work and a longer time for its completion, the written contract is admissible in evidence, in an action by the workmen to recover on a *quantum meruit*, to show what the parties had agreed on as reasonable for that portion of the work embraced in it. *Hutchison v. Cullom*, 23 Ala. 622.

In *McQuown v. Cavanaugh*, 14 Colo. 188, 23 Pac. 341, an action for work and labor performed, it was shown that the plaintiff had been in the employ of the defendant's husband at a stipulated compensation, and remained in such employ during the time the business was conducted by the husband, both individually and as the defendant's agent and by a receiver, pending an assignment for creditors, and the issue was whether or not the compensation for services rendered to the defendant when she resumed business after the discharge of the receiver was the same; and it was held proper to permit the plaintiff to testify to his original contract, as showing the terms of his employment with the defendant after she succeeded to the business.

42. In *Alling v. Cook*, 49 Conn. 574, the defendant had hired of the plaintiffs certain machinery which it was necessary for him to procure at once for a certain use, and the issue was whether or not the defendant had agreed to pay for its use a certain sum without reference to the length of time it was to be used, or whether he had agreed to pay for its use according to the time it was

negative such claim on the other hand.<sup>43</sup>

b. *Custom.* — But whether or not the terms of a particular verbal agreement are as asserted, the party so asserting cannot show that it has been his custom to insert into other similar contracts such terms, and to show particular instances in which he carried the custom into effect.<sup>44</sup>

c. *Other Contracts.* — On an issue as to the terms of an oral agreement it is not proper to receive evidence of the terms of other transactions between the parties;<sup>45</sup> nor is evidence of the terms of other transactions between one of the parties and a third person admissible on such an issue.<sup>46</sup> But where the evidence shows that

used; it was held that evidence of the market value of the machinery was not admissible for the defendant for the purpose of showing the probability that the agreement was as he claimed it. The court said: "It will be observed that the parties were not at issue as to the terms of a contract of sale. Hence the authorities cited by the defendant, that the market value of the thing sold in such cases may be proved 'as showing a probability which party is right,' do not apply. The value of its use is a very different question, and that is not necessarily affected by its market value. A party may be so situated that the use of an article may be worth much more to him than its market value. In this case the use of the engine for the time being was very important to the defendant. He was in the business of making cider, and the motion states that he had 'three thousand bushels of apples on hand, that his motive power became useless, and that it was necessary that he should immediately obtain a steam engine and boiler to save his fruit and continue work at his mill.' In this state of his affairs he agreed, according to his own claim, to pay twenty-five dollars for its use for a term which he thought would not exceed two weeks, which in that event would have been more than two dollars per day. Hence the market value of the engine would throw no light on the question whether he agreed to pay 'twenty-five dollars for twelve days' use and two dollars per day for the few days required in excess of that time, or twenty-five dollars for the whole time that might be required."

43. On an issue as to whether or not an employee was employed for a stated time at a stipulated monthly salary, the alleged employer may offer evidence tending to show that the employee was at the time engaged in the services of third persons. *Phinney v. Bronson*, 43 Kan. 451, 23 Pac. 624.

Where the terms of a parol agreement are in controversy the fact that one of the parties might have effected with another person a more favorable contract than that which his adversary contends is not relevant evidence for him. *Crews v. Threadgill*, 35 Ala. 334.

44. On an issue as to whether or not a particular verbal contract of agistment required the owner to assume certain risks, the agister cannot show that it was his custom to insert into other contracts a provision requiring the owner to take such risks and also to show particular instances in which he carried the custom into effect. *Lucia v. Meech*, 68 Vt. 175, 34 Atl. 695.

45. *Bonyng v. Field*, 81 N. Y. 159. Compare *Lelar v. Brown*, 15 Pa. St. 215; *Tibbetts v. Sumner*, 19 Pick. (Mass.) 166.

On an issue as to whether or not there was an agreement to pay a certain price for property, evidence that the parties thereto had agreed upon the same price for other like property about the same time is inadmissible. *Plummer v. Mold*, 22 Minn. 15.

46. *Indiana.* — *Evans v. Koons*, 10 Ind. App. 603, 38 N. E. 350.

*Iowa.* — *McKivitt v. Cone*, 30 Iowa 455.

the parties contracted with reference to the terms of previous contracts, it is competent to show the terms of such previous contracts, in order to arrive at the intention of the parties, and to ascertain all the terms of the contract in controversy.<sup>47</sup>

## II. AGREEMENT PARTLY ORAL, ETC.

The rules of evidence pertaining to agreements partly oral and partly in writing, as well as to distinct oral agreements contemporaneous with the execution of a written contract, and where the writing does not state the entire agreement between the parties, are treated in another article.<sup>48</sup>

## III. AGREEMENT REDUCED TO WRITING.

**1. The Writing as an Instrument of Evidence.** — The rules of evidence governing the use of written contracts as instruments of evidence are treated elsewhere in this work.<sup>49</sup>

**2. Matters Affecting the Writing as a Binding Instrument.** — A. GENERAL RULE. — The general rule as to the admissibility of parol evidence of matters affecting the writing as a binding instrument is treated elsewhere in this work.<sup>50</sup>

B. PARTICULAR GROUNDS. — The rules of evidence pertaining to proof of incapacity,<sup>51</sup> consideration,<sup>52</sup> delivery of a writing,<sup>53</sup> illegality,<sup>54</sup> and of the rules of evidence in respect of mistake, accident,<sup>55</sup> and fraud,<sup>56</sup> are to be found elsewhere in this work.

**3. Matters as to the Terms of the Contract.** — A. CONTRADICTION

*Kansas.* — *Roberts v. Dixon*, 50 Kan. 436, 31 Pac. 1,083.

*Minnesota.* — *Ham v. Wheaton*, 61 Minn. 212, 63 N. W. 495.

*Nevada.* — *Geremia v. Mayberry*, 14 Nev. 199.

*Vermont.* — *Lucia v. Meech*, 68 Vt. 175, 34 Atl. 695; *Aiken v. Kennison*, 58 Vt. 665, 5 Atl. 757.

*Wisconsin.* — *Thomas v. Parrett*, 106 Wis. 605, 82 N. W. 554.

In an action by a gas company for the price of gas used by the defendants for illuminating purposes, it is proper for the court to refuse an order compelling the plaintiff to produce contracts with other customers, asked for the purpose of showing the price charged them, and to refuse to permit evidence of what was charged by the plaintiff to other consumers. *Philadelphia Co. v. Park Bros. & Co.*, 138 Pa. St. 346, 22 Atl. 86.

47. *Davis v. Teachout*, 126 Mich.

135, 85 N. W. 475. See also *Krech v. Pacific R. Co.*, 64 Mo. 172.

In *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 So. 34, where the agreement in controversy was to renew an existing contract of insurance, it was held proper and necessary to receive in evidence said existing contract of insurance.

48. See article "PAROL EVIDENCE."

49. See article "ADMISSIONS," Vol. I. See also "DOCUMENTARY EVIDENCE," "PRIVATE WRITINGS."

50. See article "PAROL EVIDENCE."

51. See articles "AGE," Vol. I, p. 731; "INFANCY," "INSANITY," "INTOXICATION."

52. See article "CONSIDERATION."

53. See article "DELIVERY."

54. See articles "CONSIDERATION," "ILLEGALITY."

55. See article "CANCELLATION OF INSTRUMENTS," Vol. II, p. 828.

56. See articles "FRAUD," "FRAUDULENT CONVEYANCES."

BY PAROL EVIDENCE. — A full discussion of the rules of evidence as to the admissibility of extrinsic evidence to contradict or vary written contracts,<sup>57</sup> to explain an ambiguity<sup>58</sup> and to aid in the interpretation of the terms of written contracts,<sup>59</sup> is elsewhere found in this work.

B. WRITING REFERRING TO OTHER CONTRACTS. — Where a written contract refers to the terms of another contract as to some of the stipulations then agreed upon, the latter contract may be introduced in evidence to establish the terms so referred to.<sup>60</sup>

C. BEST AND SECONDARY EVIDENCE. — The rules as to secondary evidence to prove the contents of written instruments generally as treated elsewhere in this work<sup>61</sup> apply to written contracts.<sup>62</sup>

**Original Writing Lost.** — On an issue as to the terms of a lost written contract, oral evidence of similar transactions with other persons on the same terms is irrelevant.<sup>63</sup>

D. ORIGINAL CONTRACT ABANDONED. — Where a contract has been abandoned by one of the parties, and a contract with another person substituted, which person agrees to complete the contract in accordance with the terms and stipulations of the abandoned contract, the abandoned contract is admissible in evidence to establish the specific terms and stipulations of the substituted contract.<sup>64</sup>

#### IV. MATTERS IN DISCHARGE OF CONTRACTS.

1. **The Breach.** — A. BURDEN OF PROOF. — A party seeking to recover for the breach of a contract has the burden to establish the

57. See article "PAROL EVIDENCE."

58. See article "AMBIGUITY," Vol. II, p. 825.

59. See article "PAROL EVIDENCE."

60. *Casey v. Holmes*, 10 Ala. 776. See also *Rorabacher v. Lee*, 16 Mich. 168.

In an action for breach of contract, another contract between the plaintiff and third person is admissible in evidence for the purpose of explaining certain provisions in the contract in suit, where it is referred to in the contract in suit, and made in express terms a part thereof. *Hewes v. Germain Fruit Co.*, 106 Cal. 441, 39 Pac. 853. See also *Chew Farn v. Keefer*, 103 Cal. 46, 36 Pac. 1,032.

61. See article "BEST AND SECONDARY EVIDENCE," Vol. II, p. 271.

62. *Alabama*. — *Foster v. State*, 88 Ala. 182, 7 So. 185.

*California*. — *Poole v. Gerrard*, 9 Cal. 593.

*Connecticut*. — *Pitkin v. Brainard*, 5 Conn. 451, 13 Am. Dec. 79.

*Florida*. — *Edwards v. Rives*, 35 Fla. 89, 17 So. 416.

*Michigan*. — *Stanley v. Anderson*, 107 Mich. 384, 65 N. W. 247.

*Minnesota*. — *Steele v. Etheridge*, 15 Minn. 501.

*Texas*. — *Rains v. McMills*, 14 Tex. 614.

63. *Langworthy v. Goodall*, 76 Ala. 325.

It has been said, however, that on an issue as to the terms of a written contract, forms of contracts used with third persons, proved to be identical with the lost one, with the exception of dates and names, might be used as relevant evidence. *Langworthy v. Goodall*, 76 Ala. 325. In this case the court said that they were not prepared to say that this kind of proof could not be made, but that as the question was not before them they made no decision.

64. *Byrd v. Bertrand*, 7 Ark. 321.

breach and the loss occasioned to him thereby;<sup>65</sup> and it is not incumbent on the other party sought to be charged to show in the first instance that the party seeking recovery has suffered no damages.<sup>66</sup>

**B. MODE OF PROOF.** — Of course, on an issue as to the breach of a contract circumstantial evidence is necessarily very frequently resorted to.<sup>67</sup>

**65.** Where the defendant is sued for the value of cotton shipped by him under contract, the burden is on the plaintiff to establish a stipulation to deliver the cotton to some place or person and a breach of such stipulation. *Bowman v. Browning*, 17 Ark. 599.

Where the principal agreed to use his best efforts to furnish machines to his agent as fast as ordered, it is error to allow the agent, in an action to recover for a breach of the contract, to testify that he had sold five machines, where it is not shown that he had ordered them or that his principal had not used his best efforts to furnish such if any had been ordered. *Williams Harvester Co. v. Pope*, 69 Iowa 523, 29 N. W. 438.

In an action for a breach of a contract to save the purchaser of a cargo of lumber harmless against any just reclamation upon the cargo, the burden is on the plaintiff to show what the sum claimed as reclamation was for, and also that it is composed of items of just reclamation against the cargo; but where other testimony establishes such reclamation to be proper and just, it is not error for the court to permit plaintiff to testify that he had paid a given sum as reclamation when it is the amount shown by the other evidence to be correct and just. *Robinson v. Hyer*, 35 Fla. 544, 17 So. 745.

Where a contract of sale provides for the delivery by the vendor to the vendee of property to be inspected by the vendee's agent and the payment for that which came up to specifications, the natural inference, in the absence of any evidence to the contrary, would be that all the property accepted and used by the vendee came up to the contract and was to be paid for accordingly; and if the vendee asserts that although some of the property was received it did not come up to requirements, he has the

burden of proving that fact. *Draffin v. Charleston, C. & C. R. Co.*, 34 S. C. 464, 13 S. E. 427.

In an action for breach of a contract requiring the defendant to perform certain work in a workmanlike manner on materials supplied by the plaintiff, the plaintiff has the burden to show that the materials so supplied by him were of such a quality that the work to be performed by the defendant could have been performed as agreed upon. "Whether it was of good or bad quality was a fact more within his knowledge than that of the defendant's. . . . Until that fact appears, it is not shown that any damage was done the plaintiff by the defendant's want of skill or care in tempering the metal." *Hood v. Disston*, 90 Ala. 377, 7 So. 732.

**66.** *Wolf v. Gerr*, 43 Iowa 339.

**67. Circumstantial Evidence to Show Breach.** — In *Moore v. Lea*, 32 Ala. 375, an action to recover for breach of a contract to perform work and labor, the defendant proved that at the time agreed on he went to the place where the work was to be done for the purpose of commencing work, but did not, because of alleged defects in the material furnished by the plaintiff; and it was held proper to receive evidence tending to show that he was at the time actually proceeding to another place in the same neighborhood, where he had undertaken another job of work, and falsely pretended that he was willing and ready to enter upon the performance of his contract with the plaintiff.

On an issue as to whether or not the refusal of a vendee of chattels constituted a breach of the contract of sale where it appears that the property sold was to be delivered to the vendee by a third person on order of the vendor, an unsigned letter to the vendee forbidding him to take the

**Acts after Suit Brought.** — After one party to a contract has repudiated the contract as set out by defendant, and has brought suit against him, evidence of acts of the defendant done after the suit was commenced as tending to show a breach by him, is not admissible for the plaintiff.<sup>68</sup>

**Written Communications.** — Written communications of one joint obligor, as to the non-compliance of the joint undertaking, are admissible against his joint obligor as against the objection that they were not written by the obligor sought to be bound.<sup>69</sup>

**2. Performance.** — The rules of evidence in respect of proving the fact of performance are fully treated elsewhere in this work.<sup>70</sup>

**3. Substitution.** — The rules of evidence as to proving oral agreements in substitution for written contracts are fully treated elsewhere in this work.<sup>71</sup>

**4. Abandonment.** — **A. BURDEN OF PROOF.** — A party who asserts that a contract has been discharged by reason of having been abandoned has the burden of showing that fact.<sup>72</sup>

property is competent evidence where there is evidence tending to show that the letter had been sent by the attorney of such third person. *Goldman v. Bashore*, 80 Cal. 46, 22 Pac. 82.

On an issue as to the breach of an implied warranty in machinery that it was suitable for the purpose for which it was intended, evidence is properly admitted comparing the machine in question with a good machine subsequently bought by the warrantees, as it tends to establish the breach of warranty. *Davis' Sons v. Sweeney*, 80 Iowa 391, 45 N. W. 1,040.

On an issue as to a breach of implied warranty in machinery, it is proper to permit a witness to testify that he had never seen a machine which did not do better work than the one in question. *Davis' Sons v. Sweeney*, 80 Iowa 391, 45 N. W. 1,040.

In an action to recover for labor performed under a special contract to which the defense is that the plaintiffs did not comply with the terms of the contract, thereby compelling the defendants to complete it, evidence of the amount necessarily expended by the defendants to complete the contract as specified is admissible, because it tends to prove that the contract had not been substantially per-

formed by the plaintiffs. *Clark v. Russell*, 110 Mass. 133.

Where two members of a co-partnership enter into a written contract for the dissolution of the co-partnership and for the sale at some future and distinct time of all the partnership assets, and afterwards a sale is made thereof to one of the partners, the other partner in an action between them may show by parol evidence that the sale was not made in exact accordance with the terms of the written contract. *Todd v. Allen*, 18 Kan. 543.

In an action for damages for a breach of contract for exclusive wharf privileges giving the defendant the right to land all freight on the plaintiffs' wharf and the exclusive right to receive any freight which the second party may be willing to carry, evidence that the plaintiffs built and leased another wharf to an opposition line is inadmissible. *Taylor v. Albe-marle Steam Nav. Co.*, 105 N. C. 484, 10 S. E. 897.

68. *Haight v. Conners*, 149 Pa. St. 297, 24 Atl. 302.

69. *Bacon v. Green*, 36 Fla. 325, 18 So. 870. See also article "ADMISSIONS," Vol. I, p. 574.

70. See article "PERFORMANCE."

71. See article "PAROL EVIDENCE."

72. *Stevens v. Ross*, (N. J.), 13



**B. MODE OF PROOF** — On an issue as to the abandonment of a contract it is competent to prove not only acts, omissions and declarations tending to show an abandonment, but in connection therewith, and to characterize such acts, omissions and declarations, to show a reason or motive for abandonment.<sup>73</sup>

And that a contract has been abandoned may be shown by direct testimony,<sup>74</sup> but not by the opinions of witnesses.<sup>75</sup>

**5. Rescission.** — The rules as to the admissibility of evidence to prove rescission of written contracts are treated elsewhere in this work.<sup>76</sup>

## V. MATTERS IN CONFIRMATION AND SUPPORT OF WRITING.

A full discussion of the rules as to the admissibility of evidence in confirmation and support of written instruments is given elsewhere in this work.<sup>77</sup>

Atl. 225; Hood v. Smiley, 5 Wyo. 70, 36 Pac. 856.

73. Smith v. Glover, 50 Minn. 58, 52 N. W. 210, 912.

**Letters as Admissions.** — Hood v. Olin, 68 Mich. 165, 36 N. W. 177.

74. Wallis v. Randall, 81 N. Y. 164.

75. Jacksonville & A. R. Co. v. Woodworth, 26 Fla. 368, 8 So. 177.

76. See articles "PAROL EVIDENCE;" "RESCISSIION."

77. See articles "CONSIDERATION;" "PAROL EVIDENCE."

# CONTRADICTION OF WITNESSES.

BY W. H. KILER.

## I. CONTRADICTORY EVIDENCE MAY BE INTRODUCED, 530

1. *Generally*, 530
2. *Incidental Impeachment*, 532
3. *Direct Impeachment*, 533

## II. PROOF OF CONTRARY STATEMENTS, 533

1. *Reason for Admitting*, 533
2. *Reasons Against*, 534
3. *Limitations of Rule*, 535
  - A. *Generally*, 535
  - B. *Preliminary Showing*, 535
  - C. *If Witness Denies Making*, 536

## III. STATEMENT OF SUBSCRIBING WITNESSES, 536

### CROSS-REFERENCES.

Corroboration;

Impeachment.

## I. CONTRADICTORY EVIDENCE MAY BE INTRODUCED.

1. **Generally.** — Although it is a general rule that a party cannot take inconsistent positions,<sup>1</sup> yet he may introduce evidence that contradicts other evidence adduced by him.<sup>2</sup>

1. Whart. Legal Maxims IX. "*Allegans contraria non est audiendus.*" (Jenk. Cent. 16.) Contrary allegations are not to be heard.

2. Buller's N. P. 297.

*England.* — Alexander v. Gibson, 2 Camp. 556, 11 Rev. Rep. 797; Melhuish v. Collier, 15 Q. B. 878; Richardson v. Allen, 2 Stark 334, 3 Eng. C. L. 371; Ewer v. Ambrose, 3 Barn. & C. 746; Friedlander v. London Assur. Co., 4 Barn. & A. 193; Atty.-Gen. v. Hitchcock, 1 Ex. 91, 11 Jur. 478; Bradley v. Ricardo, 8 Bing. 57.

*Alabama.* — Warren v. Gabriel, 51 Ala. 235; Bradford v. Bush, 10 Ala. 386; Winston v. Moseley, 2 Stew. 137.

*California.* — Norwood v. Kenfield, 30 Cal. 393.

*Connecticut.* — Olmstead v. Winsted Bank, 32 Conn. 278, 85 Am. Dec. 260.

*Illinois.* — Rockwood v. Poundstone, 38 Ill. 199.

*Iowa.* — Thorn v. Moore, 21 Iowa 285; Hall v. Chicago, R. I. & P. R. Co., 84 Iowa 311, 51 N. W. 150;

And the party thus introducing contradictory evidence may claim the benefit of the more favorable part thereof.<sup>3</sup>

If a witness state facts against the interest of the party calling him, another witness may be called by the same party to disprove those facts.<sup>4</sup>

*Clapp v. Peck*, 55 Iowa 270, 7 N. W. 587.

*Kentucky*. — *Gray v. Gray*, 3 Litt. 465.

*Maine*. — *Dennett v. Dow*, 17 Me. 19; *Hall v. Houghton*, 37 Me. 411; *Brown v. Osgood*, 25 Me. 505.

*Maryland*. — *Wolfe v. Hauver*, 1 Gill 84.

*Massachusetts*. — *Brown v. Bellows*, 4 Pick. 179; *Brolley v. Lapham*, 13 Gray 294.

*Missouri*. — *Brown v. Wood*, 19 Mo. 475.

*New Hampshire*. — *Swamscot Mach. Co. v. Walker*, 22 N. H. 457, 55 Am. Dec. 172; *Seavy v. Dearborn*, 19 N. H. 351.

*New Jersey*. — *Skellinger v. Howell*, 8 N. J. L. 310.

*New York*. — *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Thompson v. Blanchard*, 4 N. Y. 303; *People v. Safford*, 5 Denio 112; *Lawrence v. Barker*, 5 Wend. 301; *Hunt v. Fish*, 4 Barb. 324; *People v. Sheehan*, 49 Barb. 217; *Keutgen v. Parks*, 2 Sandf. 60; *Jackson v. Leek*, 12 Wend. 105; *McArthur v. Sears*, 21 Wend. 190; *Pickard v. Collins*, 23 Barb. 444; *Parsons v. Suydam*, 3 E. D. Smith 276; *Bok v. Vincent*, 12 Abb. Pr. 137; *Bemis v. Kyle*, 5 Abb. Pr. (N. S.) 232; *Gibbs v. Huyler*, 9 Jones & S. 190.

*North Carolina*. — *Hice v. Cox*, 34 N. C. 315; *Shelton v. Hampton*, 28 N. C. 216; *Spencer v. White*, 23 N. C. 236.

*Pennsylvania*. — *Stockton v. Demuth*, 7 Watts 39, 32 Am. Dec. 735; *Cowden v. Reynolds*, 12 Serg. & R. 281.

*South Carolina*. — *Perry v. Massey*, 1 Bailey L. 32; *Farr v. Thompson*, Cheves L. 37.

3. *Bullard v. Pearsall*, 53 N. Y. 230; *Howard v. State*, 32 Ind. 478; *Melhuish v. Collier*, 15 Q. B. 878.

#### 4. Proving Facts to Be Otherwise.

In calling other witnesses to disprove facts stated by one's own witness, Mr. Justice Buller says: "Such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first, but the impeachment of his credit is incidental only, and consequential." Buller's N. P. 297.

This rule was laid down in the following early cases: *Alexander v. Gibson*, 2 Camp. 556, 11 Rev. Rep. 797. In this case, where the question was whether the defendant's servant, who had been employed to sell a horse, had warranted him sound, and the servant swore, on being called by plaintiff, that he had not given any warranty, Lord Ellenborough allowed the plaintiff to call another witness to prove that at the time of the sale the servant had expressly warranted its soundness. "There can be no rule of law," said Lord Ellenborough, "by which the truth on such an occasion is to be shut out and justice perverted."

In *Friedlander v. London Assur. Co.*, 4 Barn. & A. 193, an action on a policy of insurance against fire, an issue was joined as to the quantity and quality of the goods on the insured premises at the time of the fire; several witnesses were called to prove the sale of goods to the plaintiff and the delivery of them on the premises, one witness, called for the same purpose, being shown an invoice and a letter in his own handwriting, admitted on his examination in chief that he wrote the invoice, but denied that he sent any goods, and said that the invoice was made out by him after the fire in the presence of the plaintiff's son, and of his shopman (who had both been examined before as witnesses); that the letter was in fact written in London at the plaintiff's house and by his desire, and that the plaintiff's son and shop-

But the right to contradict one's own witnesses is limited to material facts; answers to collateral questions bind the party.<sup>5</sup>

**2. Incidental Impeachment.** — And he may introduce such evidence even when thereby discredit is cast on one of his own witnesses.<sup>6</sup>

man had persuaded him to say he had sent the goods. It was then proposed to recall those two persons to prove that the invoice was not made, nor the letter written, in the manner alleged, and that they had not acted as stated. Lord Tenterton rejected the evidence, but the Court of King's Bench granted a new trial, on the ground that the proffered evidence went to prove a material fact relevant to the issue, and not merely collateral, and that by such evidence a party might contradict his own witness.

5. *Friedlander v. London Assur. Co.*, 4 Barn. & A. 193; *Bok v. Vincent*, 12 Abb. Pr. (N. Y.) 137; *Lawrence v. Barker*, 5 Wend. (N. Y.) 301.

6. *United States*. — *Hickory v. U. S.*, 151 U. S. 303; *U. S. v. Hall*, 44 Fed. 864, 10 L. R. A. 324; *U. S. v. Watkins*, 3 Cranch C. C. 441, 28 Fed. Cas. No. 16,649.

*Alabama*. — *Hemingway v. Garth*, 51 Ala. 530; *Bradford v. Bush*, 10 Ala. 386; *Winston v. Moseley*, 2 Stew. 137; *White v. State*, 87 Ala. 24, 50 So. 829; *Griffin v. Wall*, 32 Ala. 149; *Warren v. Gabriel*, 51 Ala. 235.

*California*. — *Norwood v. Kenfield*, 30 Cal. 393; *People v. Jacobs*, 49 Cal. 384.

*Colorado*. — *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817.

*Connecticut*. — *Olmstead v. Winsted Bank*, 32 Conn. 278, 85 Am. Dec. 260.

*Georgia*. — *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744, and see note page 749; *Cronan v. Roberts*, 65 Ga. 678; *Skipper v. State*, 59 Ga. 63; *Hollingsworth v. State*, 79 Ga. 605, 4 S. E. 560.

*Illinois*. — *Rockwood v. Poundstone*, 38 Ill. 199; *McFarland v. Ford*, 32 Ill. App. 173.

*Indiana*. — *Quinn v. State*, 14 Ind. 589.

*Iowa*. — *Thorn v. Moore*, 21 Iowa 285; *State v. Cummins*, 76 Iowa 133, 40 N. W. 124; *Hunt v. Coe*, 15 Iowa 197.

*Kansas*. — *Wallach v. Wylie*, 28 Kan. 138.

*Kentucky*. — *Gray v. Gray*, 3 Litt. 465; *Helm v. Handley*, 1 Litt. 219; *Young v. Wood*, 11 B. Mon. 123; *Blue v. Kibby*, 1 T. B. Mon. 195, 15 Am. Dec. 96.

*Maine*. — *Brown v. Osgood*, 25 Me. 505; *Hall v. Houghton*, 37 Me. 411.

*Maryland*. — *Wolfe v. Hauver*, 1 Gill 84; *Sewell v. Gardner*, 48 Md. 178.

*Massachusetts*. — *Brown v. Bel-lows*, 4 Pick. 179; *Com. v. Stark-weather*, 10 Cush. 59; *Adams v. Wheeler*, 97 Mass. 67; *Brolley v. Lapham*, 13 Gray 294; *Whitney v. Eastern R. Co.*, 9 Allen 364; *Harrington v. Lincoln (Inhab. of)*, 2 Gray 133.

*Michigan*. — *Pickard v. Bryant*, 92 Mich. 430, 52 N. W. 788; *Craig v. Grant*, 6 Mich. 447.

*Mississippi*. — *Fairly v. Fairly*, 38 Miss. 280.

*Missouri*. — *Meyer Bros. Drug Co. v. McMahan*, 50 Mo. App. 18; *Price v. Lederer*, 33 Mo. App. 426; *Brown v. Wood*, 19 Mo. 475.

*Nebraska*. — *Blackwell v. Wright*, 27 Neb. 269, 43 N. W. 116, 20 Am. St. Rep. 662.

*New Hampshire*. — *Seavy v. Dearborn*, 19 N. H. 351; *Swamscot Mach. Co. v. Walker*, 22 N. H. 457, 55 Am. Dec. 171.

*New Jersey*. — *Skellenger v. Howell*, 8 N. J. L. 310.

*New York*. — *Coulter v. American Mer. U. Exp. Co.*, 56 N. Y. 585; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Simon v. Conger*, 1 Thomp. & C. 554; *Lawrence v. Barker*, 5 Wend. 301; *Pollock v. Pollock*, 71 N. Y. 137; *Thompson v. Blanch-*

**3. Direct Impeachment.** — It is a general rule that one cannot offer evidence for the purpose of impeaching his own witness.<sup>7</sup>

## II. PROOF OF CONTRARY STATEMENTS.

The law is not settled as to whether a party producing a witness whose testimony takes him by surprise shall be allowed to prove by other witnesses that the former had made statements out of court inconsistent with such testimony.

**1. Reason for Admitting.** — It has been said that this course is necessary as a security against an artful witness, who might promise favorable evidence to a party and afterwards by hostile evidence ruin his cause; and that the power of proving contradictory statements ought to be the same whether the witness is called by the one party or the other.<sup>8</sup>

ard, 4 N. Y. 303; Hunt v. Fish, 4 Barb. 324; Pickard v. Collins, 23 Barb. 444; People v. Sheehan, 49 Barb. 217; Keutgen v. Parks, 2 Sandf. 60; Parsons v. Suydam, 3 E. D. Smith 276; Bok v. Vincent, 12 Abb. Pr. 137; Bemis v. Kyle, 5 Abb. Pr. (N. S.) 232.

*North Carolina.* — Shelton v. Hampton, 28 N. C. 216; Hice v. Cox, 34 N. C. 315; State v. Taylor, 88 N. C. 694; Spencer v. White, 23 N. C. 236.

*Pennsylvania.* — Lewis v. Baker, 162 Pa. St. 510, 29 Atl. 708; Stockton v. Demuth, 7 Watts 39, 32 Am. Dec. 735; De Lisle v. Priestman, 1 Browne 176; Stearns v. Merchants' Bank, 53 Pa. St. 490.

*South Carolina.* — Perry v. Massey, 1 Bailey L. 32; Farr v. Thompson, Cheves L. 37.

*Texas.* — Paxton v. Boyce, 1 Tex. 317.

**7. See articles "IMPEACHMENT" and "CORROBORATION."**

It has been said that one cannot contradict his own witness by *general evidence*. "This," says Mr. Justice Buller, "would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him." Buller's N. P. 297. The obvious meaning of this rule is that a party after producing a witness cannot prove him to be of

such a general bad character as would render him unworthy of credit.

**8.** The introduction of such evidence is held admissible in the following cases: State v. Benner, 64 Me. 267; Campbell v. State, 23 Ala. 44; Hemmingway v. Garth, 51 Ala. 530; Pickard v. Collins, 23 Barb. (N. Y.) 444; White v. State, 10 Tex. App. 381.

This question has been settled in Kentucky and Massachusetts by statute, and it is now the settled law of those states that such declarations and contrary statements are admissible evidence. Ky. Crim. Code, § 660; Champ v. Com. 2 Met. (Ky.) 17, 74 Am. Dec. 388; Blackburn v. Com., 12 Bush (Ky.) 181; Mass. Stat. 1869, Ch. 425; Ryerson v. Abington (Inhab. of), 102 Mass. 526; Newell v. Homer, 120 Mass. 277; Brooks v. Weeks, 121 Mass. 433; Force v. Martin, 122 Mass. 5; Com. v. Donahoe, 133 Mass. 407.

The statute in Massachusetts, and perhaps the rule prevails elsewhere, requires that such former inconsistent statements should be called to the attention of the witness, in order that he may explain them, before other evidence of them should be admitted. See cases cited above and McDowell v. General Mut. Ins. Co., 10 La. Ann. 16.

In the case of Rex v. Oldroyd, 1 R. & R., C. C. 88, on a trial for murder, before Mr. Baron Graham, in 1805, several witnesses having

**2. Reasons Against.** — The opponents of this class of evidence maintain that by its introduction the naked declarations of the witness made out of court, and perhaps collusively, for the purpose of being thus introduced, are put before the jury as independent and substantive evidence.

Another common objection to this evidence is that it would necessarily discredit the witness; that the party ought not to have called him if he had not considered him worthy of credit, and that

been called for the prosecution, the prisoner's counsel observed the name of another witness indorsed on the bill of indictment; but the counsel for the prosecution declining to call her, the judge thought it his duty to call her, and her evidence went to an acquittal. The judge then cast his eye over her deposition taken before the coroner, and finding it totally at variance with what she swore at the trial, caused that deposition to be proved, and in summing up to the jury threw her testimony out of the case. The twelve judges, on consideration, confirmed the judge's proceeding, Lord Ellenborough and C. J. Mansfield observing that they thought the prosecution had the same right as the judge.

In the case of *Ewer v. Ambrose*, 3 Barn. & C. 749, a witness having been called on the part of the defendant to prove a partnership between himself and the defendant, and having denied that fact, an answer of the witness in chancery wherein he admitted himself to be a partner, was offered in evidence by the defendant's counsel and admitted. Mr. Justice Holroyd, after observing that the answer was clearly not admissible to prove substantially the partnership, proceeded thus: "But it is a very different question whether it was not evidence to destroy the credit of the witness as to the particular fact to which he swore."

In the case of *Wright v. Beckett*, 1 M. & Rob. 414, the plaintiff's counsel having examined four witnesses to prove that the plaintiff and his predecessor had immemorially exercised acts of ownership over certain land, called a fifth witness to establish the same fact. That witness contradicted the other four; upon which the plaintiff's counsel asked

him whether he had not given a different account of the facts to the plaintiff's attorney two days before. This was objected to, on the ground that the obvious tendency of the question put by the plaintiff was to discredit his own witness. On motion for new trial, Lord Denman said: "The case was brought to the simple point — to which of the witnesses was credit due; if to the first four, the plaintiff was entitled to the verdict; if to the last, the defendant. On this issue alone the event of the cause depended. The defendant enjoyed the privilege of assailing the credit of those who were opposed to his interest; the plaintiff must have the same right with respect to that witness who unexpectedly turned against him, unless he is debarred by some strict rule of law. I find no such rule, but many decisions which must have proceeded on the same principle. There is a passage, indeed, upon the subject in Buller's *Nisi Prius*, to which, as I understand it, I most fully subscribe. (See *supra* note 7.) But I consider this to mean that no party shall produce a witness whom he knows to be infamous, and whom he has, therefore, the means of discrediting by general evidence."

Mr. Baron Bolland was of opinion that the rule applicable to this question was that which had been relied upon by the defendant's counsel, viz., that a party in a cause is not to be permitted to give evidence of a fact for the purpose of discrediting his own witness *unless such fact in itself would be evidence in the cause*; but where such fact is relevant to the issue, and so *per se* evidence in the cause, such proof is allowed to be given, although it may collaterally have the effect of discrediting the testimony of his own witness.

having called him, he must take him for better or for worse, and cannot afterwards contradict him.<sup>9</sup>

**3. Limitations of Rule.** — A. GENERALLY. — Where the witness gives no prejudicial testimony upon that to which the contradictory statements relate, evidence of statements made out of court is not competent. Where the party calling the witness is surprised by his testimony, and it is *prejudicial*, then contradictory statements as to the point upon which the evidence is prejudicial is competent.<sup>10</sup>

B. PRELIMINARY SHOWING. — Other cases hold that a party may prove the previous contradictory declarations of a witness whom he has called to the stand, when it is established that he was surprised at the testimony, and was not guilty of collusion or bad faith, and that the witness was adverse to him.<sup>11</sup>

A foundation must be laid for the introduction of contrary state-

9. Best says the weight of authority is against the introduction of such evidence. 2 Best Ev. § 645. Some of the cases which hold that such declarations are not admissible are: *Coulter v. American Mer. U. Exp. Co.*, 56 N. Y. 585; *Nichols v. White*, 85 N. Y. 531; *Thompson v. Blanchard*, 4 N. Y. 303; *Moore v. Chicago, St. L. & N. O. R. Co.*, 59 Miss. 243; *De Lisle v. Priestman*, 1 Browne (Pa.) 176; *Stearns v. Merchants' Bank*, 53 Pa. St. 490; *Brewer v. Porch*, 17 N. J. L. 377.

*Ewer v. Ambrose*, 3 Barn. & C. 746. The earlier Massachusetts reports held the same doctrine. *Adams v. Wheeler*, 97 Mass. 67; *Com. v. Starkweather*, 10 Cush. 59. But this doctrine has been changed by statute in Massachusetts, and since 1869 such declarations and contrary statements are admissible in that state. Mass. Stat. 1869, Ch. 425; *Ryerson v. Abington (Inhab. of)*, 102 Mass. 526; *Newell v. Homer*, 120 Mass. 277; *Brooks v. Weeks*, 121 Mass. 433; *Force v. Martin*, 122 Mass. 5; *Com. v. Donahoe*, 133 Mass. 407.

10. *Hull v. State*, 93 Ind. 128; *Cenway v. State*, 118 Ind. 482, 21 N. E. 285; *Miller v. Cook*, 124 Ind. 101, 24 N. E. 577; *Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

In *Champ v. Com.*, 2 Met. (Ky.) 17, 74 Am. Dec. 388, the court of appeals in discussing the right to contradict one's own witness by showing that he had made statements different

from his present testimony, says: "The obvious meaning of the rule is, that where a witness states a fact prejudicial to the party calling him, the latter may be allowed to show that such fact does not exist, by proving that the witness had made statements to others inconsistent with his present testimony. But a case like the present where the witness does not state any fact prejudicial to the party calling him, but only fails to prove facts supposed to be beneficial to the party, is not within the reason or policy of the rule, and the witness cannot be contradicted in such case by evidence that he had previously stated the same facts to others." *Judy v. Johnson*, 16 Ind. 371; *Hill v. Goode*, 18 Ind. 207; *Hull v. State*, 93 Ind. 128.

11. *Alabama*. — *Campbell v. State*, 23 Ala. 44.

*California*. — *People v. Jacobs*, 49 Cal. 384.

*Georgia*. — *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744.

*Massachusetts*. — *Com. v. Starkweather*, 10 Cush. 59.

*Michigan*. — *Craig v. Grant*, 6 Mich. 447.

*Missouri*. — *Dunn v. Dunnaker*, 87 Mo. 597.

*New Hampshire*. — *Hurlburt v. Bellows*, 50 N. H. 105; *Whitman v. Morey*, 63 N. H. 448.

*New York*. — *Hunt v. Fish*, 4 Barb. 324.

*Pennsylvania*. — *Stearns v. Merchants' Bank*, 53 Pa. St. 490.

ments by calling the attention of the witness to the time and place, when and where, and the persons before whom such statements were made, and thus giving opportunity for explanation.<sup>12</sup>

C. IF WITNESS DENIES MAKING. — Many cases hold that while a witness may be asked by the one who called him if he did not make contrary statements, yet if he denies the fact it cannot be otherwise established.<sup>13</sup>

### III. STATEMENT OF SUBSCRIBING WITNESSES.

The rule that a party cannot contradict his own witness by proving that he had made contradictory statements at other times does not apply to those cases where the party is under the necessity of calling subscribing witnesses to an instrument.<sup>14</sup>

12. *Dunlap v. Richardson*, 63 Miss. 447.

13. The following is held in *Hurley v. State*, 46 Ohio St. 320, 21 N. E. 645, 4 L. R. A. 161: A party who calls a witness and is taken by surprise by his unexpected and unfavorable testimony may interrogate him in respect to declarations and statements previously made by him, which are inconsistent with his testimony, for the purpose of refreshing his recollection, and inducing him to correct his testimony, or explain his apparent inconsistency, and for such purpose his previous declarations may be repeated to him, and he may be called upon to say whether they were made by him. In case the witness denies having made such statements, or his answer is ambiguous concerning them, it is not competent for the party calling him to prove them by other witnesses.

In *Melhuish v. Collier*, 14 Jur. 621, 15 Q. B. 878, it is held: "Where a witness gives evidence adverse to the party who calls him, he may be asked whether he has not given a different account of the matter in question before the trial, but if the witness denies it, the person to whom he gave that account cannot be called to contradict him; and where a witness gives evidence of a fact adverse to the party who calls him, other witnesses may be called to disprove the fact, if it be relevant to the issue in the cause."

See also *Holdsworth v. Dartmouth Corp.*, 2 M. & Rob. 153; *Allay v. Hutchings*, 2 M. & Rob. 358, note;

*Winter v. Butt*, 2 M. & Rob. 357.

This is the doctrine maintained by a long line of American cases, among them the following:

*Georgia*. — *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744.

*Maryland*. — *Baltimore & O. R. Co. v. State*, 41 Md. 268; *Queen v. State*, 5 Har. & J. 232.

*Massachusetts*. — *Adams v. Wheeler*, 97 Mass. 67.

*New York*. — *Thompson v. Blanchard*, 4 N. Y. 303; *Pollock v. Pollock*, 71 N. Y. 137; *Coulter v. American Mer. U. Exp. Co.*, 56 N. Y. 585; *Nichols v. White*, 85 N. Y. 531; *Becker v. Koch*, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515; *Bullard v. Pearsall*, 53 N. Y. 230.

*North Carolina*. — *Gadsby v. Dyer*, 91 N. C. 311.

*Pennsylvania*. — *Stearns v. Merchants' Bank*, 53 Pa. 490.

*South Carolina*. — *Bauskett v. Keitt*, 22 S. C. 187.

*Vermont*. — *Cox v. Earyes*, 55 Vt. 24, 45 Am. Rep. 583.

14. *Louisiana*. — *Olinde v. Saizan*, 10 La. Ann. 153.

*Maine*. — *Shorey v. Hussey*, 32 Me. 579; *Dennett v. Dow*, 17 Me. 19.

*Massachusetts*. — *Brown v. Bel-lows*, 4 Pick. 179.

*New Hampshire*. — *Whitman v. Morey*, 63 N. H. 448.

*New Jersey*. — *Brown v. Bulkley*, 14 N. J. Eq. 294.

*Pennsylvania*. — *Harden v. Hays*, 9 Pa. St. 151.

*South Carolina*. — *Williams v. Walker*, 2 Rich. Eq. 291, 46 Am. Dec. 53.



**CONTRIBUTORY NEGLIGENCE.**—See Negligence; Master and Servant.

---

**CONVERSION.**—See Conversion and Trover.

---

**CONVEYANCE.**—See Deeds; Wills.

**VOL. III**

# COPIES.

BY EDWARD W. TUTTLE.

## I. AS PRIMARY EVIDENCE, 539

1. *In General*, 539
2. *Distinguished from Original*, 539
  - A. *Generally*, 539
  - B. *Notarial Protest*, 540
  - C. *Printed Publication*, 540
  - D. *Preliminary Drafts*, 540
  - E. *Letter-Press Copies*, 540
  - F. *Telegrams*, 541
    - a. *Actions Between Sender and Receiver*, 541
    - b. *Actions Against the Company*, 542
3. *By Statute*, 542
4. *Admission of Correctness*, 542

## II. AS SECONDARY EVIDENCE, 542

1. *In General*, 542
2. *Not Conclusive*, 543
3. *Similarity to Original*, 543
4. *Completeness of Copy*, 544
5. *Copy of a Copy*, 544
  - A. *General Rule*, 544
  - B. *Rule Explained*, 545
    - a. *Generally*, 545
    - b. *When the Best Evidence*, 545
    - c. *When a Copy of Original*, 545

## III. METHOD OF PROOF, 546

1. *In General*, 546
2. *Comparison With Original*, 546
  - A. *Generally*, 546
  - B. *Not Essential*, 547
3. *Circumstantial Evidence Sufficient*, 547.
4. *Ancient Copy*, 548
5. *Witnesses*, 548
  - A. *Competency*, 548
    - a. *Generally*, 548

- b. *Copyist*, 548
- B. *Knowledge of Witness*, 548
  - a. *Positive Knowledge*, 548
  - b. *Memory*, 549
  - c. *Cross-Reading*, 549
- 6. *Order of Proof*, 549

## CROSS-REFERENCES.

Best and Secondary Evidence;  
 Photographs;  
 Refreshing Memory.

## I. AS PRIMARY EVIDENCE.

1. **In General.** — While a copy of a private writing is generally inadmissible as primary evidence of the facts therein recited, unless it has become an original by act of the parties,<sup>1</sup> it may be competent to prove the existence of the original.<sup>2</sup>

2. **Distinguished from Original.** — A. GENERALLY. — A copy, however, must be distinguished from counterparts<sup>3</sup> and duplicates<sup>4</sup> which are of the same rank and equally originals.

1. *Hauberger v. Root*, 6 Watts & S. (Pa.) 431; *Sill v. Reese*, 47 Cal. 294; *Mauney v. Crowell*, 84 N. C. 314; *Vinal v. Burrill*, 16 Pick. (Mass.) 401.

**Duplicate Lease.** — Where parties draw up a lease and afterward make and sign a copy of it, the copy is an original and primary evidence of its contents. *Weaver v. Shipley*, 127 Ind. 526, 27 N. E. 146.

**Copy Incorporated in Another Paper.** — Where a copy of a prior declaration of a trust was attached to and made part of an agreement between the heirs of the trust property and the trustee, it was held to be primary evidence of the terms of the alleged trust document. *Comer v. Comer*, 120 Ill. 420, 11 N. E. 848.

**Effect of Corporate Seal.** — A copy of a resolution by the board of directors properly certified and under the corporate seal is admissible without accounting for the original record. The seal makes it presumptively the act of the corporation. *Purser v. Eagle Lake Co.*, 111 Cal. 139, 43 Pac. 523.

**Original as Copy.** — Where a copy of a paper is delivered to a party and

the original kept, the latter cannot be read as primary evidence, since it is only a copy as between the parties. *Com. v. Parker*, 2 Cush. (Mass.) 212.

2. *Williams v. Conger*, 125 U. S. 397, 8 Sup. Ct. 933, 31 L. ed. 778; *Van Gunden v. Virginia C. & I. Co.*, 52 Fed. 838, 8 U. S. App. 229; *Sill v. Reese*, 47 Cal. 294; *Poulet v. Johnson*, 25 Ga. 403.

**Alteration in Original.** — Where it is claimed that the original has been altered an alleged copy may be competent to show what the original was before such alteration. *Walker v. Walker*, 46 Tenn. 571. See also "BEST AND SECONDARY EVIDENCE," Vol. II, p. 316, note 33.

3. See "BEST AND SECONDARY EVIDENCE," Vol. II, p. 284, note 24.

4. **Duplicate Notice.** — When a notice is made in quadruplicate and one of the copies retained by the sender, all are originals and primary evidence, regardless of the fact that they are addressed to different persons. *Gardner v. Eberhart*, 82 Ill. 316. But see *Grant v. Pendery*, 15 Kan. 236; *Westbrook v. Fulton*, 60 Ind. 123.

**Copy of Bill of Lading.** — A so-

**B. NOTARIAL PROTEST.**—Duplicate protests made up from a notary's books after the commencement of the suit are admissible as originals.<sup>5</sup>

**C. PRINTED PUBLICATION.**—Generally, any one of the same issue of a printed publication,<sup>6</sup> placard,<sup>7</sup> or schedule<sup>8</sup> is primary evidence, but when the contents of a particular copy of such issue are in dispute it alone is the original.<sup>9</sup>

**D. PRELIMINARY DRAFTS.**—A letter or other paper copied from a preliminary draft is the original and not a copy.<sup>10</sup>

**E. LETTER-PRESS COPIES.**—A letter-press copy is not primary evidence of the contents of the original.<sup>11</sup> But it may be admitted

called "duplicate" bill of lading made up from the stub of the originals some time after the issuance, is a mere copy. *Edgerton v. Wilmington*, 115 N. C. 645, 20 S. E. 184.

5. *Geralopulo v. Wieler*, 10 C. B. 690, 70 Eng. C. L. 712. See also *Bailey v. Dozier*, 6 How. (U. S.) 23; *Kellam v. McKoon*, 31 Hun (N. Y.) 519.

6. **Newspapers.**—In an action for libel against the publisher of a paper, any copy of that issue is primary evidence, whether actually published or not, if the witness swears that copies just like it were published. *Simons v. Holster*, 13 Minn. 249; *McLaughlin v. Russell*, 17 Ohio 475; *Com. v. Robinson*, 1 Gray (Mass.) 555. See also *Schley v. Lyon*, 6 Ga. 530; *Larkin v. R. R.*, 91 Iowa 654, 60 N. W. 195; *Rice v. Poynter*, 15 Kan. 263.

7. *Rex v. Watson*, 2 Stark. 116; *Bank v. Champlain Transp. Co.*, 23 Vt. 186, 56 Am. Dec. 68.

8. **Printed Schedules.**—Where railroads are required by law to post their tariffs, any one of the printed copies is an original, and the copies actually posted need not be produced. *Manchester R. R. v. Fisk*, 33 N. H. 297.

9. **Particular Copies.**—In an action of libel for circulating a particular printed copy, another similar copy is competent only as secondary evidence, and must be proved to be like the one in question. *Johnson v. Hudson*, 7 Ad. & E. 233; *Gathercole v. Miall*, 15 Mees. & W. 319; *Adams v. Kelly, Ry. & M.* 157, 21 Eng. C. L. 403; *McGrath v. Cox*, 3 U. C. Q. B. 332.

10. *McDonald v. Carson*, 94 N. C.

497; *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491; *Lewis v. Manly*, 2 Yeates (Pa.) 200.

But the draft of a letter first shown to the plaintiff's attorney and approved by him, from which the letter was subsequently written, was held competent without accounting for the original. *Rawlins v. Desbrough*, 8 Car. & P. 321.

**Drafts of Deeds**, however, from which the deeds themselves were engrossed are competent secondary evidence. *Waldy v. Gray*, L. R., 20 Eq. 238.

**An Original Inventory** is good secondary evidence when the books into which it was entered have been lost. *Petersburg Co. v. Manhattan Ins. Co.*, 66 Ga. 446.

11. **Letter-press Copies** are not originals.

*England.*—*Sturge v. Buchanan*, 10 Ad. & E. 598.

*United States.*—*Anglo-American Co. v. Cannon*, 31 Fed. 313; *Chapin v. Singer*, 4 McLean 378, 5 Fed. Cas. No. 2,600.

*California.*—*Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381.

*Georgia.*—*Watkins v. Paine*, 57 Ga. 50.

*Illinois.*—*King v. Worthington*, 73 Ill. 161.

*Maryland.*—*Marsh v. Hand*, 35 Md. 123.

*Massachusetts.*—*Smith v. Brown*, 151 Mass. 338, 24 N. E. 31.

*Missouri.*—*Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1,145.

*Nebraska.*—*Delaney v. Errickson*, 10 Neb. 492, 6 N. W. 600, 35 Am. Rep. 487.

*New York.*—*Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652.

to prove that such a letter was mailed.<sup>12</sup>

F. TELEGRAMS. — a. *Actions Between Sender and Receiver.* In actions between the sender and receiver of a telegram, when the telegraph company is the sender's agent, the copy as received by the person to whom it is sent is the original. But when the latter is to take the risk of transmission, the message delivered to the company is the original.<sup>13</sup>

12. *United States.* — Rosenthal v. Walker, 111 U. S. 185.

*California.* — Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403.

*Indiana.* — Durringer v. Moschino, 93 Ind. 495.

*Minnesota.* — Smith v. Moorehead, 23 Minn. 141.

*Missouri.* — Phillips v. Scott, 43 Mo. 86, 97 Am. Dec. 369.

*New York.* — Thallhimer v. Brinkerhoff, 6 Cow. 90; Boyer v. Rhinehart, 44 N. Y. St. 370, 17 N. Y. Supp. 346.

*Pennsylvania.* — Huckestein v. Kelly, 139 Pa. St. 201, 21 Atl. 78.

*Wisconsin.* — Whiting v. Mississippi Ins. Co., 76 Wis. 592, 45 N. W. 672.

**Proof of Mailing.** — Where it is the custom for a firm to keep a letter-press copy of all letters sent, the book containing such copy has been held sufficient proof of the mailing of the alleged original as against the maker of the copy. *Sturge v. Buchanan*, 10 Ad. & E. 598. Especially when coupled with an admission that a letter was received from the sender when the original would naturally have reached the sendee, though the latter denies its being the one in question. *Whitney Wagon Wks. v. Moore*, 61 Vt. 230, 17 Atl. 1,007. But when the letters after being copied were given to another clerk to be sealed and there was no particular place of deposit for such letters, the copy book is not admissible to prove the sending. *Toosey v. Williams*, 1 M. & S. 129. Generally before a letter-press copy is admissible there must be some further proof of its being sent and received.

13. *Georgia.* — Western Union Tel. Co. v. Shotter, 71 Ga. 760.

*Illinois.* — Morgan v. People, 59 Ill. 58; *Anheuser Br. Co. v. Hutmacher*,

127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575.

*Maryland.* — Smith v. Easton, 54 Md. 138, 39 Am. Rep. 355.

*Massachusetts.* — Nickerson v. Spindell, 164 Mass. 25, 41 N. E. 105.

*Minnesota.* — Wilson v. R. R. Co., 31 Minn. 481, 18 N. W. 291.

*New York.* — Oregon St. Co. v. Otis, 14 Abb. N. C. 388, 27 Hun 452, 100 N. Y. 446, 3 N. E. 485, 53 Am. Rep. 221.

See *Thorpe v. Philbin*, 22 N. Y. St. 471, 3 N. Y. Supp. 939; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511.

*Texas.* — Abernathy v. Hewlett, 2 Tex. Civ. App. 805.

**Telegram. — What is Original?**

In the leading case of *Durkee v. R. R. Co.*, 29 Vt. 127, the rule as to what shall be considered the original telegram is stated by Redfield, Ch. J., thus: "In regard to the particular end of the line where inquiry is first to be made for the original, it depends upon which party is responsible for the transmission across the line, or in other words, whose agent the telegraph is. The first communication . . . will only be effective in the form in which it reaches its destination. In such case inquiry should first be made for the very dispatch delivered. . . . But where the party to whom the communication is made is to take the risk of transmission, the message delivered to the operator is the original."

*Contra.* — In *Henkel v. Pape*, L. R. 6 Ex. 7, the message as delivered to the company was held to be the original regardless of the fact that it was his agent. See also *Matteson v. Noyes*, 25 Ill. 591; *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88; *Kinghorn v. Montreal Tel. Co.*, 18 U. C. Q. B. 60.

b. *Actions Against the Company.* — In actions against the telegraph company, the message as delivered by it is admissible without accounting for the original.<sup>14</sup>

3. *By Statute.* — Copies of bankers' books,<sup>15</sup> of the records of private corporations, both foreign<sup>16</sup> and domestic,<sup>17</sup> and of some other private writings<sup>18</sup> are made primary evidence in some jurisdictions by statute.

4. *Admission of Correctness.* — Where a copy is admitted to be correct by the opposing party it is admissible without accounting for the original.<sup>19</sup>

## II. AS SECONDARY EVIDENCE.

1. *In General.* — A properly proved copy of any private writing<sup>20</sup> is generally competent secondary evidence when the original is

14. *Conyers v. Postal Co.*, 92 Ga. 619, 19 S. W. 253, 44 Am. St. Rep. 100; *Western Union Tel. Co. v. Blance*, 94 Ga. 431, 19 S. W. 255; *Western Union Tel. Co. v. Smith*, (Tex. Civ. App.), 26 S. W. 216.

15. See 42 Vic. C. 11; *Hallowell & Augusta Bank v. Hamlin*, 14 Mass. 178.

16. *Bliss Ann. Code* (N. Y.) § 929.

17. *Mandel v. Swan*, 51 Ill. App. 204.

18. *Cal. Code Civ. Proc.* § 1,947 provides that entries repeated in the regular course of business, one being copied from another at or near the time of the transaction, are all originals. See also *Ins. Co. v. Weides*, 81 U. S. 375.

19. *England.* — *Stowe v. Querner*, L. R. 5 Ex. 155, per Piggott B.

*United States.* — *U. S. v. Dunbar*, 60 Fed. 75, 156 U. S. 185.

*Alabama.* — *Whilden v. M. & P. Bank*, 64 Ala. 1.

*Illinois.* — *Illinois L. & L. Co. v. Bonner*, 75 Ill. 315.

*Iowa.* — *Work v. McCoy*, 87 Iowa 217, 54 N. W. 140.

*Massachusetts.* — *Com. v. Jeffries*, 7 Allen 548, 83 Am. Dec. 712.

*Michigan.* — *Kelly v. McKenna*, 18 Mich. 381.

*Mississippi.* — *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88.

*New York.* — *Haas v. Storner*, 21 Misc. 661, 47 N. Y. Supp. 1,100; *Blair v. Flack*, 50 N. Y. St. Rep. 479, 21 N. Y. Supp. 754.

*Admission Against Interest.* — In an action for wages plaintiff was permitted to introduce in evidence a letter-press copy of the time-sheet, made by defendant, without accounting for the original. This was held no error on the ground that it was an admission against interest. *Denver & R. G. R. Co. v. Wilson*, 4 Colo. App. 355, 36 Pac. 67.

*Contra.* — The admission by the adverse party that a letter corresponded with a written contract between the parties will not authorize the letter to be read in evidence to prove the contract, without accounting for the original. *Fletcher v. Weisman*, 1 Ala. 602.

20. *Mills v. Glennon*, 2 Idaho 95, 6 Pac. 116; *Prince v. Smith*, 4 Mass. 455; *Batre v. Simpson*, 4 Ala. 305; and cases following.

*Account Books.* — In *Holmes v. Marden*, 12 Pick. (Mass.) 168, where the admission of a copy of items in an account book was objected to on the ground that the defendant was entitled to inspect the whole book, Shaw J. says: "The adverse party might always suggest, as an argument against the admission of copies, that if the original were produced it would show alterations or other indications on the face of it, impairing its validity. But this argument is not considered sufficient to warrant the rejection of the secondary evidence of copies." But see *Churchill v. Fulliam*, 8 Iowa 45.

shown to be lost or destroyed,<sup>21</sup> out of the jurisdiction,<sup>22</sup> in the possession of the opposite party, proper notice having been given,<sup>23</sup> or when it is the property of a disinterested third party;<sup>24</sup> and sometimes great inconvenience in producing the original may justify the admission of a copy.<sup>25</sup>

**2. Not Conclusive.** — But, though competent, a copy is never conclusive evidence; its weight is for the jury.<sup>26</sup>

**3. Similarity to Original.** — Ordinarily a copy must be a substantially exact reproduction of the original.<sup>27</sup> An immaterial vari-

**21.** See "BEST AND SECONDARY EVIDENCE," Vol. II, p. 316, note 35, and cases note 20 *supra*.

**22.** See "BEST AND SECONDARY EVIDENCE," Vol. II, p. 347, note 54.

**Deposition. — Copies Attached.** When, the deponent is out of the state and cannot be compelled to attach original documents to his deposition, he may annex sworn copies.

*Georgia.* — *Petersburg Co. v. Manhattan Co.*, 66 Ga. 446.

*Illinois.* — *Fisher v. Greene*, 95 Ill. 94.

*Indiana.* — *Thom v. Wilson*, 27 Ind. 370; *Gimbel v. Hafford*, 46 Ind. 125.

*Massachusetts.* — *Amherst Bank v. Conkey*, 4 Metc. 459; *L'Herbette v. Pittsfield Bank*, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354; *Binney v. Russell*, 109 Mass. 55.

*New York.* — *Commercial Bank v. Union Bank*, 11 N. Y. 203.

**23.** See "BEST AND SECONDARY EVIDENCE," Vol. II, p. 352, note 71.

**24.** See "BEST AND SECONDARY EVIDENCE," Vol. II, p. 346, note 48.

**25. Inconvenience.** — In *Zimmerman v. Masonic Aid Ass'n*, 75 Fed. 236, where proved copies of the by-laws of the defendant corporation were held admissible as primary evidence, it is said: "It cannot be possible that a corporation can be required to produce its original books or records at every time and place when and where a suit may be pending, no matter how distant from its home office. There may be cases, involving special issues, wherein the production of the original books at the place of trial may be necessary to effectuate justice between the parties, but ordinarily, in cases like that now before the court, copies of the articles or by-laws of a corporation,

duly proven, may be received in evidence without requiring the production of the originals before the court."

So in *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681, *Tilghman C. J.*, in holding copies of bank books inadmissible, says: "I would not be understood, however, as laying it down as a general rule that in all cases the original books must be produced. That might often be extremely inconvenient; and perhaps there would be no danger in admitting an examined copy."

**26.** *Lessee v. Parish*, 3 Ohio 107; *Tenny v. Mulvaney*, 9 Or. 405; *Fowler v. Hoffman*, 31 Mich. 215.

"Whether or not the copy of the bill of sale was a correct one was a question of fact for the jury." *Burrill v. Lumber Co.*, 65 Mich. 571, 32 N. W. 824.

**Rebutting Evidence.** — Where the correctness of a copy of a receipt given by an express company is not conceded by the latter, they should be permitted to prove the contents of the contemporaneous entry of the transaction in their books because of its bearing on the accuracy of the copy. *Reed v. U. S. Exp. Co.*, 48 N. Y. 462, 8 Am. Rep. 561.

**27.** *Ryan v. Merriam*, 4 Allen (Mass.) 77; *Dickinson v. R. R. Co.*, 7 W. Va. 390.

**True in Substance.** — Testimony by a witness who had seen an original note, that the copy was a true copy in substance, is sufficient to admit it. *Mandel v. Fulcher*, 86 Ga. 166, 12 S. E. 469.

**Similar.** — Where the statute requires the service upon a railroad company of an affidavit of loss and the introduction in evidence of a copy thereof in an action for dam-

ance, however, will not render it inadmissible,<sup>28</sup> nor the mere fact that it contains more than is necessary.<sup>29</sup>

**4. Completeness of Copy.**—A copy must reproduce all of the original,<sup>30</sup> but where an extract is complete in itself and the only part of the original which is relevant, the copy may be confined to such portion,<sup>31</sup> except in those cases where only the original in its entirety would have been competent.<sup>32</sup>

**5. Copy of a Copy.**—A. GENERAL RULE.—It is often stated as a general rule that a copy of a copy is not competent even as secondary evidence.<sup>33</sup>

ages, such copy must be identical in form and substance with the original. A paper *similar* to the original affidavit is not sufficient evidence under this rule. *Kyser v. R. R. Co.*, 56 Iowa 207, 9 N. W. 133, 338.

**28. Immaterial Variance.**—Where three copies of an alleged libelous publication were introduced and proved to be substantially correct copies, although they differed from each other somewhat, their admission was held no error since the record failed to show in what respects they differed, the presumption being that it was an immaterial variance. *Weir v. Hoss*, 6 Ala. 881.

**Correction of Copy.**—Where there is a discrepancy in the copy as to the amount of money stated therein, this, if satisfactorily shown to be a mistake of the copyist, will not render the copy incompetent. *Cornett v. Williams*, 20 Wall. (U. S.) 226.

So the fact that a copy does not correspond in every particular with the original in respect of a memorandum written upon it does not detract from its admissibility. *Hedrick v. Hughes*, 15 Wall. (U. S.) 123.

**29. Too Much.**—Where only a part of an account is missing from a book produced at the trial, a copy of the whole account will not be rejected. *Hodnett v. Gault*, 64 App. Div. 163, 71 N. Y. Supp. 831.

**Note.—Part Torn Off.**—Where only the lower part of a note was missing, a photographic copy of the whole was held admissible. *Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431; *Dean v. Speakman*, 7 Blackf. (Ind.) 317.

**30. Edmiston v. Schwartz**, 13 Serg. & R. (Pa.) 135; *Updergraff v.*

*Perry*, 4 Pa. St. 291; *Com. v. Trout*, 76 Pa. St. 379.

**Several Pieces.**—In *Com. v. Smith*, 151 Mass. 491, 24 N. E. 677, a copy of an insurance policy was deemed competent which consisted of a book containing a transcript of the written part, supplemented by a printed blank form like the original.

**Abbreviations.**—Where an office copy of a bill in chancery contained certain abbreviations it was held not to be a sufficiently true copy. *Reg. v. Christian*, 1 Car. & M. 388.

**31. In re Hospital**, 13 L. R. Ir. 361.

**Entire Copy.**—Where a copy of a record of the proprietors of a town was introduced it was held that generally there should be an entire copy of the proceedings of a particular meeting, but where what relates to the matter in question is a distinct and independent record, a copy of that is sufficient. *Woods v. Banks*, 14 N. H. 101; *Whitehouse v. Bickford*, 29 N. H. 471.

**32. Extracts.**—A copy of an extract from a letter is not competent even though the copyist testifies that it contained all of the letter relating to the matter in controversy. *Dennis v. Barber*, 6 Serg. & R. (Pa.) 420; *Walbridge v. Kilpatrick*, 9 Hun (N. Y.) 135.

But where the witness who copied the extract supplements it with a statement of the contents of the remainder of the letter, it will be admitted. *Sizer v. Burt*, 4 Denio (N. Y.) 426.

**33. Everingham v. Roundell**, 2 M. & Rob. 138; *Liebman v. Pooley*, 1 Stark. 167, 18 Rev. Rep. 756; *Ryves v. Braddell*, 1r. Term R. 184; *Morris*



**B. RULE EXPLAINED.** — a. *Generally.* — This general statement is true when the first copy is still available.<sup>34</sup> And some courts seem to require a comparison of the second copy with the original, independent of the intermediate copy.<sup>35</sup>

b. *When the Best Evidence.* — But when a copy of a copy is the best evidence obtainable, and the lost intermediate copy appears to have been correctly made, the former becomes competent evidence.<sup>36</sup>

c. *When a Copy of Original.* — So, when the second copy is shown to be like the original it is admissible regardless of the

*v. Vanderen*, 1 Dall. (Pa.) 64; *Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358; *Green v. Caulk*, 16 Md. 556; *Haywood v. Townsend*, 4 App. Div. 246, 38 N. Y. Supp. 517; *Healy v. Gilman*, 1 Bosw. (N. Y.) 235; *Wallace v. Goodall*, 18 N. H. 439. And cases following, notes 34-38.

34. *Liebman v. Pooley*, 1 Stark. 167, 18 Rev. Rep. 756; *Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358; *White v. Herrman*, 62 Ill. 73; *Mercier v. Harnan*, 39 La. Ann. 94, 1 So. 410; *Chambers v. Haney*, 45 La. Ann. 447, 12 So. 621. But see cases in note 37.

**Rule Explained.** — In *Winn v. Patterson*, 9 Pet. (U. S.) 663, Story J. says: "We admit that the rule that a copy of a copy is not admissible evidence is correct in itself, when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original being still in existence and capable of being compared with it; for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being in existence, by law deemed as high evidence as the original; for then it is also a second remove from the record. But it is quite a different question whether it applies to cases of secondary evidence, where the original is lost, or the record of it is not in law deemed as high evidence as the original." And see further same case, note 38 *infra*.

35. *Stevenson v. Dunlap*, 23 Ky. 134.

**Comparison Necessary.** — In *Dyer v. Hudson*, 65 Cal. 372, 4 Pac. 235, a copy of a petition made from a shorthand reporter's notes of the tes-

timony in another case in which a certified copy of such petition had been read in evidence, was held inadmissible because it had not been "compared with the original by the witness or any one else."

So in *Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358, where the witness had made copies of original entries on slips of paper and then copied from these into a book, the last copy was inadmissible even though the original and first copy had been destroyed.

36. *U. S. v. Delespine*, 12 Pet. (U. S.) 654; *Cornett v. Williams*, 20 Wall. (U. S.) 226; *Howard v. Quattlebaum*, 46 S. C. 95, 24 S. E. 93. And see *Van Gunden v. Coal Co.*, 52 Fed. 838, 8 U. S. App. 229, 3 C. C. A. 294.

**Copy of Letter-press.** — A copy of a letter-press copy, the latter as well as the original being in the hands of defendant, who refuses to produce them, is competent even though a mere copy of a copy. *Merritt v. Wright*, 19 La. Ann. 91.

**Best Evidence Obtainable.** — In *Ins. Co. v. Weides*, 81 U. S. 375, an entry in a new ledger taken from an old ledger into which it had been copied from an inventory book, was held admissible on proof of the destruction of the two latter. *Strong J.* said: "It is true that a copy of a copy is not generally receivable for the reason that it is not the best evidence. A copy of the original is less likely to contain mistakes, for there is more or less danger with each transcription. . . . But in this case . . . there was no better evidence than the footings in the new ledger."

existence of an intermediate copy.<sup>37</sup> Some courts have allowed this to be done indirectly through the medium of a first copy, where the witness himself made both copies.<sup>38</sup>

### III. METHOD OF PROOF.

**1. In General.**—A copy is not admissible as secondary evidence until shown in some manner to be a true copy of the original.<sup>39</sup>

**2. Comparison With the Original.**—A. GENERALLY.—It is sometimes stated as a general rule that the witness must have compared the copy with the original.<sup>40</sup>

**37.** *Winn v. Patterson*, 9 Pet. (U. S.) 663; *Robertson v. Lynch*, 18 Johns. (N. Y.) 451; *Fowler v. Hoffman*, 31 Mich. 215.

In *Cameron v. Peck*, 37 Conn. 555, a copy of a letter-press copy was held admissible without accounting for the latter, the witness swearing that the former was an exact copy of the original letter.

**38. Circuitous Comparison.**—In *Winn v. Patterson*, 9 Pet. (U. S.) 663, the witness made the first copy and from that later took the second copy, but had never directly compared the latter with the original. Story J. said: "This is not, in our judgment, the case of a mere copy of a copy verified as such; but it is the case of a second copy verified as a true copy of the original. . . . In effect, therefore, he (the witness) swears that both are true copies of the original power. In point of evidence then, the case stands precisely in the same predicament as if the witness had made two copies at the same time of the original, and had then compared one of them with the original, and the other with the first copy, which he had found correct. The mode by which he arrived at the result, that the second is a true copy of the original, may be more circuitous than that by which he ascertained the first to be correct; but that only furnishes matter of observation as to the strength of the proof, and not as to its dignity or degree. In each case his testimony amounts to the same result, as a matter of personal knowledge, that each is a true copy of the original." But see *Schley v. Lyon*, 6 Ga. 530.

So in *Robertson v. Lynch*, 18 Johns.

(N. Y.) 451, the witness testifies "that he had copied the original letter into plaintiff's letter-book . . . and that the copy offered was a true copy made by him from the copy in the letter-book." This was held sufficient proof.

And in *Goodrich v. Weston*, 102 Mass. 362, 3 Am. Rep. 469, a copy made from a letter-press copy and compared with it by the witness was held competent without producing such press copy, although it was available. However, an offer had been made to introduce it.

**39.** *Smith v. Carrington*, 4 Cranch (U. S.) 62; *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491. And see notes 40, 41, 42 and 43 *infra*.

**40. Rule Stated.**—Where a copy made by one since deceased was offered, one witness testified, "I would take this to be a copy of the original, or what I thought to be the original;" another, "I saw the original; I would take this to be a copy," and a third that it was taken from a draft supposed to be the original, but he was unable to say he had ever seen the original. This was held too vague and unsatisfactory, *Sharswood J.* saying: "The general rule of law upon this subject requires that a copy in order to be admitted should be proved by some one who has compared it with the original." *McGinniss v. Sawyer*, 63 Pa. St. 259; *Kerns v. Swope*, 2 Watts (Pa.) 75; *American L. Ins. Co. v. Rosenagle*, 77 Pa. St. 507; *Wells v. McDole*, 5 N. J. L. 501; *Harrison v. Borwell*, 10 Sim. 380.

**Sufficient Comparison.**—Where a corporation treasurer in answer to a request to give an exact transcript of

**B. NOT ESSENTIAL.** — Such a comparison by the witness, however, is not essential. Any evidence which might reasonably justify a conclusion that the copy is correct is sufficient, in the absence of better proof of the original.<sup>41</sup>

**3. Circumstantial Evidence Sufficient.** — Where no direct evidence is obtainable the circumstances may be sufficient guaranty of its correctness to warrant the admission of an alleged copy.<sup>42</sup>

certain accounts stated in his deposition "see statement annexed," it sufficiently appeared that the transcript had been compared with the original and was a true copy. *Ide v. Pierce*, 134 Mass. 260.

In *Knapp v. Altmayer*, 33 N. Y. Super. Ct. 161, the witness had seen and taken notes from the original map and subsequently compared them with the copy which had been in use and recognized for twenty years. This was held sufficient verification.

**Correct Representation.** — A statement in the officer's certificate that the copy offered is a "correct representation" does not sufficiently show a comparison with the original. *Martin v. King*, 4 Miss. 125.

41. *White v. Herrman*, 62 Ill. 73; *Tenny v. Mulvaney*, 9 Or. 405; *Ward v. Tennessee Co.*, (Tenn.), 57 S. W. 193; *Reed v. U. S. Exp. Co.*, 48 N. Y. 462, 8 Am. Rep. 561; *Finney v. St. Charles*, 13 Mo. 266; *Baker v. Adams*, 99 Ga. 135, 25 S. E. 28.

**Letter Press.** — In *Whitney Wagon Wks. v. Moore*, 61 Vt. 230, 17 Atl. 1,007, the copyist was not produced, and no one testified in terms that the offered copy was a correct one. But the fact that it was "an impression taken in a letter press" was considered sufficient to show its correctness.

**Blank Form.** — A blank form which had been filled up from the minutes of his docket in the same manner as the original by a commissioner of insolvency for the purposes of the trial, and which he believed under oath to be a true copy, was held to be good secondary evidence. *Brigham v. Coburn*, 76 Mass. 329. See also *Williamson v. R. R. Co.*, 144 Mass. 148, 10 N. E. 790.

42. *Howe v. Taylor*, 9 Or. 288.

Where a copy of an affidavit was served upon the plaintiff's counsel by

defendant's attorney, and by the reference to it in court the former knew it was the original of the copy which he then held in his hand, such copy was held sufficiently proved. *Blair v. Flack*, 50 N. Y. St. 479, 21 N. Y. Supp. 754.

**Circumstances Sufficient.** — In *Lessee v. Parish*, 3 Ohio 107, a deceased notary's book containing a copy of a lost deed was offered in evidence. The court said: "There is no direct or positive testimony that the copy contained in the notary book of Shannon is a true copy; . . . but there is a strong chain of circumstantial testimony to prove its correctness. . . . The copy was made by the judicial officer, . . . was copied by him in his notarial book, . . . and recorded by him in his official capacity as notary public, though not regularly in the line of his official duty. We are satisfied that the book of the notary public, under the circumstances and connected with the other proofs in the case, was admissible as presumptive evidence of the contents of the deed."

**Unauthenticated Copy.** — A claim under a deed of settlement was allowed on production of an unauthenticated copy, coupled with the fact of its being recited and recognized as correct in other instruments and proceedings. *Tunstall's Case*, 3 Sim. 308.

In *McDonnell v. Ford*, 87 Mich. 198, 49 N. W. 545, a copy of a time bill transcribed from the books of original entry was held admissible in the absence of anything impeaching its correctness, the books being lost.

A copy of a note made by one entrusted with its care, but since dead, was held admissible though not otherwise proved to be a true copy, the note itself having the bottom:

**4. Ancient Copy.** — So, it may derive sufficient authenticity from its age and the accompanying circumstances.<sup>43</sup>

**5. Witnesses.** — A. **COMPETENCY.** — a. *Generally.* — A copy may be proved by any witness who has sufficient actual knowledge of both the original and the copy.<sup>44</sup>

b. *Copyist.* — But it has been held that it must be proved by the copyist when he is available.<sup>45</sup>

B. **KNOWLEDGE OF WITNESS.** — a. *Positive Knowledge.* — Where its admission depends upon the knowledge of the witness he must be able to state positively that the alleged copy is a correct one.<sup>46</sup>

torn off. *Winn v. Lloyd*, 2 Vern. 603.

43. *Booge v. Parsons*, 2 Vt. 456, 21 Am. Dec. 557.

**Ancient Inscription.** — A copy of an ancient inscription taken from a previous copy which was annexed to a parish register, though written originally in pencil by a person since deceased, and later inked over by some unknown person, is admissible when the inscription has been effaced. *Slaney v. Wade*, 7 Sim. 595.

**Ancient Copy.** — A copy of a will in the handwriting of one of the attesting witnesses, a clerk of the executor's solicitor, among whose papers it was found after a lapse of fifty years, is sufficiently verified by such circumstances. *Sly v. Dredge*, 2 P. Div. 91.

But a document more than thirty years old and coming out of the proper custody is not made evidence by an indorsement in the handwriting of a deceased family solicitor of the person claiming under it, that he has compared it with the original. *Kerin v. Davoren*, 12 Ir. Ch. 352.

**An Extract from the Foundation Deed** of a charity purporting to be signed by the founder, which has been hung up in the board room of the charity for many years, was admitted as secondary evidence of the trusts. *In re Hospital*, 13 L. R. Ir. 361.

44. *Haywood v. Townsend*, 4 App. Div. 445, 38 N. Y. Supp. 517. And cases following.

**Proper Authentication.** — A copy of a steamboat passenger list as published in a newspaper, certified by the manager of the paper, is not sufficiently authenticated. *Johnson v. Johnson*, 25 Or. 496, 36 Pac. 161.

**45. Copyist Necessary.** — In *Brewster v. Countryman*, 12 Wend. (N. Y.) 446, it was held that the testimony of one who has seen the original that the copy is substantially correct will not take the place of the better evidence of the copyist if available. See, however, "BEST AND SECONDARY EVIDENCE," p. 385.

46. *In re Gazette*, 35 Minn. 532, 29 N. W. 347; *White v. Herrman*, 62 Ill. 73.

**Positive Knowledge.** — In an action against a bank, plaintiff introduced a copy, made by the bank's clerk, of entries in its discount books. The clerk could not swear positively that it was a true copy. Since the bank had refused to produce the original this was held sufficient verification. *Bank v. Ensminger*, 7 Blackf. (Ind.) 105.

Testimony by the plaintiff that the paper offered was a substantial copy made by his attorney at his direction and that he was positive that it was correct as to the parties and the rent was held too uncertain. *Dupuis v. McCausland*, 1 Ill. App. 395.

Where the witness, an attorney, admitted that the paper offered had been issued from his office as a copy, but could not swear of his own knowledge that it was an exact copy, it was held admissible even though the court refused to make him produce the original. *Volant v. Soyer*, 13 C. B. 231.

**Belief in Correctness.** — When a copy of a deposition was made by a magistrate taking it, and sent to plaintiff's counsel, who, having seen the original before its destruction, testified that he believed them to be alike, the court said: "The case therefore from its nature does not

b. *Memory*. — But such positive knowledge may come as well from memory of the original as from actual comparison.<sup>47</sup>

c. *Cross-reading*. — Where comparison is made by cross-reading, the witness simply holding the copy and following another who reads from the original, it is not essential that they should have exchanged papers to verify the result.<sup>48</sup>

6. *Order of Proof*. — Whether the original must be proved before the copy is admitted is discretionary with the trial court.<sup>49</sup>

seem to disclose the existence of other and better evidence, and we perceive no error in permitting the copy thus proven to be read to the jury." *Finney v. St. Charles*, 13 Mo. 266.

47. *Finney v. St. Charles*, 13 Mo. 266.

**Copy Made from Memory.** — A copy of entries in a lost book made by the book-keeper from memory is not sufficiently shown to be a copy. *Printup v. James*, 73 Ga. 583.

**Comparison by Memory.** — In *Fowler v. Hoffman*, 31 Mich. 215, Cooley J. says: "Where the witness can, from his own recollection of the contents of the original, testify that it is a copy it should be received." See also *Mandel v. Fulcher*, 86 Ga. 166, 12 S. E. 469; *Williamson v. R. R. Co.*, 144 Mass. 148, 10 N. E. 790; *Stevenson v. Dunlap*, 23 Ky. 134.

**Indistinct Recollection.** — Where the witness, who had made the original, testified, "as I recollect it, it seems to be a copy. I won't swear positively it is a copy, but it has the appearance of that, and to the best of my recollection it seems to be a copy of the answer as served. I rec-

ognize the handwriting as that of one of the clerks;" such testimony was insufficient. It was not enough that according to the recollection of the witness (which may have been very indistinct) "this paper had the appearance of being a copy, or seemed to have been such." *In re Gazette*, 35 Minn. 532, 29 N. W. 347.

So in *Nostrum v. Halliday*, 39 Neb. 828, 58 N. W. 429, the testimony was that it was an exact copy to the best of the witness's knowledge, that it looked like the original, that the witness had not compared it with the original, but thought his wife had copied it. The admission of the copy was held error.

48. *Lynde v. Judd*, 3 Day (Conn.) 499; *Hill v. Packard*, 5 Wend. (N. Y.) 375; *Pickard v. Bailey*, 26 N. H. 152; *Tenny v. Mulvaney*, 9 Or. 405; *Rolf v. Dart*, 2 Taunt. 52; *Fyson v. Kemp*, 6 Car. & P. 71, 25 Eng. C. L. 287.

*Contra.* — *Slane Peerage Case*, 5 Cl. & F. 23. Where the reader is the agent of both parties to the suit, it is presumed that he read the original correctly. *Krise v. Neason*, 66 Pa. St. 253.

49. *Groff v. Ramsey*, 19 Minn. 44.

# COPYRIGHT.

BY E. M. STANNARD.

## I. PROOF OF COPYRIGHT, 550

1. *In General*, 550
2. *Proof of Registry of Title or Description*, 551
3. *Proof of Deposit of Copies*, 552
4. *Proof of Notice*, 553

## II. PROOF OF AUTHORSHIP, 554

## III. INFRINGEMENT, 556

1. *In General*, 556
2. *Comparison*, 559
  - A. *In General*, 559
  - B. *Coincidence of Errors*, 561
3. *Defenses*, 562
  - A. *In General*, 562
  - B. *Invalidity of the Copyright*, 563
    - a. *In General*, 563
    - b. *Abandonment*, 564
  - C. *Abridgement and Review*, 566

## IV. ASSIGNMENT, 566

## V. ACTIONS FOR PENALTIES, 566

### CROSS-REFERENCES.

Documentary Evidence;

Patents; Public Documents.

## I. PROOF OF COPYRIGHT.

1. *In General*. — A strict compliance with all the statutory provisions entitles the author or proprietor of a work to a copyright, which during its existence gives him the sole and exclusive right, power and liberty of printing, reprinting, copying or otherwise multiplying, completing, publishing, circulating and vending the copyrighted matter, or any part thereof; and also the right of preventing others from doing so.<sup>1</sup> Such compliance must be

1. *Perris v. Hexamer*, 99 U. S. 15 Fed. Cas. No. 8,136; *Springer* 674; *Lawrence v. Dana*, 4 Cliff. 1, Lith. Co. v. Falk, 59 Fed. 707;

shown before any of the rights can be asserted,<sup>3</sup> and the burden of proof to show the same rests upon the person asserting the right,<sup>3</sup> with no presumptions in his favor.<sup>4</sup> Where, however, it appears that all the necessary acts have been done it will be presumed that they were done in conformance with the statute.<sup>5</sup>

**2. Proof of Registry of Title or Description.**—The registry, on or before the day of publication, of the title of a book<sup>6</sup> or the

*Fishel v. Lueckel*, 53 Fed. 499; *Stephens v. Cady*, 14 How. 528; *Stowe v. Thomas*, 2 Wall. 547; *Baker v. Selden*, 101 U. S. 99; *Clemens v. Belford*, 14 Fed. 728; *Gambart v. Ball*, 14 C. B. (N. S.) 306; *Jollie v. Jaques*, 1 Blatchf. 618, 13 Fed. Cas. No. 7,437; *Henry Bill Pub. Co. v. Smythe*, 27 Fed. 914; *Gilmore v. Anderson*, 38 Fed. 846; *Chase v. Sanborn*, 4 Cliff. 306, 5 Fed. Cas. No. 2,628; *Rev. Stat. § 4,952*.

Constitutionality of copyright laws discussed. *Burrow-Giles Lith. Co. v. Sarony*, 111 U. S. 53.

Copyrights are governed by statutes which have superseded the common law, both in the United States and England. *Holmes v. Hurst*, 174 U. S. 82. That such a right exists at common law has been denied. *Banks v. Manchester*, 128 U. S. 244; *Jefferys v. Boosey*, 4 H. L. Cas. 815.

Copyrights afford no protection to what is not in existence at the time when granted. *Platt v. Walter*, 17 L. T. 157; *Lawrence v. Dana*, 4 Cliff. 1; 15 Fed. Cas. No. 8,136.

**2.** *Merrell v. Tice*, 104 U. S. 557; *Osgood v. Aloe Instrument Co.*, 83 Fed. 470; *Wheaton v. Peters*, 8 Pet. 591; *Thompson v. Hubbard*, 131 U. S. 123; *Bennett v. Carr*, 96 Fed. 213; *Higgins v. Keuffel*, 140 U. S. 428; *Baker v. Taylor*, 2 Blatchf. 82, 2 Fed. Cas. No. 782; *Myers v. Callaghan*, 10 Biss. 139; *Chase v. Sanborn*, 4 Cliff. 306, 5 Fed. Cas. No. 2,628; *Chicago Music Co. v. Butler Paper Co.*, 19 Fed. 758; *Jollie v. Jaques*, 1 Blatchf. 618, 13 Fed. Cas. No. 7,437; *Jackson v. Walkie*, 29 Fed. 15; *West Pub. Co. v. Lawyers Co-operative Pub. Co.*, 64 Fed. 360.

A failure to comply with the statutory provisions in the case of a second edition will not vitiate a copyright of the original, nor will a valid copyright of a second edition cure

material defects in the copyright of the original. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

**3.** *Osgood v. Aloe Instrument Co.*, 83 Fed. 470; *Chase v. Sanborn*, 4 Cliff. 306, 5 Fed. Cas. No. 2,628.

**4.** *Dielman v. White*, 102 Fed. 892; *Chicago Music Co. v. Butler Paper Co.*, 19 Fed. 758.

**5.** *Myers v. Callaghan*, 10 Biss. 139, affirmed in *Callaghan v. Myers*, 128 U. S. 617, was a case in which the official reporter of the supreme court of the state of Illinois claimed a copyright in such reports. It was there shown that both the title page and the printed volume itself were filed in the clerk's office of the district court on October 23, 1866. It was there held that the presumption was, in the absence of proof to the contrary, that the filing of the certificate of title preceded the deposit of the printed volume.

In the same case it was shown that a number of volumes of the work were delivered to the state on October 2, 1865; and that the certificate was filed with the clerk of the district court on January 17, 1866. It was claimed that the delivery of such volumes to the state constituted a publication of the work, and that as the certificate was filed after such delivery the statute had not been complied with and the copyright was invalid. Held that it would be presumed, in the absence of proof to the contrary, which might easily have been obtained, that the state did not immediately put the work into circulation, thereby publishing the same, and that such delivery was not equivalent to publication by the author.

**6.** Suit for infringement of a copyright cannot be maintained without proof of the deposit of the title page, (*Chase v. Sanborn*, 4 Cliff.

description of an article must be shown.<sup>7</sup> This may be shown by parol evidence.<sup>8</sup> It has been held that the record of a copyright<sup>9</sup> or the certificate required by the statute,<sup>10</sup> as to the time of registry, was *prima facie* proof of registry,<sup>11</sup> and that the proof of the delivery of the title to the librarian of congress was sufficient evidence of the registry thereof.<sup>12</sup>

**3. Proof of Deposit of Copies.**—The deposit of complete copies of the work in the office of the librarian of congress, in one of the modes, and within the time prescribed by the statute, must be shown.<sup>13</sup> In general this may be shown by parol,<sup>14</sup> and to have been in either or both of the ways designated.<sup>15</sup> Slight proof is sometimes sufficient,<sup>16</sup> and proof of the mailing to and delivery at the librarian's office has been held, in the absence of proof to the contrary, sufficient to show the deposit,<sup>17</sup> even though there was some evidence indicating the absence of the copies alleged to have been deposited.<sup>18</sup>

306, 5 Fed. Cas. No. 2,628), which must be prior to the publication of the work. *Holmes v. Hurst*, 174 U. S. 82.

7. Rev. Stat. § 4,956. Proof that a photograph or its name was filed is not sufficient. *Bennett v. Carr*, 96 Fed. 213.

8. The oral testimony of the plaintiff that he filed a tracing of the printed title of his map was held sufficient. *Chapman v. Ferry*, 18 Fed. 539.

9. *Roberts v. Myers*, *Brunner Col. Cas.* 698, 20 Fed. Cas. No. 11,906.

Under a former statute it was held that the record of copyrights required to be kept by the clerk of the district court was competent evidence that a copyright had been obtained. *Boucicault v. Fox*, 5 Blatchf. 87, 3 Fed. Cas. No. 1,691.

10. Rev. Stat. § 4,957.

11. *Callaghan v. Myers*, 128 U. S. 617.

12. *Edward Thompson Co. v. American Law Book Co.*, 119 Fed. 217.

13. *Merrell v. Tice*, 104 U. S. 557; *Baker v. Taylor*, 2 Blatchf. 82, 2 Fed. Cas. No. 782; *Holmes v. Hurst*, 174 U. S. 82; *Osgood v. Aloe Instrument Co.*, 83 Fed. 470; *Chase v. Sanborn*, 4 Cliff. 306, 5 Fed. Cas. No. 2,628; *Jollie v. Jaques*, 1 Blatchf. 618, 13 Fed. Cas. No. 7,437; *Henderson v. Maxwell*, 46 L. J. Ch. 59.

14. *Patterson v. Ogilvie Pub. Co.*, 119 Fed. 451.

15. Rev. Stat. § 4,596. Proof may be made in either or both of the ways prescribed. *Scribner v. Allen Co.*, 43 Fed. 680.

16. Where it appeared beyond a doubt that the advance copies necessary to obtain a copyright had been forwarded so early that the opposing party could not possibly have been prejudiced by any alleged delay, the court held that strict proof was not necessary. *Ladd v. Oxnard*, 75 Fed. 703.

17. In *Falk v. Gast Lith. & E. Co.*, 48 Fed. 262, complainant's business manager testified that he caused two copies of the work to be mailed to the librarian of congress and that officer's certificate stated that "two printed copies of a photograph entitled . . . were delivered" at his office. *Held*, sufficient proof, in the absence of proof to the contrary.

18. In *Patterson v. Ogilvie Pub. Co.*, 119 Fed. 451, complainant testified that he personally inclosed two copies of his work in a package, addressed to the librarian of congress and deposited same in the mail a considerable time before publication of the work. The register of copyrights certified that he had made a search and could find no such copies on file in his office. There was no evidence to corroborate complainant's



The librarian's receipt is competent evidence of the deposit of copies,<sup>19</sup> but it must be signed by him,<sup>20</sup> and has been admitted as evidence of the deposit without proof of the signature thereto;<sup>21</sup> nor need the receipt be under seal.<sup>22</sup> Such a receipt in evidence, supplemented by oral testimony of the mailing of the copies and getting the receipt in return, was held sufficient evidence of the deposit, even in the absence of testimony as to how the copies were addressed.<sup>23</sup>

**4. Proof of Notice.**—Proof must be made of the giving of the required notice,<sup>24</sup> which must be shown to have been complete and sufficient.<sup>25</sup> It has been held that the entire notice must be on

testimony, nor was there any suspicion cast upon his good faith. *Held*, sufficient to show the deposit.

19. *Falk v. Gast Lith. & E. Co.*, 48 Fed. 262. In *Belford v. Scribner*, 144 U. S. 488, a letter written by the consignor, describing the work by its title and notifying the librarian of the mailing of the copies and asking him to acknowledge their receipt. Such an acknowledgment appeared upon the letter as follows: "Two copies of the above received Nov. 15, 1880. A. R. Spofford, Librarian of Congress." It was held that such acknowledgment was competent and sufficient evidence to show the deposit.

20. In *Merrell v. Tice*, 104 U. S. 557, the document in evidence was an exemplification of the record of the copyright, to which was appended the words: "Two copies of the above publication deposited December 6, 1876," which was without any signature, and the statement so appended was held incompetent to show deposit.

21. *Callaghan v. Myers*, 128 U. S. 617.

22. *Belford v. Scribner*, 144 U. S. 488.

23. In *Blume v. Spear*, 30 Fed. 629, the author testified that he mailed two copies of his work to the librarian of congress and thereafter received from that officer an acknowledgment, dated, and over his official signature, of his receipt of such copies, and in which the work was designated by its title in full. There was no evidence showing how the copies were addressed. *Held*, that it would be presumed that they were addressed to the librarian of

congress. Under the prior statute a book kept by the clerk of the district court, properly authenticated, containing various memoranda relative to applications for copyrights was admitted to show the deposit of copies. *Daly v. Webster*, 56 Fed. 483; again under the same statute it was held that it was necessary to show the time of the deposit of the copies, with reference to the time of publication of the work, (*Chase v. Sanborn*, 4 Cliff. 306, 5 Fed. Cas. No. 2,628), but where it appeared that the copies were deposited within ten days after the publication of the work, it was held sufficient. *Belford v. Scribner*, 144 U. S. 488.

24. Rev. Stat. § 4,962; *Blume v. Spear*, 30 Fed. 629; *Banks v. McDivitt*, 13 Blatchf. 163, 2 Fed. Cas. No. 961; *Jollie v. Jaques*, 1 Blatchf. 618, 13 Fed. Cas. No. 7,437; *Osgood v. Aloe Instrument Co.*, 83 Fed. 470; *Falk v. Gast Lith. & E. Co.*, 40 Fed. 168.

25. A defective notice is no notice, and where it is shown that copies with a defective notice had come into public use, it was held that no valid copyright existed, consequently no action could be maintained for alleged infringement. *Osgood v. Aloe Instrument Co.*, 83 Fed. 470.

**Sufficient Notices.**—Must contain the three essentials of name, claim of exclusive right, and date when obtained. *Hoertel v. Raphael Tuck Sons Co.*, 94 Fed. 844. When on the first page of the composition in plain sight, (*Blume v. Spear*, 30 Fed. 629), or the surname only of the author inserted, in absence of proof that there was another of the same name. *Burrow-Giles Lith. Co. v. Sarony*, 111 U.

one page.<sup>26</sup>

Affidavits of persons having charge of the preparation of the work for publication are admissible,<sup>27</sup> and general testimony as to the giving of notice will primarily establish that fact.<sup>28</sup>

## II. PROOF OF AUTHORSHIP.

Proof of authorship of the copyrighted work is essential,<sup>29</sup> of which fact the original manuscript is the best evidence,<sup>30</sup> but if that be lost or destroyed, secondary evidence may be resorted to;<sup>31</sup> and where it is shown that one has a copyright for a work, it has been held *prima facie* proof of his authorship,<sup>32</sup> the burden of proof resting upon the party asserting the contrary.<sup>33</sup>

Testimony of persons cognizant of the manner in which the work was produced is admissible to show authorship, and is direct and primary evidence thereof; and such evidence has been held, even in the absence of the testimony of the author himself, *prima facie* proof of that fact.<sup>34</sup> The authorship of an engraving may, be

S. 53. "Copyright, 1902, Published by Hills & Co., Ltd., London, England." Hills & Co. v. Austrich, 120 Fed. 862.

**Insufficient Notices.**—When contains the name of an agent only. Thompson v. Hubbard, 131 U. S. 123; Osgood v. Aloe Instrument Co., 83 Fed. 470; Mifflin v. Dutton, 107 Fed. 708; Hoertel v. Raphael Tuck Sons Co., 94 Fed. 844; Jackson v. Walkie, 29 Fed. 15. "Entered according to act of congress in the year 1878, by H. A. Jackson." Jackson v. Walkie, 29 Fed. 15. "Copyright, 1891, all rights reserved." Osgood v. Aloe Instrument Co., 83 Fed. 470.

26. In Osgood v. Aloe Instrument Co., 83 Fed. 470, the words: "Copyright, 1891, all rights reserved," appeared upon one page of the work, while the words: "Published by Osgood Art School, 1891," appeared upon another. Proof was made that the Osgood Art School was the trade name of Adelaide H. Osgood, the author, and it was claimed that the part appearing upon one page should be read into that upon the other, the whole taken constituting sufficient notice. The court held that the notice could not be so given.

27. Falk v. Gast Lith. & E. Co., 40 Fed. 168.

28. Complainant proved that he had taken great care to issue no copies without the notice, and it was

held that separate, distinct and specific proof of the notice being upon each particular copy was unnecessary, it being incumbent upon defendant to show the want of notice at the time the copy left complainant's possession, proof that it was without the notice at the time it came into defendant's hands being insufficient. Falk v. Gast Lith. & E. Co., 40 Fed. 168.

29. Burrow-Giles Lith. Co. v. Sarony, 111 U. S. 53; Greene v. Bishop, 1 Cliff. 186, 10 Fed. Cas. No. 5,763; Bullinger v. Mackey, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127.

30. Thompson v. Symonds, 5 T. R. 41, 2 Rev. Rep. 526; Bullinger v. Mackey, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127.

31. Bullinger v. Mackey, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127.

32. Reed v. Carusi, Taney 72, 20 Fed. Cas. No. 11,642; Boucicault v. Fox, 5 Blatchf. 87, 3 Fed. Cas. No. 1,691.

33. Reed v. Carusi, Taney 72, 20 Fed. Cas. No. 11,642.

34. The testimony of any one that he saw performed the labor of gathering together from original sources and arranging the materials for the work, either by the author or those in his employ and working under his direction; that the manuscript for the work was partly in his

proved by the production of one of the prints taken from the original plates,<sup>35</sup> and parol testimony of the subject of a photograph is admissible to show its authorship,<sup>36</sup> but in such case it has been held that the originality of intellectual production, thought and conception should also be shown.<sup>37</sup> Generally the work must be shown to be new and original with the person claiming authorship thereof;<sup>38</sup> and evidence that the compilation is the result of labor, thought and judgment, exercised by gathering together from original sources and arranging in useful or convenient form, facts or data open to be published by any one, shows a new work.<sup>39</sup>

handwriting and that of his amanuensis, and that from such manuscript the work was printed for him and at his expense, is direct and primary evidence of authorship, and, in the absence of testimony to the contrary, is sufficient to establish that fact. *Bullinger v. Mackey*, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127.

35. *Thompson v. Symonds*, 5 T. R. 41, 2 Rev. Rep. 526.

36. Testimony of the subject that complainant arranged the light, background, and all other details, and finally posed her, when corroborated by the testimony of complainant himself, is sufficient to show authorship. *Falk v. Gast Lith. & E. Co.*, 48 Fed. 262.

37. Some intellectual effort must have been used in the production, but intellectual effort involving invention or originality is not necessary in a photograph of a person or natural object. *Burrow-Giles Lith. Co. v. Sarony*, 111 U. S. 53; *Falk v. City Item Print. Co.*, 79 Fed. 321.

38. In *Bullinger v. Mackey*, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127, it was said: "Before the rule that 'every author of a book has a copyright in the plan, arrangement and combination of his materials, if it be new and original in substance', he must make it appear that his book exhibits a substantially new and original system of arranging materials of that character, which system was his own invention."

Such a plan of arrangement as would naturally suggest itself to any one familiar with this subject, cannot be claimed as new and original. *Perris v. Hexamer*, 99 U. S. 674; *Emer-*

*son v. Davies*, 3 Story 768, 8 Fed. Cas. No. 4,436.

In *Lawrence v. Cupples*, 9 O. G. 245, 15 Fed. Cas. No. 8,135, plaintiff issued a monthly chart, containing information in regard to a certain class of debtors, which information was conveyed by means of a list of debtors arranged alphabetically, with the debtor, creditor and amount of claim arranged in tabular form. It was there held that no such novelty of plan or arrangement was exhibited as would preclude its use by any one.

In *Gray v. Russell*, 1 Story 11, 10 Fed. Cas. No. 5,728, the question was stated to be whether or not the complainant first adopted the plan or system as a whole. If so, he might be justified in claiming originality, but he could not use substantially the same plan, system or ideas, though in a more elaborate form, of previous writers, and, by a claim of infringement, prohibit the subsequent use thereof by others who might resort to the same common sources of information. See also *Kelly v. Morris*, L. R. 1 Eq. 697, 14 L. T. 222.

39. *Bullinger v. Mackey*, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127; *Falk v. City Item Print. Co.*, 79 Fed. 321; *Burrow-Giles Lith. Co. v. Sarony*, 111 U. S. 53; *Stowe v. Thomas*, 2 Wall. 547.

Where a plan of lessons, an arrangement of tables to illustrate same, a gradation of examples, and an illustration of the lessons by attaching to each example unit marks representing the numbers embraced in the example, also combined in such a manner as to form with the tables a peculiar appearance of the page, and to constitute in the aggre-

## III. INFRINGEMENT.

1. **In General.** — The plaintiff in an action for infringement of copyright is required to establish, primarily, the validity of the copyright for the work alleged to have been infringed, as well as the infringement,<sup>40</sup> but proof of an equitable right to a copyright has been held sufficient to maintain a suit in equity.<sup>41</sup>

Infringement may be proved by circumstantial as well as by direct evidence.<sup>42</sup>

Evidence showing or tending to show that the alleged infringement is in any manner<sup>43</sup> similar in plan or arrangement,<sup>44</sup> designed to convey the same information,<sup>45</sup> serve the same purposes,<sup>46</sup> or

gate a new method of illustration, it was held to be a new and original combination. *Emerson v. Davies*, 3 Story 768, 8 Fed. Cas. No. 4,436.

40. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136; *Chase v. Sanborn*, 4 Cliff. 306, 5 Fed. Cas. No. 2,628; *Osgood v. Aloe Instrument Co.*, 83 Fed. 470.

41. *Little v. Gould*, 2 Blatchf. 165, 15 Fed. Cas. No. 8,394; *Pulte v. Derby*, 5 McLean 328, 20 Fed. Cas. No. 11,405.

42. *Jewelers' Merc. Agency v. Jewelers' Weekly Pub. Co.*, 66 Hun 38, 20 N. Y. Supp. 749; *Belford v. Scribner*, 144 U. S. 488; *Ladd v. Oxnard*, 75 Fed. 703.

43. *Gray v. Russell*, 1 Story 11, 10 Fed. Cas. No. 5,728.

44. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136. Similarity in plan or system of arrangement, the order in which the subject is displayed and mode by which it is set forth, all indicate infringement. *Greene v. Bishop*, 1 Cliff. 186, 10 Fed. Cas. No. 5,763; but such similarity may be visible and yet each work may be the result of labor, skill, and use, by each of the respective authors, of common materials and derived from common sources of knowledge open to all. *Emerson v. Davies*, 3 Story 768, 8 Fed. Cas. No. 4,436. This might occur where the plan, arrangement and method adopted is such as would necessarily suggest itself to any intelligent person intending to impart the same information. *Bullinger v. Mackey*, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127.

45. Where the new work contains

so much of the substance of the original language with immaterial variations, but still communicates the same thoughts or information, infringement will be shown. *Jollie v. Jaques*, 1 Blatchf. 618, 13 Fed. Cas. No. 7,437; *Gilmore v. Anderson*, 38 Fed. 846; *Harper v. Shoppell*, 26 Fed. 519; *Story v. Holcombe*, 4 McLean 306, 23 Fed. Cas. No. 13,497. But the character of the works must be considered. *Bullinger v. Mackey*, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127.

The same character of information conveyed in a different manner is not infringement. Plaintiff devised an ingenious plan for advertising artificial teeth by the publication of charts showing illustrated sections of teeth, so arranged and numbered as to convey information respecting their character, size, shape, etc. Defendant procured engraved illustrations of teeth made by him, arranged in sections, and numbered, and printed them on charts, thus conveying the same character of information. Neither the teeth nor numbers were the same, either in fact or appearance, but the objects of the charts, plan of conveying information and information conveyed were the same. *Held*, no infringement. *White Dental Co. v. Sibley*, 38 Fed. 751.

46. *Emerson v. Davies*, 3 Story 768, 8 Fed. Cas. No. 4,436; *Greene v. Bishop*, 1 Cliff. 186, 10 Fed. Cas. No. 5,763; *Harper v. Shoppell*, 26 Fed. 519. In the case of a musical composition it was shown that the theme or melody of the two pieces of music was substantially the same; that the

is, in force, substance and effect the same,<sup>47</sup> or that its publication will sensibly and materially diminish the value of the original<sup>48</sup> by superseding its use<sup>49</sup> or injuriously affect its sale by deceiving purchasers,<sup>50</sup> or that its distinctive ideas and characteristics have been adopted,<sup>51</sup> or its valuable portions, in whole or in part, have been extracted, directly or indirectly, is competent evidence to show infringement,<sup>52</sup> without proof that the work alleged to have been infringed was the result of great labor or skill.<sup>53</sup>

A part only of a work may be shown to have been infringed.<sup>54</sup> Evidence showing the amount taken is of less importance than is proof of the value of the extracts.<sup>55</sup> Unless it be shown that a considerable portion of the new work is an infringement, the presumption that there has been an infringement of the whole does not

measure, which was peculiar, was followed, and that when played they appeared really the same, although there were, in fact, variations. *Held*, infringement shown. *Blume v. Spear*, 30 Fed. 629.

47. *Gray v. Russell*, 1 Story 11, 10 Fed. Cas. No. 5,728; *Harper v. Shoppell*, 26 Fed. 519; *Gilmore v. Anderson*, 38 Fed. 846. Where it was shown that defendant made perforated papers which, when used in organettes, produced plaintiff's copyrighted musical composition. *Held*, no infringement. *Kennedy v. Mc-Tammany*, 33 Fed. 584; *Boosey v. Wright*, 81 Law T. (N. S.) 571.

48. *Greene v. Bishop*, 1 Cliff. 186, 10 Fed. Cas. No. 5,763; *Gray v. Russell*, 1 Story 11, 10 Fed. Cas. No. 5,728; *Simms v. Stanton*, 75 Fed. 6.

49. *Gilmore v. Anderson*, 38 Fed. 846. That the alleged infringement may be used in lieu of the original need not be shown to entitle plaintiff to a decree restraining its publication. *Reed v. Holliday*, 19 Fed. 325.

50. Where one publication contained a list of railroads with but 14 main lines, while the other contained 25, the names were not identical, one work gave the starting points and termini of each road, while the other gave no such information, the arrangement in one was in alphabetical order, in the other by states, held, that the differences were such as to enable purchasers to determine a choice between them and no infringement shown. *Bullinger v. Mackey*, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127.

51. *Johnson v. Donaldson*, 3 Fed.

22. The reproduction in substance and effect of the distinctive ideas and characteristics, although minor particulars are omitted, shows infringement. *Springer Lith. Co. v. Falk*, 59 Fed. 707.

52. *Story v. Holcombe*, 5 McLean 306, 23 Fed. Cas. No. 13,497; *Harper v. Shoppell*, 26 Fed. 519; *West Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 64 Fed. 360; *Johnson v. Donaldson*, 3 Fed. 22.

53. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

54. *Greene v. Bishop*, 1 Cliff. 186, 10 Fed. Cas. No. 5,763; *Story v. Holcombe*, 4 McLean 306, 23 Fed. Cas. No. 13,497. Appropriation of a part is no less an infringement than the appropriation of the whole, provided the infringed part contains any substantial repetitions of any material parts which are original and distinctive. *Fishel v. Lueckel*, 53 Fed. 499. In *Folsom v. Marsh*, 2 Story 100, 9 Fed. Cas. No. 4,901, the court said: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity." *Citing Bramwell v. Halcomb*, 3 Mylne & C. 737; *Saunders v. Smith*, 3 Mylne & C. 711.

55. *Folsom v. Marsh*, 2 Story 100, 9 Fed. Cas. No. 4,901; *Story v. Holcombe*, 4 McLean 306, 23 Fed. Cas. No. 13,497; *Gray v. Russell*, 1 Story 11, 10 Fed. Cas. No. 5,728; *Sims v. Stanton*, 75 Fed. 6; *Gilmore v. Anderson*, 38 Fed. 846. In *Folsom v. Marsh*, 2 Story 100, 9 Fed. Cas. No.

arise.<sup>56</sup> Proof by the plaintiff of a part of his case, and the difficulty of proving his whole case, will support a recovery<sup>57</sup> only for so much as proved.

Evidence showing the history of the works<sup>58</sup> or how they were prepared is competent,<sup>59</sup> and sometimes a failure to furnish such evidence may be taken as indicative of infringement.<sup>60</sup>

Evidence that a prior work was used for the purpose of comparison and correction does not necessarily imply infringement.<sup>61</sup>

Proof that damages will result to the plaintiff from the alleged infringement is usually immaterial and unnecessary.<sup>62</sup>

It has been held that there should be proof of the publishing of the alleged infringing work.<sup>63</sup>

If it be shown that one procured to be made,<sup>64</sup> knowingly furnished the means for making<sup>65</sup> or sold an infringement, such proof

4,901, the court said: "If so much is taken that the value of the original is sensibly diminished or the labors of the author to an injurious extent substantially appropriated it is sufficient to constitute piracy."

56. *West Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 64 Fed. 360.

57. It was alleged that about thirty per cent. of complainants' work had been infringed. Less than one per cent. was proved to be and about twenty-eight per cent. was shown not to have been infringement. Complainants then showed to the court the extreme difficulty of proving infringement of the thirty per cent. as alleged, and claimed that the remaining seventy per cent. should be presumed infringement, because of the proof thus made. The court said that to hold thus would "be pushing the law of presumptive evidence far in advance of any reported case." *West Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 64 Fed. 360.

58. In *Hegeman v. Springer*, 110 Fed. 374, it was alleged that a copyright of a picture had been infringed, and there held that the production of the design to the lithographer who produced the alleged copy was part of the *res gestae* and evidence thereof admissible.

59. *West Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 64 Fed. 360.

60. *Webb v. Powers*, 2 Woodb. & M. 497, 29 Fed. Cas. No. 17,323; *Chapman v. Ferry*, 18 Fed. 539. In *Trow Directory P. & B. Co. v. Boyd*, 97 Fed. 586, it was alleged that a

directory had been copied. Defendant claimed that his work was made up from lists obtained from original sources by canvassers. The court held that defendant's failure to furnish such lists or the testimony of the canvassers was strong proof of piracy. In *List Pub. Co. v. Keller*, 30 Fed. 772, the court said: "The case for the complainant is such as to call for a full and explicit vindication on the part of the defendant. If it is true that his directory was prepared from several private visiting lists furnished [him] for the purpose, these lists should have been produced or their non-production accounted for, and, if they could not be produced, corroborative testimony of their existence, the sources from which they were obtained, and their contents should have been adduced."

61. *Chapman v. Ferry*, 18 Fed. 539.

62. *Black v. Allen Co.*, 56 Fed. 764; *Springer Lith. Co. v. Falk*, 59 Fed. 707; *Fishel v. Lueckel*, 53 Fed. 499, but see *Farmer v. Elstner*, 33 Fed. 494. An injunction will be granted without proof of actual damage where infringement is clearly shown. *Reed v. Holliday*, 19 Fed. 325, citing *Tinsley v. Lacy*, 32 L. J. Ch. 536.

63. *Harper v. Shoppell*, 26 Fed. 519, 28 Fed. 613.

64. *Fishel v. Lueckel*, 53 Fed. 499.

65. One who made an electrotype copy of an important, substantial and material part of a copyrighted illustrated newspaper, and sold the plate

will render him equally guilty with the one who actually did the work.<sup>66</sup>

**2. Comparison.** — A. IN GENERAL. — In some cases the best evidence obtainable of infringement is a comparison of the two works,<sup>67</sup> and secondary evidence is admissible to aid the court in making the comparison.<sup>68</sup> Where, upon such comparison, the alleged infringement reveals an identity of plan, arrangement,<sup>69</sup> ideas,<sup>70</sup> thought,<sup>71</sup> language,<sup>72</sup> typographical peculiarities,<sup>73</sup> or mode of expression, it is strong evidence of infringement;<sup>74</sup> and especially if in the new work the same instances are given and illustrated by reference, in the same manner, to the same authorities,<sup>75</sup> or citation thereof from the same edition or place,<sup>76</sup> in the same order,<sup>77</sup> or by copying words and sentences without change,<sup>78</sup> or with slight or immaterial changes.<sup>79</sup>

The comparison must indicate some copying,<sup>80</sup> and to show

to the proprietor of another newspaper, knowing that it would be used by the purchaser for printing and publishing the matter copied, was held guilty equally with the publisher. *Harper v. Shoppell*, 28 Fed. 613.

66. *Greene v. Bishop*, 1 Cliff. 186, 10 Fed. Cas. No. 5,763.

67. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

68. *Sheriff v. Coates*, 1 Russ & M. 159; *West Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 64 Fed. 360; *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

69. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

70. *Gilmore v. Anderson*, 38 Fed. 846; *Jollie v. Jaques*, 1 Blatchf. 618, 13 Fed. Cas. No. 7,437.

71. *Greene v. Bishop*, 1 Cliff. 186, 10 Fed. Cas. No. 5,763; *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136; *Banks v. McDivitt*, 13 Blatchf. 163, 2 Fed. Cas. No. 961.

72. *Myers v. Callaghan*, 10 Biss. 139; *Brightley v. Littleton*, 37 Fed. 103.

73. *Folsom v. Marsh*, 2 Story 100, 9 Fed. Cas. No. 4,901.

74. *Chils v. Gronlund*, 41 Fed. 145; *Bullinger v. Mackey*, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127; *Callaghan v. Myers*, 128 U. S. 617.

75. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136; *Pike v. Nichols*, L. R. 5 Ch. 251.

76. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

77. *Callaghan v. Myers*, 128 U. S. 617.

78. *Gilmore v. Anderson*, 38 Fed. 846; *List Pub. Co. v. Keller*, 30 Fed. 772; *Greene v. Bishop*, 1 Cliff. 186, 10 Fed. Cas. No. 5,763. Where the first 100 pages of the alleged infringement contained about 2000 lines, 900 of which were apparently copied and the balance contained certain passages copied, but generally abridged and in different language, it was held infringement was shown. *Story v. Holcombe*, 4 McLean 306, 23 Fed. Cas. No. 13,497.

79. In *Emerson v. Davies*, 3 Story 768, 8 Fed. Cas. No. 4,436, which was a leading case, the court said: "It may be laid down as the clear result of the authorities in cases of this nature, that the true test of piracy or not is to ascertain whether the defendant has, in fact, used the plan, arrangements and illustrations of the plaintiff as the model of his own book, with colorable alterations and variations only to disguise the use thereof, or whether his work is the result of his own labor, skill and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental or arising from the nature of the subject." See also *Dickens v. Lee*, 8 Jur. 183.

80. *Falk v. City Item Print. Co.*, 79 Fed. 321; *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

similarity or identity of language of a small part is insufficient, yet if such identity is continuous it becomes suggestive of copying;<sup>81</sup> and it has been held in the case of a map that a substantial copy must be produced.<sup>82</sup> When the comparison shows that the substance itself has been literally copied,<sup>83</sup> contains the same information,<sup>84</sup> or produces the same impression, infringement clearly appears.<sup>85</sup> Literal repetition is not necessary,<sup>86</sup> but generally the comparison must show such similitude as to make it probable and reasonable to suppose that one is a copy of the other,<sup>87</sup> and when it so appears, copying will be presumed, unless the presumption be rebutted by convincing evidence.<sup>88</sup> Accidental resemblances may

81. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136. The mere circumstance that two syllabi of the same opinion are found to be expressed in similar or identical language is not sufficient proof that one was borrowed, yet where instance after instance occurs in which the language is so found, in both technical as well as common speech, such continuous identity becomes suggestive of copying. *West Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 64 Fed. 360.

82. In *Perris v. Hexamer*, 99 U. S. 674, complainant made a map of New York City, using common and ordinary signs and key. Defendant made one of the City of Philadelphia, using substantially the same general plan. The court held that they were not only not copies, but did not convey the same information.

83. *Chils v. Gronlund*, 41 Fed. 145; *Gyles v. Wilcox*, 2 Atk. 141; *Gilmore v. Anderson*, 38 Fed. 846; *Morris v. Wright*, L. R. 5 Ch. 279; *Pike v. Nichols*, L. R. 5 Ch. 251.

84. *List Pub. Co. v. Keller*, 30 Fed. 772; *Kelly v. Morris*, L. R. 1 Eq. 697; *Emerson v. Davies*, 3 Story 768, 8 Fed. Cas. No. 4,436; *Story v. Holcombe*, 4 McLean 306, 23 Fed. Cas. No. 13,497.

85. *Blume v. Spear*, 30 Fed. 629; *Scott v. Stanford*, L. R. 3 Eq. 718; *Martinetti v. Maguire*, Deady 216, 16 Fed. Cas. No. 9,173, was a case in which it was alleged that a theatrical exhibition had been infringed. There was a striking similarity of names and the evidence showed that the impression created upon spectators was the same. The court there stated the rule to be: "If the sim-

ilarity in general character and effect . . . is sufficient to deceive the public, it is fair to conclude that one is a piracy of the other."

86. Copying will not be confined to literal repetition, but includes also the various modes in which the matter may be adopted, imitated or transferred with more or less colorable alterations intended to disguise the piracy. *Greene v. Bishop*, 1 Cliff. 186, 10 Fed. Cas. No. 5,763.

87. Points of similarity may arise from the character of the publication, the object intended to be served and the nature of the information sought to be conveyed. *Bullinger v. Mackey*, 15 Blatchf. 550, 4 Fed. Cas. No. 2,127; *Sayre v. Moore*, 1 East 361n; *Cary v. Longman*, 1 East 358. Fact of similarity of names of a theatrical production suggests imitation. *Martinetti v. Maguire*, Deady 216, 16 Fed. Cas. No. 9,173. The court must be satisfied that the person accused of plagiarism has, in fact, copied or imitated another's work in some substantial degree. *Simms v. Stanton*, 75 Fed. 6. In *Pike v. Nicholas*, 5 Ch. App. 251, cited in the above case, the plaintiff proved that defendant had referred to a large number of authorities which plaintiff had previously cited. Defendant stated that he had taken the references from a previous writer from whom plaintiff had also cited, and further showed that he had referred to two authorities not mentioned by plaintiff, but as to two of the authorities cited by plaintiff and also by defendant, the latter was unable to state where he had found them. *Held*, no infringement was shown.

88. *Lawrence v. Dana*, 4 Cliff. 1,



be explained,<sup>89</sup> and evidence as to the personal relations of the two writers is admissible for the purpose.<sup>90</sup>

The best evidence for the purpose of comparison is the writings themselves, which must be produced if possible, and, in their absence, oral testimony as to resemblances between them is not admissible,<sup>91</sup> but it has been held in England that the production of a part only was sufficient.<sup>92</sup> And when the works are so in evidence, the opinions of experts who have examined and compared them are admissible. Such evidence is, however, of a secondary nature, and admissible only for the purpose of aiding the court to make the comparison.<sup>93</sup>

Comparison of the size of the works or the number of pages is no criterion,<sup>94</sup> nor is it error to exclude experimental evidence intended to show the rate of speed with which the work can be done with or without copying.<sup>95</sup>

Exhibits cut from a newspaper, not apparently copies or connected with the original, are inadmissible.<sup>96</sup>

**B. COINCIDENCE OF ERRORS.**—Where a comparison of the two works shows that the alleged infringement contains the same errors as occur in the work from which it is alleged to have been copied, a strong presumption of copying is raised.<sup>97</sup> This coin-

15 Fed. Cas. No. 8,136; *Brightley v. Littleton*, 37 Fed. 103.

<sup>89</sup> *Brightley v. Littleton*, 37 Fed. 103; *Daly v. Palmer*, 6 Blatchf. 256, 6 Fed. Cas. No. 3,552.

<sup>90</sup> The fact that the two writers had been on friendly terms with each other may be taken into consideration as an indication that there might be a striking similarity in many expressions and definitions used by both in treating of the same subject and still not show piracy by one from the other. *Simms v. Stanton*, 75 Fed. 6.

<sup>91</sup> And so held where one of the writings was produced and the other not. *Boucicault v. Fox*, 5 Blatchf. 87, 3 Fed. Cas. No. 1,691.

<sup>92</sup> *Lewis v. Fullarton*, 2 Beav. 6.

<sup>93</sup> *West Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 64 Fed. 360; *Boucicault v. Fox*, 5 Blatchf. 87, 3 Fed. Cas. No. 1,691. In *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136, the court said: "Though admissible in all such cases, the opinions of experts are nevertheless, in their nature, secondary evidence. Regarded as a basis to enable the court to compare one book with another, the results given by experts have

proved valuable."

<sup>94</sup> *Story v. Holcombe*, 4 McLean 306, 23 Fed. Cas. No. 13,497.

<sup>95</sup> In *West Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 64 Fed. 360, after testimony had been introduced by both parties as to the rate of speed with which digesting for their respective works had been done, the complainant, to prove the falsity of defendant's testimony, offered that several editors should, in the presence of the court or master, digest a certain number of cases to be selected by the court or master, to demonstrate that defendant's testimony was false. *Held*, no error to exclude the evidence.

<sup>96</sup> *Falk v. City Item Print. Co.*, 79 Fed. 321.

<sup>97</sup> *Webb v. Powers*, 2 Woodb. & M. 497, 29 Fed. Cas. No. 17,323; *Mawman v. Tegg*, 2 Russ. 385, 26 Rev. Rep. 112; *Jewelers' Merc. Agency v. Jewelers' Weekly Pub. Co.*, 84 Hun 12, 32 N. Y. Supp. 41; *List Pub. Co. v. Keller*, 30 Fed. 772.

In the case last cited, the court said: "In a case like this, when a close resemblance is the necessary consequence of the use of common materials, the existence of the same

cidence of errors has been held to be the best evidence of copying short of direct evidence of the fact.<sup>98</sup> The reproduction of typographical errors and peculiarities in some parts of the work raises the presumption that parts in which no such blunders occur have also been copied.<sup>99</sup> Very strong, clear and conclusive evidence is required to rebut these presumptions.<sup>1</sup> The mere denial of defendant is insufficient.<sup>2</sup>

**3. Defenses.** — A. IN GENERAL. — Where infringement clearly appears, evidence of independent labor expended in the preparation of the new work,<sup>3</sup> or in making corrections and additions to the original,<sup>4</sup> or that there was no intention to infringe,<sup>5</sup> or that some parts of plaintiff's work had been used by others from whom they were copied,<sup>6</sup> or that the infringement is intended for a different use,<sup>7</sup> or that it is incomplete, or not marketable, is not available as a defense.<sup>8</sup>

Evidence establishing the fact that while ignorant of a prior work something similar was produced is a good defense,<sup>9</sup> and so,

errors in the two publications affords one of the surest tests of copying. The improbability that compilers would have made the same mistakes if both had derived their information from independent sources suggests such a cogent presumption of copying by the later compiler from the first that it can be overcome only by clear evidence to the contrary." *Citing* *Mawman v. Tegg*, 2 Russ. 385, 26 Rev. Rep. 112; *Spiers v. Brown*, 31 Law T. (N. S.) 402; *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

98. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

99. *Lewis v. Fullerton*, 2 Beav. 6. Reproduction of typographical errors and peculiarities is conclusive proof of copying of such parts of the work in which they are found and *prima facie* proof that other passages in which no blunders occur were copied. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

1. *List Pub. Co. v. Keller*, 30 Fed. 772; *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136; *Mawman v. Tegg*, 2 Russ. 385, 26 Rev. Rep. 112.

2. *Chicago Dollar Directory Co. v. Chicago Directory Co.*, 66 Fed. 977; *Folsom v. Marsh*, 2 Story 100, 9 Fed. Cas. No. 4,901; *Reed v. Holliday*, 19 Fed. 325.

3. *Callaghan v. Myers*, 128 U. S. 617.

4. *Ladd v. Oxnard*, 75 Fed. 703.

5. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136; *Reed v. Holliday*, 19 Fed. 325; *Webb v. Powers*, 2 Woodb. & M. 497, 29 Fed. Cas. No. 17,323; *Story v. Holcombe*, 4 McLean 306, 23 Fed. Cas. No. 13,497. The liability of the infringer arises from the fact that he is enabled to sell the simulated article for the genuine, and proof of fraudulent intent is immaterial. *McLean v. Fleming*, 96 U. S. 245.

6. *Gilmore v. Anderson*, 38 Fed. 846.

7. *Gilmore v. Anderson*, 38 Fed. 846.

8. The defendants manufactured copies of pictures, omitting therefrom the tint, title and plate mark, and shipped them to England, where the tint, title and plate mark were put on. The defense was that there was no infringement because of the incompleteness of the copies without tint, title and plate mark, and therefore not marketable, and not copies within the meaning of the law. The fact that the pictures had some market value without the tint, title or mark was held sufficient to establish the infringement. *Fishel v. Lueckel*, 53 Fed. 499.

9. *White Dental Co. v. Sibley*, 38 Fed. 751; *Bailey v. Taylor*, 3 L. J. Ch. 66.

if the new work be shown to have been the result of the author's independent labor in gathering together from original sources, independent of plaintiff's production, the claim of infringement will be defeated.<sup>10</sup>

Laches in the institution of suit for infringement may be taken into consideration.<sup>11</sup>

If, in defense, it is claimed that the publication was made under a license from the author, proof thereof must be made according to the statute.<sup>12</sup>

B. INVALIDITY OF THE COPYRIGHT. — a. *In General.* — The invalidity of the copyright under which the plaintiff claims, may be shown in defense of an action for infringement.<sup>13</sup> Failure to comply with the statutory provisions,<sup>14</sup> or an ineffectual attempt to do so will invalidate the copyright,<sup>15</sup> but the disregard of a trifling particular,<sup>16</sup> an immaterial error,<sup>17</sup> or a slight variance in language is not sufficient, so long as the statute has been substantially and in good faith complied with,<sup>18</sup> although there may be slight evidence that it has not.<sup>19</sup>

10. *Simms v. Stanton*, 75 Fed. 6; *Webb v. Powers*, 2 Woodb. & M. 497, 29 Fed. Cas. No. 17,323; *Greene v. Bishop*, 1 Cliff. 186, 10 Fed. Cas. No. 5,763.

11. *Edward Thompson Co. v. American Law Book Co.*, 121 Fed. 907; *Simms v. Stanton*, 75 Fed. 6; *Saunders v. Smith*, 3 Mylne & C. 711; *Rundell v. Murray*, 1 Jac. 311; *Lewis v. Chapman*, 3 Beav. 133. But see *Hogg v. Scott*, 43 L. J. Ch. 705; *Weldon v. Dicks*, 48 L. J. Ch. 201.

12. Rev. Stat. § 4,965.

13. *Chicago Music Co. v. Butler Paper Co.*, 19 Fed. 758; *Callaghan v. Myers*, 128 U. S. 617; *Chase v. Sanborn*, 4 Cliff. 306, 5 Fed. Cas. No. 2,628; *Jackson v. Walkie*, 29 Fed. 15; *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136; *Black v. Allen Co.*, 56 Fed. 764; *Reed v. Carusi*, *Taney* 72, 20 Fed. Cas. No. 11,642; *Clemens v. Belford*, 14 Fed. 728.

14. *Jackson v. Walkie*, 29 Fed. 15; *Myers v. Callaghan*, 10 Biss. 139; *Merrell v. Tice*, 104 U. S. 557; *Osgood v. Aloe Instrument Co.*, 83 Fed. 470; *Wheaton v. Peters*, 8 Pet. 591; *Fuller v. Blackwall Gardens Co.*, 2 Q. B. 429.

15. *Osgood v. Aloe Instrument Co.*, 83 Fed. 470.

16. *Daly v. Webster*, 56 Fed. 483; *Carte v. Evans*, 27 Fed. 861; *Belford v. Scribner*, 144 U. S. 488.

17. *Colletts v. Goode*, 47 L. J. Ch. 370. The title page was deposited with the clerk of the district court in January, 1867, and the notice printed in the volume was: "Entered according to act of congress in the year 1866." *Held*, that there was evidently a mistake in the imprint, which should have been 1867 instead of 1866, and that the error was immaterial. *Myers v. Callaghan*, 10 Biss. 139. *Affirmed* in *Callaghan v. Myers*, 128 U. S. 617.

18. In *Daly v. Webster*, 56 Fed. 483, the title as filed was "'Under the Gaslight,' a romantic panorama of the streets and homes of New York, by Augustin Daly, author of 'Leah, the Forsaken,' 'Griffith Gaunt,' 'Taming a Butterfly,'" etc. The title in the completed work was "'Under the Gaslight,' a totally original and picturesque drama of life and love in these times, in five acts, by Augustin Daly, author of 'Leah, the Forsaken,' 'Griffith Gaunt,' 'Taming a Butterfly,'" etc., etc. *Held*, that the variance was immaterial.

19. From the place where the copies were expressed to the City of Washington, D. C., the time taken by the express was less than 24 hours. The copies were shown to have been expressed on April 5, to the librarian of congress, at Washington. It was also shown by the delivery book of the

The copyright may be shown to be invalid by proving that the work is of such a nature as not to come within the statutory provisions,<sup>20</sup> or that it is libelous, obscene or injurious.<sup>21</sup> And proof that a book had been published,<sup>22</sup> or a picture publicly exhibited without the required notice,<sup>23</sup> or with a defective notice,<sup>24</sup> will invalidate the copyright, but that the notice had been inadvertently omitted may be shown.<sup>25</sup>

Evidence that the plaintiff himself pirated the work alleged to have been infringed is admissible to show the invalidity,<sup>26</sup> but the burden of proving this is on the defendant.<sup>27</sup>

*b. Abandonment.*—Abandonment of the right to a copyright may be shown by proof of any act of the author which would indicate such to be his intention.<sup>28</sup> Such intention may be manifested by publishing the work, in whole or in part,<sup>29</sup> or the public exhibition of a picture without the statutory notice,<sup>30</sup> or before securing a copyright,<sup>31</sup> or in any manner dedicating the work to the public.<sup>32</sup> Proof of such public exhibition, publication or

express company, as well as by the librarian's receipt book, that he received a package from the consignor April 6, and none on April 7. The evidence further showed that consignments to the librarian were stamped by his assistant as soon as possible after the receipt thereof, and the record in his office made from such stamps; that his office was greatly crowded with work; that his force of clerks was insufficient to promptly care for all matter received and that sometimes books received were not stamped until the day following their receipt. The librarian's record showed that the books in question were received and deposited on April 7. The validity of the copyright depended upon the deposit of the books on April 6, and the court held that such deposit was sufficiently shown. *Black v. Allen Co.*, 56 Fed. 764.

20. Rev. Stat. § 4,952; *Southey v. Sherwood*, 2 Mer. 435.

21. *Stockdale v. Onwhyn*, 7 D. & R. 625; *Walcot v. Walker*, 7 Ves. 1; *Southey v. Sherwood*, 2 Mer. 435.

22. *Clemens v. Belford*, 14 Fed. 728; *Wheaton v. Peters*, 8 Pet. 591; *Bartlett v. Crittenden*, 5 McLean 32, 2 Fed. Cas. No. 1,076.

23. *Werckmeister v. American Lith. Co.*, 117 Fed. 360.

24. *Osgood v. Aloe Instrument Co.*, 83 Fed. 470.

25. *American Press Ass'n v. Daily Story Pub. Co.*, 120 Fed. 766.

26. *Reed v. Carusi*, Taney 72, 20 Fed. Cas. No. 11,642.

27. *Reed v. Carusi*, Taney 72, 20 Fed. Cas. No. 11,642.

28. *Keene v. Clarke*, 5 Robt. (N. Y.) 38; *Folsom v. Marsh*, 2 Story 100, 9 Fed. Cas. No. 4,901.

29. *Holmes v. Hurst*, 174 U. S. 82; *Mifflin v. Dutton*, 112 Fed. 1004.

In *American Press Ass'n v. Daily Story Pub. Co.*, 120 Fed. 766, it was shown that copyrighted matter had been published by a newspaper under an agreement with the proprietor of the copyright not to publish without the notice, and that the notice had been inadvertently omitted by the licensee and the matter republished by another newspaper. In an action against the latter it was held that the proprietor had lost none of his rights.

30. *Werckmeister v. American Lith. Co.*, 117 Fed. 360.

31. If the author publishes his work before securing a copyright it becomes public property. *Clemens v. Belford*, 14 Fed. 728; *Wheaton v. Peters*, 8 Pet. 591; *Osgood v. Aloe Instrument Co.*, 83 Fed. 470; *Clayton v. Stone*, 2 Paine 382, 5 Fed. Cas. No. 2,872.

32. An intent to abandon all private right has been inferred from the mode of communication. The de-

dedication will bar the author from claiming any right under a subsequently acquired copyright for the work.<sup>33</sup>

A sale of the work raises a presumption of publication,<sup>34</sup> but mere proof that the work was delivered to carriers to be forwarded to subscribers will not.<sup>35</sup>

An intention to abandon a copyright is negatived by evidence that the author denied permission to another to publish it,<sup>36</sup> or proof of republishing of part of the work by the author and giving notice of his intention to republish the other parts.<sup>37</sup>

Proof that the author allowed the plates from which his work was to have been printed to be sold under execution is no evidence of abandonment,<sup>38</sup> nor is any special use of the work in public by the author for his own benefit such evidence.<sup>39</sup>

Proof that the composition was published under a different title from which it was copyrighted shows abandonment.<sup>40</sup>

Proof of abandonment should be conclusive,<sup>41</sup> and the burden

livery of a printed copy to one of several subscribers has been held to be a surrender to the public, although the delivery of a manuscript copy would not. Such delivery may be made confidential by a notice thereon that it is for private circulation only. A limited communication of a literary or musical composition by private lectures, recitations, or its performance has been held no surrender to the public. But where such communications are indefinitely multiplied, so as to embrace many readers or hearers there would seem to be no great difference in giving it to the public at once. So that where the audience is not limited, as in the case of a public theatrical performance, the public are held entitled to make use of the memory for the purpose of repeating the contents of the play, or even performing it elsewhere, when no restraint has been laid by the owner upon the knowledge so obtained. *Keene v. Clarke*, 5 Robt. (N. Y.) 38. But see *Boucicault v. Fox*, 5 Blatchf. 87, 3 Fed. Cas. No. 1,691.

33. *Clemens v. Belford*, 14 Fed. 728; *Holmes v. Hurst*, 174 U. S. 82; *Wheaton v. Peters*, 8 Pet. 591.

34. The purchaser having the right to know the contents of a book and make them known to others, there can be no presumption that the right was not exercised. *Baker v.*

*Taylor*, 2 Blatchf. 82, 2 Fed. Cas. No. 782.

35. The copyright was perfected March 27. It was shown that two days prior thereto copies of the work had been delivered to carriers to be forwarded to subscribers. *Held*, that in the absence of proof that the work actually reached the consignees before the 27th publication was not shown. *Black v. Allen Co.*, 56 Fed. 764.

36. *New Jersey State Dental Soc. v. Dentacura Co.*, 57 N. J. Eq. 593, 41 Atl. 672.

37. *Myers v. Callaghan*, 10 Biss. 139.

38. *Patterson v. Ogilvie Pub. Co.*, 119 Fed. 451.

39. The mere fact that the manuscript has by consent and procurement of the author been read in public by him or another, or recited, or represented, is not evidence of abandonment, nor is proof that a play was performed under agreement and with the consent of the author for six nights before the copyright was taken out. Such proof is not sufficient to show a dedication to the public with the right to represent the play on the stage. *Boucicault v. Fox*, 5 Blatchf. 87, 3 Fed. Cas. No. 1,691.

40. *Blume v. Spear*, 30 Fed. 629.

41. *Myers v. Callaghan*, 10 Biss. 139; *Folsom v. Marsh*, 2 Story 100, 9 Fed. Cas. No. 4,901.

of proof is upon the party claiming an abandonment.<sup>42</sup>

C. ABRIDGEMENT AND REVIEW. — To make available the defense that the alleged infringement is but an abridgement or review, the defendant must show that his work is entirely new, the result of labor and judgment,<sup>43</sup> and that he has gone no further than to make a fair exposition of the original work.<sup>44</sup> It must appear that the citation of important parts or points was for the purpose of honest criticism and not designed to supersede the original or serve as a substitute therefor in any use to which it might be put.<sup>45</sup> That a different arrangement has been followed to bring the work into a smaller compass is not sufficient.<sup>46</sup>

#### IV. ASSIGNMENT.

Assignment of rights under a copyright will not be presumed.<sup>47</sup> Parol evidence of an assignment of an interest in matter that might be but has not been copyrighted is admissible. Parol evidence of an assignment of an interest in a copyright would perhaps be inadmissible if properly objected to.<sup>48</sup> A receipt for purchase money is no evidence of assignment.<sup>49</sup>

#### V. ACTIONS FOR PENALTIES.

In actions for penalties under the statute<sup>50</sup> plaintiff must prove

42. *New Jersey State Dental Soc. v. Dentacura Co.*, 57 N. J. Eq. 593, 41 Atl. 672.

43. *Story v. Holcombe*, 4 McLean 306, 23 Fed. Cas. No. 13,497. "There must be real substantial condensation of the materials and intellectual labor and judgment bestowed thereon, not merely the facile use of the scissors, or extracts of the essential parts constituting the chief value of the original work." *Folsom v. Marsh*, 2 Story 100, 9 Fed. Cas. No. 4,901; *Hawkesworth v. Newberry*, Lofft. 775; *Gyles v. Wilcox*, 2 Atk. 141; *Wilkins v. Aikin*, 17 Ves. 422; *Tonson v. Walkner*, 2 Atk. 143.

44. *Harper v. Shoppell*, 26 Fed. 519; *Bell v. Whitehead*, 86 J. Ch. 141. In some cases what amounts to piracy is a very nice question. Where large extracts are made in the form of review, whether designed for purpose of criticism or designed to supersede the original. *Gray v. Russell*, 1 Story 11, 10 Fed. Cas. No. 5,728; *Campbell v. Scott*, 11 Sim. 31.

45. *Harper v. Shoppell*, 26 Fed. 519; *Folsom v. Marsh*, 2 Story 100,

9 Fed. Cas. No. 4,901. It is not abridgement if it operates to the injury of the original. *Story v. Holcombe*, 4 McLean 306, 23 Fed. Cas. No. 13,497.

Reviewers may make extracts sufficient to show the merits or demerits of the book, but not sufficiently to supersede the original. *Lawrence v. Dana*, 4 Cliff. 1, 15 Fed. Cas. No. 8,136.

46. *Folsom v. Marsh*, 2 Story 100, 9 Fed. Cas. No. 4,901. "Books colorably shortened are mere evasions and not abridgements." *Gyles v. Wilcox*, 2 Atk. 143.

47. The presumption is that a man's intellectual productions are peculiarly his own, and he will not, in the absence of proof, be presumed to have transferred them to his employer. *Boucicault v. Fox*, 5 Blatchf. 87, 3 Fed. Cas. No. 1,691.

48. *Callaghan v. Myers*, 128 U. S. 617.

49. *Lover v. Davidson*, 1 C. B. (N. S.) 182.

50. Rev. Stat. § 4,965.

that copies of the infringing article were discovered or detected in possession of the defendant prior to bringing suit, and his recovery will be limited to the number of copies found. Evidence of the number of copies printed and delivered to defendant is incompetent.<sup>51</sup> The defendant cannot be compelled to furnish such evidence.<sup>52</sup>

The record of a suit for infringement of a copyright is competent evidence to show the validity of the copyright in a subsequent suit between the same parties to recover penalties.<sup>53</sup>

51. *Bolles v. Outing Co.*, 77 Fed. 966.

52. Defendant cannot be compelled to produce his books, plates,

etc., to furnish evidence upon which plaintiff seeks to recover. *Johnson v. Donaldson*, 3 Fed. 22.

53. *Brady v. Daly*, 83 Fed. 1,007.

# CORONER'S INQUEST.

BY EDWARD W. TUTTLE.

## I. RIGHTS OF SUSPECTED PERSONS, 569

1. *Presence at Inquest*, 569
2. *Right to Offer Testimony*, 569

## II. WITNESSES AND EVIDENCE, 569

1. *Attendance of Witnesses*, 569
2. *Limits of Inquiry*, 569

## III. ADMISSIBILITY IN SUBSEQUENT PROCEEDINGS, 570

- 1 *Homicide Trial*, 570
  - A. *As Primary Evidence*, 570
    - a. *Generally*, 570
    - b. *Corpus Delicti*, 570
  - B. *As Secondary Evidence*, 570
    - a. *Record Required*, 570
    - b. *Record Not Required*, 571
  - C. *Wholly Inadmissible*, 571
  - D. *Presence of the Accused*, 571
  - E. *By Statute*, 573
2. *Civil Proceedings*, 573
  - A. *Verdict*, 573
  - B. *Testimony*, 574
3. *Proper Foundation*, 574
4. *Method of Proof*, 575
  - A. *Parol Evidence*, 575
  - B. *Authentication and Proof*, 575

### CROSS-REFERENCES.

Confessions; Corpus Delicti;  
Examination Before Committing Magistrates;  
Homicide.



## I. RIGHTS OF SUSPECTED PERSONS.

1. **Presence at Inquest.** — It is not necessary that the accused or suspected person be present at the coroner's inquest.<sup>1</sup>

2. **Right to Offer Testimony.** — Neither has he a right to be represented by counsel<sup>2</sup> at the inquest, to offer testimony in his favor,<sup>3</sup> nor to cross-examine the witnesses, except as otherwise provided by statute.<sup>4</sup>

## II. WITNESSES AND EVIDENCE.

1. **Attendance of Witnesses.** — The coroner may compel witnesses to attend and testify<sup>5</sup> or summon a physician to give expert testimony,<sup>6</sup> but cannot compel the latter to make more than a superficial examination of the body.<sup>7</sup>

2. **Limits of Inquiry.** — It is the coroner's duty to hear all the evidence,<sup>8</sup> whether for or against the suspected party, since the purpose of the inquest is to determine the cause of the death, but the limits of such evidence lie within his discretion.<sup>9</sup> Witnesses have the same privileges as in trials.<sup>10</sup>

1. *State v. Parker*, 7 La. Ann. 83; *People v. Collins*, 20 How. Pr. (N. Y.) 111, 11 Abb. Pr. 406; *Wheeler v. State*, 34 Ohio St. 394; *Whitehurst v. Com.*, 79 Va. 556.

2. *Whitehurst v. Com.*, 79 Va. 556; *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N. E. 439.

3. *People v. Collins*, 20 How. Pr. (N. Y.) 111, 11 Abb. Pr. 406; *State v. Parker*, 7 La. Ann. 83; *Wheeler v. State*, 34 Ohio St. 394.

*See Meyers v. State*, 33 Tex. Crim. App. 204, 26 S. W. 196. Also state statutes.

4. *See cases in note 3 supra.*

Statutes sometimes give the coroner discretionary power in allowing a suspected person to be represented by counsel at the inquest; or give such person the right to offer testimony and cross-examine. *See Meyers v. State*, 33 Tex. Crim. App. 204, 26 S. W. 196.

5. *People v. Taylor*, 59 Cal. 640; *St. Francis Co. v. Cummings*, 55 Ark. 419, 18 S. W. 461; *Cushman v. Washington Co.*, 45 Iowa 255; *Farrell v. Floyd Co. Com'rs*, 57 Ga. 347; *Allegheny Co. v. Watt*, 3 Pa. St. 462; *Cox v. Royal Tribe*, (Or.), 71 Pac. 73; *Rex v. Quinch*, 4 Car. & P. 571, 19 Eng. C. L. 533. *See state statutes.*

**Privilege.** — A witness at the coroner's inquest need not give testimony incriminating himself. *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721.

6. *Crisfield v. Perine*, 15 Hun (N. Y.) 200. And cases *supra* note 5.

7. *Allegheny Co. v. Watt*, 3 Pa. St. 462; *St. Francis Co. v. Cummings*, 55 Ark. 419, 18 S. W. 461.

Statutes sometimes give the coroner power to summon a physician to give information and render services incident to his profession; Va., W. Va., Utah, and see statutes generally.

8. 1 Hale P. C. 415, 2 Hale P. C. 60, 61.

9. **Limits of Evidence.** — In *McLain v. Com.*, 99 Pa. St. 86, speaking of the proceedings at an inquest the court says: "No technical rules restrict or control the admission of evidence. No cross-examination of witnesses is had. The coroner's discretion marks the line where the evidence of a witness shall begin, and where it shall end."

10. **Incriminating Evidence.** Testimony should not be excluded merely because it may incriminate the witness. The latter should be informed of his privilege and allowed

## III. ADMISSIBILITY IN SUBSEQUENT PROCEEDINGS.

1. **Homicide Trial.** — A. AS PRIMARY EVIDENCE. — a. *Generally.* The record of neither the verdict<sup>11</sup> of the coroner's jury nor of the testimony<sup>12</sup> taken at the inquest is admissible as primary evidence on the trial for the homicide, except for impeachment,<sup>13</sup> or as an admission or confession.<sup>14</sup>

b. *Corpus Delicti.* — However, the verdict has been held admissible to prove the *corpus delicti*.<sup>15</sup>

B. AS SECONDARY EVIDENCE. — a. *Record Required.* — The statutes<sup>16</sup> requiring the filing of a record of the testimony and proceedings at a coroner's inquest in the trial court have been construed in England and some American states to render admissible<sup>17</sup> such

to proceed on his own responsibility. *Wakley v. Healey*, 4 Exch. 510.

11. *State v. Cecil Co. Comr's*, 54 Md. 426; *State v. Turner*, Wright (Ohio) 21; *State v. Row*, 81 Iowa 138, 46 N. W. 872; *Colquit v. State*, 107 Tenn. 381, 64 S. W. 713; *Crisfield v. Perine*, 15 Hun (N. Y.) 200.

12. *Com. v. Ryan*, 134 Mass. 223; *Ritter v. People*, 130 Ill. 255, 22 N. E. 605; *Wormeley v. Com.*, 10 Gratt. (Va.) 658; *Whitehurst v. Com.*, 79 Va. 556.

**Corroboration of Defendant.** — The proceedings before the coroner, including the testimony and verdict, cannot be shown merely to corroborate the defendant at his trial for the homicide. *People v. Coughlin*, 67 Mich. 466, 35 N. W. 72.

**The Absence of Evidence** at the inquest against defendant cannot be shown. *Sylvester v. State*, 71 Ala. 17.

**Tendency of Evidence.** — The tendency of evidence at the inquest as to other facts cannot be proved. *Hall v. State*, (Ala.), 34 So. 680.

13. See article "IMPEACHMENT."

14. See articles "ADMISSIONS" and "CONFESSIONS."

15. *State v. Baptiste*, 108 La. 234, 32 So. 371; *State v. Tate*, 50 La. Ann. 1, 183, 24 So. 592. And see *State v. Garth*, 164 Mo. 553, 65 S. W. 275.

"That part of the inquest which ascertains the death of a person and its precise causes, establishes mere physical facts, which are to be ascertained, according to law, for public purposes. A record of those facts made at the time, and upon inspec-

tion by a public officer and intelligent men, aided by professional skill, is better and more precise evidence of those facts than proof from the fleeting recollection of men, or the hasty and heedless observation of passers-by. Every one feels that it is more satisfactory proof than any other that could be offered. The facts, in themselves, are evidence of neither guilt nor innocence, and have no direct tendency to implicate the accused, nor any one else. . . .

There can be, therefore, no reasonable objection to this mode of ascertaining the physical facts, which caused the death, before the petty jury." *State v. Parker*, 7 La. Ann. 83.

16. *England.* — The statutes 1 and 2 Phil. & M., Ch. 13, § 5, and of George IV, Ch. 64, § 4, require the coroner to reduce to writing the testimony given before him and file the inquisition and the testimony so taken with the court before which the trial for the homicide is to be held.

*United States.* — Statutes in this country are generally similar to that in England. See state statutes and also notes 19 and 23.

17. *England.* — Reg. v. Plummer, 1 Car. & K. 600, 47 Eng. C. L. 600; *King v. Eriswell*, 3 T. R. 707. And cases following:

*Alabama.* — See also *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422; *Sylvester v. State*, 71 Ala. 17.

*Georgia.* — *Smalls v. State*, 101 Ga. 570, 28 S. E. 981, 40 L. R. A. 369.

*Indiana.* — *Brown v. State*, 71 Ind. 470.

record of the testimony of a witness since deceased.<sup>18</sup>

b. *Record Not Required*.—Where, however, the testimony is not required to form a part of the record so filed, the coroner's minutes of it are inadmissible for any purpose.<sup>19</sup>

c. *WHOLLY INADMISSIBLE*.—In some states, however, testimony given before the coroner is deemed wholly incompetent either as primary or secondary evidence, in a trial for homicide.<sup>20</sup>

d. *PRESENCE OF THE ACCUSED*.—By the weight of authority in those jurisdictions admitting such evidence the accused must have been present at the inquest to render it competent against him.<sup>21</sup> When offered by the accused, however, this objection has

*Missouri*.—State v. Mullins, 101 Mo. 514, 14 S. W. 625.

*New York*.—People v. White, 22 Wend. 167; People v. Restell, 3 Hill 289.

*North Carolina*.—State v. Grady, 83 N. C. 643; State v. Taylor, Phil. L. 508.

*South Carolina*.—State v. Terry, 23 S. C. 603.

*Texas*.—Head v. State, 40 Tex. Crim. App. 265, 50 S. W. 352.

"Neither the statute nor the act has any express provision that the depositions shall go to the jury in any case. But the Statute P & M. has been so expounded: Provided the accused was present, and had the opportunity of a cross-examination, and the witness be dead, etc. So much may be conceded as well settled. See East Pl. of Cr. 440; Leach, 14; Buller, 43; Salk. 281." State v. Campbell, 1 Rich. L. (S. C.) 124.

"The justice who holds an inquest is required to draw up and sign a report, and file it with the records of the Superior Court. He is not required to take or file minutes in writing of the testimony before him. Such minutes when taken are for his private use, and belong to him. They are not competent evidence for any purpose in the trial of an indictment for the murder of a person to whom the inquest relates." Com. v. Ryan, 134 Mass. 223.

"The provision of our statute simply is, 'which testimony (before coroner) shall be filed with said coroner in his office and carefully preserved,' there being no implication, as in the English statute, that

the inquisition is for use in court. There is such difference between the statutes as to afford room for question whether the English decisions fully apply." Pittsburgh, C. & St. L. R. Co. v. McGrath, 115 Ill. 172, 3 N. E. 439.

18. See *infra* notes 30 and 31.

19. Bass v. State, 29 Ark. 142.

20. State v. Cecil Co. Comr's, 54 Md. 426.

*Evidence Too Unrestricted*.—In McLain v. Com., 99 Pa. St. 86, the court in holding the testimony taken at the inquest inadmissible, says: "The hearing before the coroner was not . . . between the commonwealth and the plaintiff in error. An inquiry there takes a broad range. It is not to ascertain the guilt of any particular person, but of every person that the evidence may implicate. No technical rules restrict or control the admission of evidence. No cross-examination of witnesses is had. The coroner's discretion marks the line where the evidence of a witness shall begin, and where it shall end."

*Violates Rights of Accused*.—"A coroner's inquest with us is of such a nature that to admit it, against the objection of the accused, would violate that clause of the bill of rights which entitles him to meet the witnesses face to face." Wheeler v. State, 34 Ohio St. 394. But see State v. McNeil, 33 La. Ann. 1,332, note 17 *supra*.

21. State v. Campbell, 1 Rich. L. (S. C.) 124.

In People v. Restell, 3 Hill (N. Y.) 289, Bronson J. says: "It is said that depositions taken by the coroner on holding an inquest are

been held not to apply.<sup>22</sup>

evidence, although the defendant was not present when they were taken. This doctrine has been gravely questioned, and I am strongly inclined to the opinion that it cannot be maintained."

**Absence of Evidence.** — Absence of evidence against the defendant at the coroner's inquest cannot be shown by him at his trial for the homicide. "The guilt or innocence of the prisoner can in no manner be affected by *ex parte* statements made in his absence, whether they be inculpatory or exculpatory." *Sylvester v. State*, 71 Ala. 17.

**English Doctrine.** — In the dissenting opinion in *State v. Campbell*, 1 Rich. L. (S. C.) 124, it is said, "In *Lord Morley's Case*, 7 State Trials 421, the judges of England . . . met, and, *inter alia*, resolved, *una voce*, 'that in case any of the witnesses which were examined before the coroner were dead or unable to travel, and oath made thereof, that then the examination of such witnesses so dead or unable to travel, might be read. . . . ' This point, thus solemnly settled, has been uniformly followed ever since. To this it is objected that it does not appear but that the prisoner might have been present at the examination. But I take it, if any such distinction as presence or non-presence had been deemed material, it would have been stated in as solemn a settlement of the rule of evidence as that which occurred in *Lord Morley's Case*. (Citing also *Bromwick's Case*, 1 Lev. 180, 2 Keb. 19.) That great and good man, Sir Matthew Hale, in his *Pleas of the Crown* (Vol. II, 284,) recognizes the rule in its broadest terms. In the *King v. Eriswell*, 3 T. R. 713, it is stated by Buller J. that the examination of a pauper, under the 13 and 14 Car. 2, 'was very similar to the case of depositions before a coroner, which has been long settled to be good evidence, *though the person accused be not present when it is taken, nor ever heard of it till the moment it is produced against him.*' Lord Kenyon admitted the rule in criminal

cases, as to depositions before the coroner (saying) 'The examination before the coroner is an *inquest of office*; it is a transaction of notoriety to which every person has access.'

**Text Writers.** — For adverse criticism and discussion of the English cases see 2 Stark. Ev. (5 Am. Ed.) 276, 2 Phil. Ev. (6 Am. Ed.) 74.

In 3 Russ. on Crimes 477 it is said: "The prevailing opinion seems to have been that they are equally admissible, *though the prisoner may have been absent at the time of taking the inquisition.* The reasons given for this distinction usually are that the examination before the coroner is a transaction of notoriety to which every one has right of access, and that the coroner is an officer appointed on behalf of the public to make inquiry about the matters within his jurisdiction, and therefore the law will presume the depositions before him to be duly and impartially taken. But these reasons and the authorities for the doctrine are certainly not at all satisfactory; since the distinction is not warranted by the language of the legislature, and is unfounded on principle, it may, when the question arises, be a matter of very grave and serious consideration whether it ought to be admitted."

**22. Offered by Accused.** — In *State v. McNeil*, 33 La. Ann. 1,332, where the accused offered in evidence the testimony of a witness at the inquest, since deceased, it was held admissible. The court said: "In regard to the constitutional objection urged, it is sufficient to say that, whilst it may operate to the exclusion of such testimony when offered by the State and the objection in question is urged by the accused, it is not applicable when the same testimony is offered by the accused himself." The right to confront and cross-examine the witnesses against him is a privilege which he may waive.

But see *State v. Row*, 81 Iowa 138, 46 N. W. 872.

But in *Whitehurst v. Com.*, 79 Va. 556, where such evidence was offered by the accused, the court says: "These proceedings are usually con-

E. BY STATUTE. — In Texas, by statute, if the witness be dead or out of the state, the record of his testimony taken at the inquest is admissible in a trial for the homicide, if the accused was present at the inquest and had the right to cross-examine.<sup>23</sup>

2. **Civil Proceedings.** — A. VERDICT. — The verdict of the coroner's jury as distinguished from the testimony<sup>24</sup> given before him is admitted by some courts in civil actions to prove the manner of death<sup>25</sup> where that fact is in issue; but it is incompetent as to any other facts therein contained.<sup>26</sup> In other jurisdictions it is deemed

ducted in this state in the absence of the accused, without the aid of counsel, and often in the absence of the most material witnesses, both for the prosecution and the defense. In nearly every case the rights of either the commonwealth or the accused would be inevitably prejudiced [by the admissions of such evidence.]

23. Tex. Code Civ. Proc. Art. 774. *Meyers v. State*, 33 Tex. Crim. App. 204, 26 S. W. 196.

24. **Verdict and Testimony Distinguished.** — "It will be observed that the evidence of all witnesses examined before the coroner is required to remain in his office, while the inquest must be sealed up and returned to the clerk of the circuit court of the county, where it shall be filed. Thus the inquest becomes, by force of the statute, a public record of the county where the inquest is held. It is a record containing the results of a public inquiry, made by a public officer under authority of law, relating to matters in which the public have an interest. And when it is returned into court, and is filed, we see no reason why it should not be competent evidence tending to prove any matter properly before the coroner which appears upon the face of the inquisition. We do not hold that such evidence is conclusive, but only that it is competent evidence to be considered." *U. S. Life Ins. Co. v. Kielgast*, 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65.

25. *Metzradt v. Modern Brotherhood*, 112 Iowa 522, 84 N. W. 498; *Gooding v. U. S. Life Ins. Co.* 46 Ill. App. 307; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Grand Lodge v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61

Am. St. Rep. 123; *Supreme Lodge v. Fletcher*, 78 Miss. 377, 28 So. 872, 29 So. 523; *Pittsburgh C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N. E. 439.

**Action on Insurance Policy.** **Admission.** — In *Walther v. Mutual L. Ins. Co.*, 65 Cal. 417, 4 Pac. 413, plaintiff introduced the coroner's verdict solely to show his compliance with the requirements of the policy as to preliminary proofs of death. The court said: "When the papers were in evidence they were before the court, and showed on their face that the deceased had committed suicide; and for the purposes of the trial they were *prima facie* evidence of that fact, and should have been so considered." *Citing Insurance Co. v. Newton*, 22 Wall. (U. S.) 32; *Contra. Goldschmidt v. Insurance Co.*, 102 N. Y. 486, 7 N. E. 408. *See Insurance Co. v. Kielgast*, 26 Ill. App. 567; *National Union v. Thomas*, 10 App. D. C. 277; *Home Benefit Ass'n v. Sargent*, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. ed. 1,160.

**Burden of Proof.** — In *Prince of Wales v. Palmer*, 25 Beav. 605, where the action was on an insurance policy, it was held that the introduction of the verdict of the coroner's jury as evidence of the cause of death throws the burden of proof on the party maintaining a different theory.

26. *Pittsburgh C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N. E. 439; *Gooding v. U. S. Life Ins. Co.*, 46 Ill. App. 307; *Chicago, M. & St. P. R. Co. v. Staff*, 46 Ill. App. 499; *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 So. 618.

In *Lake Shore & M. S. R. Co. v. Taylor*, 46 Ill. App. 506, the court says: "The reason for their admis-

wholly incompetent.<sup>27</sup>

B. TESTIMONY. — Nowhere, except in England,<sup>28</sup> is the testimony given at the inquest competent proof of the facts therein stated in civil actions.<sup>29</sup>

3. Proper Foundation. — Before the record of the testimony taken at the inquest is admissible in any case the witness must be shown to be dead,<sup>30</sup> or, in some jurisdictions, otherwise

sibility in evidence contrary to the general rule in relation to hearsay evidence being that they are proceedings on behalf of the public, and are matters of public and general interest, they are only competent within the scope of the statute, which presumably points out the limit of such public and general interest. . . . The expression of belief by the jury that the switch stand was negligently placed, was altogether extraneous to the province of the inquest as prescribed by the statute, and should have been controlled by an instruction" requiring them to disregard it.

27. Union Cent. L. Ins. Co. v. Hollowell, 14 Ind. App. 611, 43 N. E. 277; Memphis & C. R. Co. v. Womack, 84 Ala. 149, 4 So. 618; Goldschmidt v. Mutual L. Ins. Co., 102 N. Y. 486, 7 N. E. 408; Cox v. Royal Tribe, (Or.), 71 Pac. 73; Texas Mut. L. Ins. Co. v. Brown, 2 Posey Unrep. Cas. (Tex.) 160; U. S. L. Ins. Co. v. Kielgast, 26 Ill. App. 567, overruled 129 Ill. 557, 22 N. E. 467, 6 L. R. A. 65.

Extrajudicial. — Against Public Policy. — In Germania L. Ins. Co. v. Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215, the court says: "It is claimed that inquisitions by coroners were admissible in evidence at common law, and hence are now admissible in jurisdictions where the common-law rule has not been changed by statute. The English rule, however, grew out of the fact that the inquisition was a judicial proceeding, authorized by statute, but this reason is without force under our system of government. Moreover, under our constitution, no part of the judicial power of the state could be vested in the coroner; hence the inquest sought to be introduced in this case was extrajudicially taken,

and should have been excluded." *Citing and distinguishing* Walther v. Mutual L. Ins. Co., 65 Cal. 417, 4 Pac. 413; Insurance Co. v. Newton, 22 Wall. (U. S.) 32, and it would be contrary to public policy to permit such inquisitions to be used in evidence because of the resulting effect on the proceedings at the inquest.

Not a Judicial Proceeding. — In State v. Cecil Co. Com'rs, 64 Md. 426, the court said: "The inquisition sought to be introduced as evidence in this case is not a judicial proceeding" and "is inadmissible either upon a criminal prosecution or in a civil suit."

But in some states it is held to be a judicial proceeding. *People v. Devine*, 44 Cal. 452; *Boisliniere v. Board of Com'rs*, 32 Mo. 375; *State v. Knight*, 12 Ired. L. (N. C.) 789; *People v. Coombs*, 158 N. Y. 532, 53 N. E. 527.

28. England. — In an action for damages to a vessel, caused by a collision, the deposition of a witness, taken before the coroner on an inquiry touching the death of a person killed by the collision, was held admissible, such witness being abroad. *Sills v. Brown*, 9 Car. & P. 601, 38 Eng. C. L. 245.

29. *Cook v. New York C. R. Co.*, 5 Lans. (N. Y.) 401; *Insurance Co. v. Schmidt*, 40 Ohio St. 112; *Texas Mut. L. Ins. Co. v. Brown*, 2 Posey Unrep. Cas. (Tex.) 160; U. S. L. Ins. Co. v. Kielgast, 26 Ill. App. 567. And cases in notes 24-27 *supra*.

But see *Union Cent. L. Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277.

30. *Sylvester v. State*, 71 Ala. 17; *State v. Taylor*, Phil. L. (N. C.) 508; *State v. Grady*, 83 N. C. 643; *McLain v. Com.*, 99 Pa. St. 86, *citing* *Rex v. Morley*, Kel. 53, and *Bromwick's Case*, 1 Lev. 180, 2 Keb. 19.

unavailable.<sup>31</sup>

**4. Method of Proof.** — A. PAROL EVIDENCE. — The record is the best evidence of its contents<sup>32</sup> and cannot be varied by parol;<sup>33</sup> but where no record is required,<sup>34</sup> or none has been made,<sup>35</sup> or the record kept is too irregular to be admitted,<sup>36</sup> parol proof is proper.<sup>37</sup>

B. AUTHENTICATION AND PROOF. — The record must be properly authenticated,<sup>38</sup> and is proved in the same manner as other records

**Absence of Witness** from the jurisdiction is not sufficient reason for admitting his testimony before the coroner. *Dupree v. State*, 33 Ala. 380, 73 Am. Dec. 422.

**31. By Statute.** — *Johnson v. State*, 26 Tex. App. 631, 10 S. W. 235.

**Absence from the Kingdom** was held sufficient in *Sills v. Brown*, 9 Car. & P. 601, 37 Eng. C. L. 245; *Lord Morley's Case*, note 21 *supra*.

**32. Dunn v. State**, 2 Ark. 229; *State v. Zellers*, 7 N. J. Law 220; *State v. Prater*, 26 S. C. 198, 613, 2 S. E. 108.

*See Halloway v. People*, 181 Ill. 544, 54 N. E. 1,030.

**Report of Coroner.** — The report of the coroner where he did not deem it necessary to hold an inquest is not admissible. *National Union v. Thomas*, 10 App. D. C. 277.

**Record of Another State.** — Where the record of another state is offered, which shows an inquest held without a jury, it is inadmissible without further showing that the laws of that state authorized the holding of such an inquest. *National Gross Loge v. Jung*, 65 Ill. App. 313.

**33. Robinson v. State**, 87 Ind. 292; *Woods v. State*, 63 Ind. 353; *Brown v. State*, 71 Ind. 470; *Moffatt v. State*, 35 Tex. Crim. App. 257, 33 S. W. 344.

**Post-mortem Examination.** — The fact that the coroner is required to make and file a record of the proceedings of the inquest, including the post-mortem examination, does not render incompetent, on the trial of the homicide, the physician who made the post-mortem and testified concerning it at the inquest. *State v. Vaughan*, 152 Mo. 73, 53 S. W. 420.

**34. Minutes of Coroner.** — Where no record is required to be kept on file by the coroner, his minutes of the testimony are inadmissible in a

subsequent proceeding for any purpose. *Com. v. Ryan*, 134 Mass. 223; *Bass v. State*, 29 Ark. 142.

**35. Nelson v. State**, 32 Ark. 192; *Lyons v. People*, 137 Ill. 602, 27 N. E. 677; *Rex v. Reed*, 1 Moody & M. 403.

**36. Brown v. State**, 71 Ind. 470; *Robinson v. State*, 87 Ind. 292; *Lyons v. People*, 137 Ill. 602, 27 N. E. 677.

**Signing of the Written Statement** by the witness where required by statute is essential to its admissibility. *Brown v. State*, 71 Ind. 470; *Reg. v. Plummer*, 1 Car. & K. 600, 47 Eng. C. L. 600.

**37. The Coroner** or any other competent witness may testify as to the verdict and testimony at the inquest where parol proof is required. *Com. v. Ryan*, 134 Mass. 223; *Bass v. State*, 29 Ark. 142; *Reg. v. Plummer*, 1 Car. & K. 600, 47 Eng. C. L. 600.

**A Memorandum** of the testimony of witnesses examined before the coroner taken by a person who was present is not competent evidence. *State v. McElmurrey*, 3 Strob. (S. C.) 33; *Price v. State*, (Tex. Crim. App.) 43 S. W. 96.

**38. Authentication.** — In *People v. White*, 22 Wend. (N. Y.) 167, where an unsigned pencil indorsement on the back of the inquisition filed by the coroner was offered as evidence for purposes of impeachment and rejected, the court says: "It is in no way authenticated, and though the law presumes that the coroner reduced the testimony of the witnesses to writing, as in duty bound by the statute, yet the same statute requires that the written testimony should be returned by him. Here he has furnished nothing which can be recognized as an official return. We have no *jurat*; nor anything importing

are proved.<sup>39</sup>

that the witness was sworn. . . . The statute, in requiring the coroner to make a return of the testimony with the inquisition, cannot be satisfied short of some official certificate indicating that the witnesses named were sworn before him to the matter insisted on as evidence."

39. See cases under notes 17 and 25, and "RECORDS."

### Vol. III

**Regular on Face.** — Where the record appears regular on its face and recites all the steps taken at the inquest, the proceedings thereat are presumed to have been properly taken as set forth in the record, and no further proof is necessary. *State v. Baptiste*, 108 La. 234, 32 So. 371.

But see *People v. Dowd*, 127 Mich. 140, 86 N. W. 546.



# CORPORATIONS.

BY CLARK ROSS MAHAN.

## I. MATTERS AS TO CORPORATE EXISTENCE, 584

### 1. *Judicial Notice*, 584

#### A. *Domestic Corporations*, 584

##### a. *General Governing Laws*, 584

##### b. *Public Law Granting Charter*, 584

###### (1.) *Generally*, 584

###### (2.) *Act Declared Public*, 584

###### (3.) *Private Act Recognized in Subsequent Public Law*, 585

###### (4.) *Acts Required by Statute to Be Judicially Noticed*, 585

###### (5.) *Name of Corporation*, 585

###### (6.) *Citizenship of Corporators*, 586

##### c. *Private Law Granting Charter*, 586

###### (1.) *Generally*, 586

###### (2.) *Name of Corporation*, 586

###### (3.) *Acceptance of Charter*, 586

##### d. *Termination of Corporate Existence*, 586

#### B. *Foreign Corporations*, 586

### 2. *Burden of Proof*, 587

#### A. *Domestic Corporations*, 587

##### a. *In General*, 587

##### b. *Quo Warranto Proceedings*, 588

##### c. *Performance of Conditions Precedent*, 588

##### d. *Sufficiency of Proof to Satisfy Burden*, 590

- (1.) *Direct Proceedings*, 590
- (2.) *Condemnation Proceedings by Corporation*, 590
- (3.) *Corporate Existence Collaterally in Issue*, 591
  - (A.) *Generally*, 591
  - (B.) *Criminal Prosecutions*, 594
- B. *Foreign Corporations*, 595
- 3. *Presumptions*, 597
  - A. *In General*, 597
  - B. *Long-Continued Exercise of Corporate Powers*, 598
  - C. *Election of Officers*, 598
  - D. *Absence of General Statute*, 598
  - E. *Voluntary Association*, 598
  - F. *Notice of Organization*, 598
  - G. *Regularity Presumed*, 599
  - H. *Use of Name Importing Corporation*, 599
    - I. *President and Secretary Transacting Business*, 600
  - J. *Acceptance of Charter*, 600
    - a. *Organizing and Exercising Corporate Powers*, 600
    - b. *Charter Beneficial to Corporators*, 601
  - K. *Acceptance of Amendment to Charter*, 601
    - a. *Choosing Officers, etc.*, 601
    - b. *Intention Not to Accept*, 601
    - c. *Estoppel to Question Acceptance of Amendment*, 602
- 4. *Best and Secondary Evidence*, 602
  - A. *Articles of Association*, 602
  - B. *Records*, 602
  - C. *Copies, etc.*, 603
  - D. *Recitals in Instruments Executed by Corporation*, 603

- E. Oral Evidence, 604**
  - a. *In General*, 604
  - b. *Estoppel to Deny Corporate Existence*, 604
  - c. *Foreign Corporation*, 604
  - d. *Criminal Prosecutions*, 604
  - e. *As Secondary Evidence*, 605
- 5. Documentary Evidence, 605**
  - A. Domestic Corporations, 605**
    - a. *Statutes*, 605
    - b. *Articles or Certificates of Association*, 605
      - (1.) *The Originals*, 605
      - (2.) *Copies, Records, etc.*, 606
        - (A.) *Generally*, 606
        - (B.) *Alterations*, 608
        - (C.) *National Banks*, 608
        - (D.) *Consolidation*, 609
    - c. *Corporate Books and Records*, 609
      - (1.) *Generally*, 609
      - (2.) *Acceptance of Charter*, 610
      - (3.) *User*, 610
      - (4.) *Authentication of Books*, 610
    - d. *Ex-parte Affidavits*, 610
  - B. Foreign Corporations, 611**
    - a. *Generally*, 611
    - b. *Seal of Officer*, 612
    - c. *Opinion of Certifying Officer*, 612
    - d. *Appointment of Resident Agent*, 612
- 6. Admissions, 612**
  - A. *By Contract*, 612
  - B. *By Appearance*, 613
  - C. *By Plea to Merits*, 614

- D. *By Stipulation in Court*, 614
- 7. *Circumstantial Evidence to Prove User*, 614
- 8. *Parol Evidence*, 615
  - A. *Purposes of Corporation*, 615
  - B. *Certificate as to Capital Stock Fixed and Paid in*, 615
  - C. *Fraud in Procurement of Charter*, 615

## II. MATTERS AS TO MEMBERS OF A CORPORATION, 616

- 1. *Burden of Proof and Presumptions*, 616
  - A. *The Fact of Membership*, 616
  - B. *Creditor Without Further Remedy Against Corporation*, 616
  - C. *Genuineness of Issue of Stock*, 616
  - D. *Transfer of Stock*, 617
  - E. *Stock Paid for by Property Overvalued*, 617
  - F. *Inspection of Corporate Books*, 617
- 2. *Best and Secondary Evidence*, 617
  - A. *Contract of Subscription*, 617
  - B. *Parol Evidence*, 618
- 3. *Documentary Evidence*, 618
  - A. *Subscription to Capital Stock*, 618
  - B. *Requisite Amount Subscribed*, 618
  - C. *The Fact of Membership*, 619
    - a. *Stock Books*, 619
      - (1.) *Non-Statutory Rule*, 619
      - (2.) *Statutory Rule*, 621
    - b. *Other Documents*, 621
- 4. *Declarations and Admissions*, 622
- 5. *Parol Evidence*, 622
  - A. *In General*, 622

- B. *Conditional Delivery of Subscription*, 624
- 6. *Circumstantial Evidence*, 624

### III. MATTERS AS TO OFFICERS AND AGENTS, 625

- 1. *Judicial Notice*, 625
- 2. *Burden of Proof and Presumptions*, 625
  - A. *The Relationship*, 625
  - B. *Authority to Act for Corporation*, 625
    - a. *In General*, 625
    - b. *Presumption From Exercise of Authority*, 626
    - c. *Presumption From Execution of Instrument Under Corporate Seal*, 627
- 3. *Best and Secondary Evidence*, 629
- 4. *Documentary Evidence*, 630
- 5. *Admissions and Declarations*, 630
- 6. *Circumstantial Evidence*, 631
  - A. *Authority*, 631
  - B. *Ratification of Unauthorized Acts*, 631

### IV. POWERS OF CORPORATION, 631

- 1. *Judicial Notice*, 631
- 2. *Burden of Proof and Presumptions*, 632
  - A. *In General*, 632
  - B. *Carrying on Business*, 634
  - C. *Power to Take and Hold Property*, 634
  - D. *Power to Alienate Property*, 635
  - E. *Power to Take Corporate Stock*, 635
- 3. *Documentary Evidence*, 635
- 4. *Best Evidence*, 635
- 5. *Circumstantial Evidence*, 635

**V. MATTERS AS TO THE MANAGEMENT OF THE CORPORATION, 636**

1. *Judicial Notice*, 636
2. *Burden of Proof and Presumptions*, 636
  - A. *Regularity*, 636
    - a. *Meetings of Stockholders*, 636
    - b. *Acts of Directors*, 636
    - c. *Adoption of By-laws*, 637.
    - d. *Knowledge of Unauthorized Acts*, 638
3. *Admissions and Declarations by Officers and Agents*, 638
  - A. *General Rule Stated*, 638
  - B. *Rule Applied as to Authority of Officer or Agent*, 641
  - C. *Rule Applied as to Time When Made*, 643
    - a. *Generally*, 643
    - b. *Declarations Forming Part of Transaction*, 644
    - c. *Declarations by an Officer After Termination of Office*, 645
  - D. *Rule Applied to Promoters*, 645
  - E. *Rule Applied to Members*, 645
  - F. *Rule Applied to Particular Officers*, 645
    - a. *Directors*, 645
    - b. *President*, 646
    - c. *Secretary or Treasurer*, 647
    - d. *General Manager*, 647
    - e. *Cashier of Bank*, 647
  - G. *Rule Applied to Purpose of Proof*, 647.
    - a. *Contract Liability*, 647
    - b. *Estoppel*, 648
    - c. *Negligence*, 648
    - d. *Liability of a Corporation for False Representations*, 649

- e. *Insolvency of Corporation*, 649
- f. *Corporate Knowledge of Management*, 649
- g. *Tampering With Witnesses*, 649
- H. *Declarations in Interest of Officer or Agent*, 650
- 4. *Best and Secondary Evidence*, 650
  - A. *Acts of Corporation*, 650
    - a. *In General*, 650
    - b. *Copies*, 651
    - c. *Parol Evidence*, 652
      - (1.) *Generally*, 652
      - (2.) *Statute Requiring Record*, 653
      - (3.) *Corporate Acts Collaterally in Issue*, 654
    - d. *Opinion of Witness*, 655
- 5. *Documentary Evidence*, 655
  - A. *Corporate Books and Records*, 655
    - a. *Against the Corporation and Members*, 655
    - b. *Against Officers*, 656
    - c. *Against Strangers*, 656
- 6. *Opinion Evidence*, 657
- 7. *Parol Evidence*, 657

## VI. DISSOLUTION OF CORPORATION, 658

- 1. *Burden of Proof and Presumptions*, 658
  - A. *In General*, 658
  - B. *Insolvency*, 658
  - C. *Non-User*, 658

### CROSS-REFERENCES.

Bonds;  
 Carriers; Consideration; Contempt;  
 Elections; Eminent Domain;  
 Franchises;  
 Insurance;  
 Principal and Agent;  
 Waters.

## I. MATTERS AS TO CORPORATE EXISTENCE.

**1. Judicial Notice.** — A. DOMESTIC CORPORATIONS. — a. *General Governing Laws.* — Judicial notice will be taken of the general corporation laws in force authorizing and regulating the formation of domestic corporations.<sup>1</sup>

b. *Public Law Granting Charter.* — (1.) *Generally.* — So, also, judicial notice will be taken of a public law granting a special charter to a domestic corporation.<sup>2</sup>

(2.) *Act Declared Public.* — If an act of incorporation is expressly

1. *Methodist Episcopal U. Ch. v. Pickett*, 19 N. Y. 482.

**National Banks.** — Judicial notice will be taken of the general laws of the United States authorizing the organization of national banks. *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834.

2. *United States.* — *Central Bank v. Tayloe*, 2 Cranch C. C. 427, 5 Fed. Cas. No. 2,548.

*Alabama.* — *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422.

*Arkansas.* — *McKiel v. Real Estate Bank*, 4 Ark. 592; *Washington v. Finley*, 10 Ark. 423, 52 Am. Dec. 244; *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204.

*Georgia.* — *Jackson v. State*, 72 Ga. 28.

*Indiana.* — *White Water Val. C. Co. v. Boden*, 8 Blackf. 130; *Russell v. Branham*, 8 Blackf. 277.

*Kentucky.* — *Lexington Mfg. Co. v. Dorr*, 2 Litt. 256; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. 13, 35 Am. Dec. 171; *Halbert v. Skyles*, 1 A. K. Marsh. 368.

*Maine.* — *Roger's Case*, 2 Me. 303; *State v. McAllister*, 24 Me. 139.

*Maryland.* — *Towson v. Havre-de-Grace Bank*, 6 Har. & J. 47, 14 Am. Dec. 254.

*Massachusetts.* — *Portsmouth Liv-ry Co. v. Watson*, 10 Mass. 91.

*New York.* — *Bank of Utica v. Magher*, 18 Johns. 341.

*South Carolina.* — *Bank of Newberry v. Greenville & C. R. R. Co.*, 9 Rich. 495; *Simpson v. South Carolina Mut. Ins. Co.*, 59 S. C. 195, 37 S. E. 18, 225; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

*Tennessee.* — *Owen v. State*, 5 Sneed 493; *Shaw v. State*, 3 Sneed

86; *Williams v. Union Bank*, 2 Humph. 339.

*Texas.* — *Bank of Alabama v. Simonton*, 2 Tex. 531.

*Vermont.* — *Buell v. Warner*, 33 Vt. 570.

*Virginia.* — *Hays v. Northwestern Bank*, 9 Gratt. 127; *Stribling v. Bank of the Valley*, 5 Rand. 132.

*West Virginia.* — *Farmers' Bank v. Willis*, 7 W. Va. 31; *Beasley v. Beckley*, 28 W. Va. 81.

**The Corporate Existence of a National Bank** will be judicially noticed. *U. S. v. Williams*, 4 Biss. 302, 28 Fed. Cas. No. 16,706.

In *State v. Baltimore & O. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803, it was held that the charter of the defendant company, whereby it was made a corporation, was a public act of which the court would take judicial notice. See also *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

In *West Virginia* the law makes it the duty of the secretary of state, at every regular session of the legislature, to deliver to the clerk of the lower house accurate copies of every certificate of incorporation not before reported by him, and makes it the duty of such clerk to cause the same to be printed and bound with the session acts. In *Bon Aqua Imp. Co. v. Standard F. Ins. Co.*, 34 W. Va. 764, 12 S. E. 771, it was held that judicial notice would be taken of the corporate existence of corporations so certified by the secretary of state.

In *Missouri P. R. Co. v. White*, 3 Wills Civ. Cas. (Tex.), § 160, it was held that judicial notice would be taken of the fact that the Texas and Pacific Railway was a part of the Missouri Pacific Railway System and operated by the latter company.



declared by the legislature to be a public act, it must be judicially noticed.<sup>3</sup>

(3.) **Private Act Recognized in Subsequent Public Law.**—And, although the act may have in fact been a private statute, yet where it is recognized in a subsequent public law the courts will judicially notice it.<sup>4</sup>

(4.) **Acts Required by Statute to Be Judicially Noticed.**—Sometimes by express statute the courts are required to judicially notice all acts of incorporation.<sup>5</sup>

(5.) **Name of Corporation.**—Judicial notice will not be taken of the name of a corporation organized under the general laws relating to the organization of corporations.<sup>6</sup> But judicial notice will be taken of the name by which a corporation is designated in a public act creating it.<sup>7</sup>

See also *Miller v. Texas & N. O. R. Co.*, 83 Tex. 518, 18 S. W. 954.

In *Crawford v. Planters' & Merchants' Bank*, 6 Ala. 289, it was held that the statute incorporating the Planters' & Merchants' Bank was a public statute and would be judicially noticed.

In *McKiel v. Real Estate Bank*, 4 Ark. 592, an action by that bank, it was held that as the bank was a public corporation, the court was bound to judicially take notice of its corporate existence.

3. *United States.*—*Covington Drawbridge Co. v. Shepherd*, 20 How. 227; *Beaty v. Knowler*, 4 Pet. 152.

*Indiana.*—*Herod v. Rodman*, 16 Ind. 241; *Brookville Ins. Co. v. Records*, 5 Blackf. 170.

*Iowa.*—*Durham v. Daniels*, 2 Greene 518.

*Massachusetts.*—*Worcester Medical Inst. v. Harding*, 11 Cush. 285.

*Michigan.*—*People v. River Raisin & L. E. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64; *Hurlbut v. Britain*, 2 Doug. 191.

*New Jersey.*—*Stephens & C. Transp. Co. v. Central R. Co.*, 33 N. J. L. 229.

4. *Crawford v. Planters' & Merchants' Bank*, 6 Ala. 289.

In *Jemison v. Planters' & Merchants' Bank*, 17 Ala. 754, it was held that the acts of Feb. 13, 1843, for the final settlement of the affairs of the Planters' and Merchants' Bank, and of Jan. 24, 1845, amendatory thereof were public acts and would be judicially noticed.

5. *Boynton v. Middlesex Mut. F. Ins. Co.*, 4 Metc. (Mass.) 212.

**Corporations to Construct Levees.** The existence of corporations organized under the Indiana statute for the construction of levees and drains must be judicially noticed by the courts of the county or counties in which the articles of association were recorded. *Delaware v. Sand Creek D. Co.*, 26 Ind. 407.

See also *Eel River Drg. Ass'n v. Topp*, 16 Ind. 242; *Anderson v. Kern Drg. Co.*, 14 Ind. 199, 77 Am. Dec. 63. Compare *Cicero Hygiene Drg. Co. v. Craighead*, 28 Ind. 274.

Although all the statutes under which plank road companies are organized will be judicially noticed, it cannot be judicially known under which one any particular corporation was organized, or whether it has adopted the provisions of some other act. *Danville & W. L. P. R. Co. v. State*, 16 Ind. 456.

6. *Holloway v. Memphis*, E. P. & P. R. Co., 23 Tex. 465, 76 Am. Dec. 68.

In *Church v. Imperial G. & C. Co.*, 2 Ad. & E. 846, 3 N. & P. 35, it was held that when a corporation declares in the name by which it was incorporated by act of parliament, the court was bound, even after verdict, to judicially notice that it was a corporation.

Judicial notice will be taken that "A. B. & Co." is not the name of a corporation. *Rex v. Harrison*, 8 T. R. 508.

7. *Jackson v. State*, 72 Ga. 28. And see *Bank of Alabama v. Simon-*

(6.) **Citizenship of Corporators.** — Judicial notice cannot be taken that the members of a domestic corporation created by public statute are all citizens of the state.<sup>8</sup>

c. **Private Law Granting Charter.** — (1.) **Generally.** — Where a corporation is created by a private act, however, judicial notice thereof will not be taken by the courts,<sup>9</sup> unless otherwise expressly provided by statute.<sup>10</sup>

(2.) **Name of Corporation.** — Nor will judicial notice be taken of the name of a corporation created by a special or private act.<sup>11</sup>

(3.) **Acceptance of Charter.** — Judicial notice cannot be taken that a corporation has accepted the provisions of a statute under which it was created.<sup>12</sup>

d. **Termination of Corporate Existence.** — Judicial notice will not be taken that the corporate existence of a corporation, whose charter has not expired by limitation, has ceased.<sup>13</sup>

B. **FOREIGN CORPORATIONS.** — Unless it is otherwise expressly provided by statute,<sup>14</sup> the courts will not take judicial notice of a foreign statute creating a corporation,<sup>15</sup> but proof thereof must be

ton, 2 Tex. 531; *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. (Ky.) 171.

8. *Lexington Mfg. Co. v. Dorr*, 2 Litt. (Ky.) 256.

9. *Alabama.* — *Kelly v. Alabama & C. R. Co.*, 58 Ala. 489; *Montgomery v. Montgomery & W. P. R. Co.*, 31 Ala. 76; *Drake v. Flewellen*, 33 Ala. 106; *Perry v. New Orleans M. & C. R. Co.*, 55 Ala. 413, 28 Am. Rep. 740. *Connecticut.* — *Goshen & S. Tpke. Co. v. Sears*, 7 Conn. 86.

*Indiana.* — *Ohio & I. R. Co. v. Ridge*, 5 Blackf. 78.

*Louisiana.* — *Manadere v. Bon-signore*, 28 La. Ann. 415.

*Maryland.* — *Agnew v. Bank of Gettysburg*, 2 Har. & G. 478.

*Missouri.* — *Bailey v. Lincoln Academy*, 12 Mo. 174.

*New Hampshire.* — *Haven v. New Hampshire Insane Asylum*, 13 N. H. 532, 38 Am. Dec. 512.

*New Jersey.* — *Perdicaris v. Trenton City B. Co.*, 29 N. J. L. 367.

*New York.* — *Williams v. Sherman*, 7 Wend. 109.

*North Carolina.* — *Carrow v. Washington Toll B. Co.*, 61 N. C. 118.

*Pennsylvania.* — *Timlow v. Philadelphia & R. R. Co.*, 99 Pa. St. 284.

*Texas.* — *Conley v. Columbus T. R. Co.*, 44 Tex. 579; *Holloway v. Memphis, E. P. & P. R. Co.*, 23 Tex. 465, 76 Am. Dec. 68.

**A Statute Validating the Grants,** rights, privileges and franchises granted to certain corporations by a municipal corporation and its predecessors is local and private, judicial notice of which will not be taken by the courts. *Mobile v. Louisville & N. R. Co.*, 124 Ala. 132, 26 So. 902.

10. **As in Kentucky.** — *Collier v. Baptist Ed. Soc.*, 8 B. Mon. (Ky.) 68. See also *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346.

11. See *supra* case cited in note 9.

12. *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220. See also *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

13. *Shea v. Knoxville & K. R. Co.*, 6 Baxt. (Tenn.) 277.

14. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16.

15. *Gaines v. Bank of Mississippi*, 12 Ark. 769; *Hahnemannian L. Ins. Co. v. Beebe*, 48 Ill. 87, 95 Am. Dec. 579; *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74; *Stone v. State*, 20 N. J. L. 401; *Jones v. State*, 5 Sneed (Tenn.) 346; *Lewis v. Bank of Kentucky*, 12 Ohio 132, 40 Am. Dec. 469.

See also *Bank of Alabama v. Simonton*, 2 Tex. 531.

Judicial notice will not be taken that the Chesapeake & Ohio R. Co. was chartered in another state and had not been domesticated under the

made by the production of a copy of the act duly authenticated, as in the case of other foreign statutes, or by a sworn copy of the charter, in order that the court may be advised of the legal warrant for the creation of such corporation.<sup>16</sup> Nor where the statute creating and naming the corporation is a foreign statute will judicial notice be taken of the name thereof.<sup>17</sup>

**2. Burden of Proof.** — A. DOMESTIC CORPORATIONS. — a. *In General.* — Where the fact of corporate existence is in issue, the burden of proof is on the party asserting that fact.<sup>18</sup> Thus where several

Tennessee laws. *Nashville T. Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763.

In *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171, an action by a foreign corporation, the court said: "Although we may know judicially that neither of the plaintiffs, as described in the petitions, has ever been incorporated by this state, yet we may be presumed to have the like knowledge of the fact that they are all, as to Kentucky, extra-territorial, and the style of each of them indicates an incorporated character, and therefore according to the case of the Dutch East India Company, reported in 2nd Lord Raymond, 1534, and the principle of which we approve, these plaintiffs should *prima facie* be deemed foreign corporations."

16. *Jones v. State*, 5 Sneed (Tenn.) 346; *Duke v. Taylor*, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484; *U. S. v. Johns*, 4 Dall. (U. S.) 412. And see cases cited in previous note. See also article "FOREIGN LAWS."

17. *Holloway v. Memphis*, E. P. & P. R. Co., 23 Tex. 465, 76 Am. Dec. 68.

18. **Burden of Proving Corporate Existence.** — *Alabama.* — *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 So. 658, 24 Am. St. Rep. 887.

*Illinois.* — *Cozzens v. Chicago Hyd. P. B. Co.*, 166 Ill. 213, 46 N. E. 788; *Mix v. National Bank of Bloomington*, 91 Ill. 20, 33 Am. Rep. 44; *Ramsey v. Peoria M. & F. Ins. Co.*, 55 Ill. 311; *Bushnell v. Consolidated Ice Mach. Co.*, 138 Ill. 67, 27 N. E. 596.

*Indiana.* — *Rikhoff v. Browers R. S. S. M. Co.*, 68 Ind. 388; *Indianapolis F. & Min. Co. v. Herkimer*, 46 Ind. 142.

*Louisiana.* — *Williams v. Hewitt*, 47 La. Ann. 1,076, 17 So. 496, 49 Am. St. Rep. 394.

*Maine.* — *Hudson v. Carman*, 41 Me. 84.

*Michigan.* — *Owen v. Farmers' Bank*, 2 Doug. 134; *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Doug. 457.

*New York.* — *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729; *Methodist Episcopal U. Ch. v. Pickett*, 19 N. Y. 482; *Bill v. Fourth St. West Tpke. Co.*, 14 Johns. 416; *Williams v. Bank of Michigan*, 7 Wend. 539.

*North Carolina.* — *Buncombe Tpke. Co. v. McCarson*, 18 N. C. 306.

*Vermont.* — *Lord v. Bigelow*, 8 Vt. 445; *Searsbrugh Tpke. Co. v. Cutler*, 6 Vt. 315.

*Virginia.* — *Grays v. Lynchburg & S. Tpke. Co.*, 4 Rand. 578.

*West Virginia.* — *Anderson v. Kanawha C. Co.*, 12 W. Va. 526.

**General Denial.** — Where a corporation, as plaintiff, avers its corporate existence, a general denial to the petition containing such averment does not impose upon the plaintiff the burden of proving its corporate existence. *Brady v. National Supp. Co.*, 64 Ohio St. 267, 60 N. E. 218, 83 Am. St. Rep. 753.

In *Alabama* a statute (Code 1896, § 1,803,) relieves corporations of the necessity of proving the fact of incorporation, unless denied by a verified plea; and in *Mobile & O. R. Co. v. Postal Tel. C. Co.*, 120 Ala. 21, 24 So. 408, it was held that the introduction in evidence by a licensed foreign corporation of a copy of its charter, signed by the deputy secretary of the state of its residence, was not error when no such verified plea was interposed.

persons sued as individuals assert corporate existence as a ground for non-liability as individuals, they must prove their assertion.<sup>19</sup> It is held, however, that a corporation suing as such need prove its corporate existence only when the fact is disputed.<sup>20</sup>

b. *Quo Warranto Proceedings*. — On proceedings to oust the respondents from exercising corporate franchises and powers on the ground that they had not been legally incorporated, the respondents have the burden of proving corporate existence.<sup>21</sup>

c. *Performance of Conditions Precedent*. — When the act of incorporation does not itself confer corporate capacity, but provides for the doing of certain things as a condition precedent thereto,

In *Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894, an action against the defendant on the alleged subscription to the capital stock of the National Exp. & Transp. Co., under the name of the National Express Co., which he defended on the ground that he had subscribed only to the corporation last named, it was held that the plaintiff had the burden to show the legal identity of the two corporations; and further that the minutes of the meetings of the subscribers to the corporation of whom defendant was one, being properly identified, were admissible in evidence against the defendant for the purpose of showing that in the incorporation of the second company there was no material change or departure from the character and purposes of the corporation originally intended.

In *Farmers' & Drovers' Bank v. Williamson*, 61 Mo. 259, it was held that in trials before a justice of the peace, in the absence of anything to the contrary, the defendant is presumed to plead the general issue, that this plea admits the corporate existence, and that accordingly on appeal to the circuit court the plaintiff is not required to prove that fact.

**The Plea of Non-Assumpsit in an Action Against a Corporation** admits the existence of a corporation only, and where the plaintiff has alleged that the corporation was organized under the general law for the creation of certain corporations, he has the burden of proving that fact for *non constat*, but that the corporation was organized under a

special charter. *Gay v. Keys*, 30 Ill. 413.

19. *Owen v. Shepard*, 59 Fed. 746; *Duke v. Taylor*, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484; *Williams v. Hewitt*, 47 La. Ann. 1,076, 17 So. 496, 49 Am. St. Rep. 394; *Abbott v. Omaha S. & R. Co.*, 4 Neb. 416; *Vanneman v. Young*, 52 N. J. L. 403, 20 Atl. 53.

20. *California S. Nav. Co. v. Wright*, 6 Cal. 258; *Concordia Sav. & Aid Ass'n v. Read*, 93 N. Y. 474; *Southern Exp. Co. v. Western N. C. R. Co.*, 99 U. S. 191.

21. *State v. Webb*, 97 Ala. 111, 12 So. 377, 38 Am. St. Rep. 151; *People v. Lowden*, (Cal.), 8 Pac. 66; *People v. Selfridge*, 52 Cal. 331; *People v. River R. & L. E. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64; *Attorney General v. Lorman*, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287; *People v. DeMill*, 15 Mich. 164, 93 Am. Dec. 179; *State v. Critchett*, 37 Minn. 13, 32 N. W. 787.

On a writ of *quo warranto* requiring the defendant to show by what warrant he exercised the office of president of a corporation, the defendant in answering the demand has the burden of showing such facts as, if true, completely invest him with the legal title to such office, unless he disclaims all right to the franchise in question and denies that he has assumed its exercise; otherwise the law considers him a usurper and denounces judgment against him, leaving the franchise to be held by the state, or such other person as may have a valid legal title thereto, derived by or from some grant or

the performance of such condition precedent must be shown.<sup>22</sup> This rule does not apply, however, to corporations declared such by the act of incorporation;<sup>23</sup> and in the latter case acceptance of the

authority from the state. *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460.

22. *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204; *Granby Min. & S. Co. v. Richards*, 95 Mo. 106, 8 S. W. 246; *Lord Essex Bldg. Ass'n*, 37 Md. 320; *Bank of Auburn v. Aikin*, 18 Johns. (N. Y.) 137; *Fire Department v. Kip*, 10 Wend. (N. Y.) 266; *Sons of Temp. v. Brown*, 9 Minn. 151; *Farmers' & Merchants' Bank v. Troy City Bank*, 1 Doug. (Mich.) 457.

In *McKenney v. Bowie*, 94 Me. 397, 47 Atl. 918, an action on a note which the defendants alleged they had signed as officers of a duly incorporated corporation organized under Rev. Stat., Ch. 55, §§ 1-3, it was held that to form a corporation under this statute, its terms must be proved when the existence of the corporation is in controversy; and further that the case did not fall within the principle that, under some circumstances, a legal organization may be presumed from the granting of a charter and the performance of corporate acts without the production of a record of its first meeting.

**In an Action by a Corporation on Stock Subscriptions**, the first step to be taken by the corporation is to show that it is the incorporation which the statute created, that it has done all that was necessary to be done to fulfill the terms upon which the subscriptions were made, that the assessment laid upon the subscribers was one which the corporation had authority to lay, and that it had been properly laid. *Katama L. Co. v. Holley*, 129 Mass. 540. To similar effect, see *Maltby v. Northwestern Va. R. Co.*, 16 Md. 422; *Swartwout v. Michigan A. L. R. Co.*, 24 Mich. 389.

**Existence of Written Articles of Association.**—In *Utley v. Union T. Co.*, 11 Gray (Mass.) 139, where it was sought to charge private stockholders, it was held that the plaintiff must show the existence of

articles of association in writing, and failing to show that, he failed to show the necessary steps to the assumption of corporate power.

**Existence of Charter.**—In an action against several defendants, alleged to have been the directors and officers of a chartered bank, to recover the bills issued by them which had become worthless, the burden of proof is on the plaintiff to prove the charter, where a charter was necessary under the act of incorporation to create the bank a body corporate. *Gardner v. Post*, 43 Pa. St. 19.

**By Statute, in Connecticut**, a copy certified by the secretary of state, under seal of the original certificate of organization of the corporation, is *prima facie* evidence of the due formation, existence and capacity of such corporation. And in *Wood v. Wiley Cons. Co.*, 56 Conn. 87, 13 Atl. 137, it was held that this was *prima facie* evidence, not merely that the corporation is a legal entity, but that there is no legal bar to the transaction of business by it as such, and that if the stockholders have omitted any of the formal statutory prerequisites, and notwithstanding, proceed to transact business as a corporation, and when sued for breach of contract they desire to take advantage of such omission, the burden of showing it is upon them.

**Under the Oregon Statute**, the testimony of a subscribing witness to a writing purporting to be articles of incorporation, that he was present, and saw the persons named therein as incorporators execute it, and the paper itself, and the testimony of one of the alleged incorporators that he was president of the corporation, but not accompanied by any evidence of the filing of the articles, the subscription of one-half of the stock, or the election of a board of directors, is not sufficient to establish corporate existence. *Goodale Lumb. Co. v. Shaw*, 41 Or. 544, 69 Pac. 546.

23. *Sons of Temp. v. Brown*, 9

charter is all that need be shown.<sup>24</sup> Thus where the statutes required as a condition precedent to corporate existence that the articles of incorporation be filed with an officer designated therein, the filing of such articles of incorporation must be shown.<sup>25</sup>

d. *Sufficiency of Proof to Satisfy Burden.* — (1.) *Direct Proceedings.* — In proceedings directly brought for the purpose of ousting certain individuals from exercising corporate powers and franchises, the burden on such individuals of establishing their right so to do as a corporation is satisfied only by proof of a corporation *de jure*.<sup>26</sup>

(2.) *Condemnation Proceedings by Corporation.* — In condemnation proceedings by a corporation to appropriate private property under the law of eminent domain it has been held that the burden of proving corporate existence is satisfied only by proof of a corporation *de jure*,<sup>27</sup> although there are decisions holding that proof of a corporation *de facto* is sufficient.<sup>28</sup>

Minn. 151; Attorney General *v.* Chicago & N. W. R. Co., 35 Wis. 425; Hammett *v.* Little Rock & N. R. Co., 20 Ark. 204.

It is not necessary in order to maintain an action on a judgment against an association acting as a corporation, that the plaintiff should prove that the corporation was organized and divided its stock, etc., conformably to the directions of the statute creating the corporation. It is, in general, sufficient to give in evidence the act of incorporation and the actual user of the powers and privileges of an incorporated company under the name designated in the act. Narragansett Bank *v.* Atlantic S. Co., 3 Metc. (Mass.) 282.

A certificate of the officers of a corporation, required by statute, setting forth the corporation named and other particulars, and published and recorded in the manner there indicated, is not a condition precedent to corporate existence, which must be shown by the party asserting that fact. Merrick *v.* Reynolds Eng. & Gov. Co., 101 Mass. 381.

Where the act creating a corporation provides that its members, or they who may become such, shall organize before their corporate existence is complete, in an action to recover subscription to stock subscribed previous to their organization, the defendants may, by an appropriate plea, throw upon the plain-

tiff the burden of showing compliance with the requirements of the charter. Selma & T. R. Co. *v.* Tip-ton, 5 Ala. 787, 39 Am. Dec. 344.

24. St Joseph & I. R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581.

25. Abbott *v.* Omaha S. & R. Co., 4 Neb. 416.

In the Case of Banking Associations, proof that the articles of incorporation were also filed in the banking department is unnecessary. Leonardsville Bank *v.* Willard, 25 N. Y. 574.

In New Jersey the filing and recording of the certificate of incorporation are not made by the statute a condition precedent to the legal existence of the corporation; they are merely necessary evidence of such existence. That evidence being produced, the legal existence of the corporation from the time of commencement fixed in the certificate is proved. Vanneman *v.* Young, 52 N. J. L. 403, 20 Atl. 53.

26. See cases cited *supra* in note 21.

27. St. Joseph & I. R. Co. *v.* Shambaugh, 106 Mo. 557, 17 S. W. 581; Atlantic & O. R. Co. *v.* Sullivan, 5 Ohio St. 276; Powers *v.* Hazelton & L. R. Co., 33 Ohio St. 429; *In re* Brooklyn W. & N. R. Co., 72 N. Y. 245.

28. Thomas *v.* St. Louis B. & S. R. Co., 164 Ill. 634, 46 N. E. 8;

(3.) **Corporate Existence Collaterally in Issue.**—(A.) **GENERALLY.**—But in an action by or against a corporation, or in any other action, in which the fact of corporate existence is only collaterally in issue, the burden of proof thereof is satisfied usually by proof of a corporation *de facto*,<sup>29</sup> which may be done by production of its charter with some evidence of user<sup>30</sup> or acceptance, or by other competent evidence to

Peoria & P. U. R. Co. v. Peoria & F. R. Co., 105 Ill. 110; McAuley v. Columbus C. & I. C. R. Co., 83 Ill. 348; Wellington & P. R. Co. v. Cashie & C. R. & Lumb. Co., 114 N. C. 690, 19 S. E. 646; Niemeyer v. Little Rock Jc. R., 43 Ark. 111; Reisner v. Strong, 24 Kan. 410.

29. *Alabama.*—Schloss v. Montgomery T. Co., 87 Ala. 411, 6 So. 360, 13 Am. St. Rep. 51.

*California.*—Lakeside Ditch Co. v. Crane, 80 Cal. 181, 22 Pac. 76.

*Colorado.*—Duggan v. Colorado Mte. & Inv. Co., 11 Colo. 113, 17 Pac. 105.

*Illinois.*—Cozzens v. Chicago Hyd. P. B. Co., 166 Ill. 213, 46 N. E. 788; Marsh v. Astoria Lodge No. 112, 27 Ill. 420; Ramsey v. Peoria M. & F. Ins. Co., 55 Ill. 311.

*Indiana.*—Tipton Fire Co. v. Barnheisel, 92 Ind. 88.

*Minnesota.*—Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1,150, 38 Am. St. Rep. 552, 18 L. R. A. 778.

*New York.*—U. S. Vinegar Co. v. Schlegel, 143 N. Y. 537, 38 N. E. 729.

*Pennsylvania.*—*In re Gibbs' Estate*, 157 Pa. St. 59, 27 Atl. 383, 22 L. R. A. 276.

*Vermont.*—Loomis v. Wainwright, 21 Vt. 520; Reynolds v. Myers, 51 Vt. 444.

And see other cases cited in this section *supra* and *infra*.

"In the very nature of things, it cannot be the law that in every suit brought by one person against another which involves some transaction had with a corporation such transaction cannot be shown in evidence without first establishing that the corporation, although not a party to the pending litigation, is a *de jure* corporation. If such were the rule, the business of the country, under present conditions, could not be transacted." *Smith v. Mayfield*, 163 Ill. 447, 45 N. E. 157.

Corporate existence is established sufficiently as against a motion for non-suit, where there is testimony of a witness, unobjected and uncontradicted, that he is president of the corporation and that the plaintiff company, a corporation, was the owner of the premises in controversy. *Stanford L. Co. v. Steidle*, 28 Wash. 72, 68 Pac. 178.

30. *Alabama.*—Schloss v. Montgomery T. Co., 87 Ala. 411, 6 So. 360, 13 Am. St. Rep. 51.

*Arkansas.*—Gaines v. Bank of Mississippi, 12 Ark. 769.

*Illinois.*—Peoria & P. U. R. Co. v. Peoria & F. R. Co., 105 Ill. 110; Doyle v. Douglas Mach. Co., 73 Ill. 273.

*Indiana.*—Heaston v. Cincinnati & F. W. R. Co., 16 Ind. 275, 79 Am. Dec. 430.

*Maine.*—Came v. Brigham, 39 Me. 35; Penobscot Boom Corp. v. Lamson, 16 Me. 224, 33 Am. Dec. 656.

*Maryland.*—Lafin & R. P. Co. v. Suisheimer, 46 Md. 315, 24 Am. Rep. 522.

*Massachusetts.*—Barrett v. Mead, 10 Allen 337, 6 Am. Dec. 129; Worcester Medical Inst. v. Harding, 11 Cush. 285; Provident Sav. Inst. v. Burnham, 128 Mass. 458.

*Michigan.*—Way v. Billings, 2 Mich. 397; Swartwout v. Michigan A. L. R. Co., 24 Mich. 389; Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. 124, 43 Am. Dec. 457.

*Minnesota.*—Finnigan v. Knights of L. Bldg. Ass'n, 52 Minn. 239, 53 N. W. 1,150, 38 Am. St. Rep. 552, 18 L. R. A. 778; St. Paul F. & M. Ins. Co. v. Allis, 24 Minn. 75.

*Mississippi.*—Henderson v. Mississippi Union Bank, 6 Smed. & M. 314.

*Missouri.*—Merchants' Bank v. Harrison, 39 Mo. 433, 93 Am. Dec. 285.

be discussed in subsequent sections, or by showing an estoppel which will operate to preclude the denial of corporate existence.<sup>31</sup>

*New Hampshire.*—*State v. Carr*, 5 N. H. 367.

*New Jersey.*—*Stout v. Zulick*, 48 N. J. L. 599, 7 Atl. 362.

*New York.*—*Bank of Toledo v. International Bank*, 21 N. Y. 542; *Eaton v. Aspinwall*, 19 N. Y. 119; *Buffalo & A. R. Co. v. Cary*, 26 N. Y. 75; *Methodist Episcopal U. Ch. v. Pickett*, 19 N. Y. 482; *Leonardsville Bank v. Willard*, 25 N. Y. 574; *Bill v. Fourth Gt. West. Tpke. Co.*, 14 Johns. 416.

*North Carolina.*—*Buncombe Tpke. Co. v. McCarson*, 18 N. C. 306; *Elizabeth City Academy v. Lindsey*, 28 N. C. 476, 45 Am. Dec. 500.

*Ohio.*—*Bank of Circleville v. Renick*, 15 Ohio 322.

*Vermont.*—*Montpelier & W. R. R. Co. v. Langdon*, 46 Vt. 284; *Searsbrugh Tpke. Co. v. Cutler*, 6 Vt. 315; *Bank of Manchester v. Allen*, 11 Vt. 302.

In *Provident Sav. Inst. v. Burnham*, 128 Mass. 458, it was held that there was evidence of the corporate existence of the demandant, first, in the books, or records, produced by its clerk and proved by his testimony; second, in the description of the demandant as a corporation in the mortgage referred to, and affirmed in the deed executed by the tenant himself.

In *Grubb v. Mahoning Nav. Co.*, 14 Pa. St. 302, an action by the corporation to recover on subscriptions to its capital stock, it was held that proof of the act of incorporation, or the certificate of the commissioners and the letters patent, were sufficient to establish corporate existence, and that the organization by the election of officers need not be proved, although laid in the declaration.

In *Wilmington C. & R. R. Co. v. Thompson*, 152 N. C. 387, an action to enforce the payment of unpaid subscriptions to capital stock of a corporation, it was held that proof of a charter, and that at the time when the contract was executed there was a president and engineer, acting and purporting to act for, and in behalf of, the corporation, was

sufficient to establish corporate existence, as against the defendant and all others dealing and treating with it in its corporate capacity.

**By Statute in Michigan** it is provided that in any suit wherein it shall become material or necessary to prove incorporation of any corporation, evidence that such corporation is doing business under a certain name shall be *prima facie* evidence of its due incorporation or existence pursuant to law, and of its name. *Canal St. G. R. Co. v. Paas*, 95 Mich. 372, 54 N. W. 907.

**In the Case of National Banks**, it has also been held that the introduction of the certificate of the comptroller of the currency, issued under the National Bank Act, together with evidence that the bank had been acting as a national bank for many years, was sufficient to establish, at least *prima facie*, the fact of corporate existence. *Mix v. National Bank of Bloomington*, 91 Ill. 20, 33 Am. Rep. 44. See also *Merchants' Ex. Nat. Bank v. Cardozo*, 3 Jones & S. (N. Y.) 162. And in *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834, it was held sufficient to show that the corporation was carrying on a general banking business as a national bank under the name by which it brought suit, even without the introduction of the certificate.

**31. Estoppel of Subscriber or Stockholder to Deny Corporate Existence.**—*Alabama.*—*Schloss v. Montgomery T. Co.*, 87 Ala. 411, 6 So. 360, 13 Am. St. Rep. 51.

*Arkansas.*—*Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204.

*California.*—*Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76.

*Colorado.*—*Bates v. Wilson*, 14 Colo. 140, 24 Pac. 99.

*Connecticut.*—*Danbury & N. R. Co. v. Wilson*, 22 Conn. 435; *West Winsted Sav. Bank & Bldg. Ass'n v. Ford*, 27 Conn. 282, 71 Am. Dec. 66.

*Delaware.*—*Brady v. Delaware Mut. L. Ins. Co.*, 2 Pen. 237, 45 Atl. 345.



**In Order to Estop** one who has contracted with an alleged corporation to deny that the association was a corporation, it must appear that there was an existing statute known to the court, either by judicial notice or actual evidence in the cause, authorizing the creation of such a corporation.<sup>32</sup>

**A Contract of Subscription to the Preliminary Articles** of association does not purport to be with an existing corporation, and hence does not estop the subscribers to deny the existence of the corporation.<sup>33</sup>

**The Degree of Proof Required to Establish User** depends to some extent upon the nature of the corporation and the law under which it was organized. Where no provision is made for any permanent evidence of the fact of organization, more proof of user would be necessary than where the essential steps by which the organization is accomplished are required to be made a matter of record. If the law exists, and the record exhibits a *bona fide* attempt to organize

*Illinois.*—McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83.

*Indiana.*—Doty v. Patterson, 155 Ind. 60, 56 N. E. 668.

*Iowa.*—Seaton v. Grimm, 110 Iowa 145, 81 N. W. 225.

*Louisiana.*—East Pascagoula Hotel Co. v. West, 13 La. Ann. 545.

*Massachusetts.*—Newcomb v. Reed, 12 Allen 362.

*Minnesota.*—Gardner v. Minneapolis & St. L. R. Co., 73 Minn. 517, 76 N. W. 282.

*Missouri.*—Home Stock Ins. Co. v. Sherwood, 72 Mo. 461.

*New York.*—Black River & U. R. Co. v. Clarke, 25 N. Y. 208.

*Ohio.*—Callender v. Painesville & H. R. Co., 11 Ohio St. 516.

*Pennsylvania.*—McHose v. Wheeler, 45 Pa. St. 32.

*Rhode Island.*—Slocum v. Providence S. & G. P. Co., 10 R. I. 112.

*Utah.*—Marsh v. Mathias, 19 Utah 350, 56 Pac. 1,074; Jackson v. Crown Point Min. Co., 21 Utah 1, 59 Pac. 238, 81 Am. St. Rep. 651.

32. Harriman v. Southam, 16 Ind. 190.

**Although the Statute Under Which a Corporation Was Organized May Be Unconstitutional**, a stockholder in the corporation, who, as a member, participated in its organization, and as a director exercised authority under the statute, cannot be heard to dispute his liability for subscriptions to the stock on the ground of such unconstitutionality. Weinman

v. Wilkensburg & E. L. P. R. Co., 118 Pa. St. 102, 12 Atl. 288.

33. Rikhoff v. Brown's R. S. S. M. Co., 68 Ind. 388.

See also Indianapolis F. & Min. Co. v. Herkimer, 46 Ind. 142; Schloss v. Montgomery T. Co., 87 Ala. 411, 6 So. 360, 13 Am. St. Rep. 51; Christian & C. G. Co. v. Fruitdale Lumb. Co., 121 Ala. 340, 25 So. 566; Duke v. Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484.

Compare Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532.

"He would not be bound under such a contract to invest his capital in the stock of a corporation not legally formed, or which had not obtained the franchise of carrying on the business contemplated by the contract, and in which he had agreed to become interested." Dorris v. Sweeney, 60 N. Y. 463.

**A Traffic Arrangement Between Two Railroad Companies**, under which one stipulated that during the time of the life of the contract it would not attempt to infringe on the territory covered by the other, does not estop the latter to deny the corporate existence of the former. There can be no such estoppel in such cases, except as to matters arising out of the contract itself; and it is held that in this case the estoppel cannot be said to have arisen out of the contract. Wilmington City R. Co. v. Wilmington & B. S. R. Co., (Del.), 46 Atl. 12.

under it, very slight evidence of user beyond this is all that can be required.<sup>34</sup>

(B.) CRIMINAL PROSECUTIONS. — On a prosecution for an offense committed on the property of a corporation, proof that a corporation was a *de facto* corporation doing business as such in the corporate name set out in the indictment is sufficient. It is not necessary that it should be proven to be a corporation *de jure*.<sup>35</sup> And sometimes this is the rule by express statutory provision.<sup>36</sup>

34. Methodist Episcopal U. Ch. *v. Pickett*, 19 N. Y. 482.

The Taking of Subscriptions to and Issuing Stock by an association, electing managers and officers, adopting by-laws, and doing other acts within the scope of its powers, are a sufficient user to constitute a corporation attempted to be organized a *de facto* one. *Finnegan v. Knights of L. Bldg. Ass'n*, 52 Minn. 239, 53 N. W. 1,150, 38 Am. St. Rep. 552, 18 L. R. A. 778.

### 35. Criminal Prosecutions.

*Alabama*. — *Corbett v. State*, 31 Ala. 329.

*California*. — *People v. Ah Sam*, 41 Cal. 645; *People v. Barric*, 49 Cal. 342.

*Florida*. — *Thalheim v. State*, 38 Fla. 169, 20 So. 938; *Duncan v. State*, 29 Fla. 439, 10 So. 815.

*Indiana*. — *Smith v. State*, 28 Ind. 321; *Norton v. State*, 74 Ind. 337.

*Iowa*. — *State v. Watson*, 102 Iowa 651, 72 N. W. 283.

*Kentucky*. — *Adams v. Com.*, 9 Ky. L. Rep. 372, 5 S. W. 310.

*Louisiana*. — *State v. Collens*, 37 La. Ann. 607.

*Nebraska*. — *Braithwaite v. State*, 28 Neb. 832, 45 N. W. 247.

*North Carolina*. — *State v. Grant*, 104 N. C. 908, 10 S. E. 554; *State v. Shaw*, 92 N. C. 768.

*Ohio*. — *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121.

*Rhode Island*. — *State v. Habib*, 18 R. I. 558, 30 Atl. 462. Compare *State v. Murphy*, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

*Vermont*. — *State v. Hopkins*, 56 Vt. 250.

*Virginia*. — *Shinn v. Com.*, 32 Gratt. 899.

*Wyoming*. — *Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627.

"The Rule Springs from Necessity

and the absolute impossibility of conviction in frequent cases without its adoption." *Reed v. State*, 15 Ohio 217. See also *Smith v. State*, 28 Ind. 321.

In *Sasser v. State*, 13 Ohio 453, the court in sustaining this rule said: "When they exercise powers under the authority of a written charter, the non-production of that charter, and the attempt to supply it by parol evidence, is an indirect admission that the charter is insufficient, and that if they can not make out by parol a better one than exists on paper, they must fail. An analogous point was ruled by Lord Mansfield, in *Roe v. Harvey*, 7 Burr. 2,484. No such implication necessarily arises when parol proof of the actual existence of a bank, in a sister state, is offered by a third party, and especially when offered by the public prosecutor, against a person charged with counterfeiting the bills or plates of such bank, because the act of counterfeiting implies, on his part, an admission that there is such bank, and that its genuine issues and plates are authorized, and of value. It is irrational to presume that men will take the trouble to counterfeit paper which is wholly worthless. All men are presumed to act according to their interest. No one could have any interest in forging valueless notes." See also *People v. Davis*, 21 Wend. (N. Y.) 309.

36. *Waller v. People*, 175 Ill. 221, 51 N. E. 900; *State v. Thompson*, 23 Kan. 338, 33 Am. Rep. 165.

In *State v. Newland*, 7 Iowa 242, 71 Am. Dec. 444, a prosecution for passing counterfeit bank bills, wherein the indictment charged that the bank was a corporation duly authorized for that purpose by a sister state, it was held that the prosecu-

B. FOREIGN CORPORATIONS. — In an action by a foreign corporation the plaintiff has the burden of showing not only the fact of incorporation, but also the statute under which it was incorporated.<sup>37</sup> And it is not enough to show merely the papers and proceedings of incorporation.<sup>38</sup>

tion had the burden of proving the fact of incorporation as alleged. There is a statute, however, in Iowa, under which, in such criminal prosecutions, the corporate existence of the prosecuting witness may be proved by general reputation, and this case is simply in line with the rule that where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved.

In *Com. v. Smith*, 6 Serg. & R. 568, it was intimated that if in the indictment the bank had been alleged to be a chartered bank, it would have been incumbent on the state to prove the existence of a corporation, and that this could only be done by the production of the charter or by the act of the corporation.

**By Statute in Pennsylvania Passed in 1824**, it was expressly provided that in prosecutions for any of the offenses mentioned and described in the preceding sections, it was not necessary for the commonwealth to produce the charters of the banks created thereby, and this provision was carried afterward in an act passed in 1860 consolidating, revising and maintaining statutes relating to penal procedure. *Gardner v. Post*, 43 Pa. St. 19.

**In Wyoming** a statute provides that a copy of the certificate of incorporation of a domestic corporation, duly certified by the secretary of state under the great seal, shall be evidence of the existence of such incorporated company. Another statute requires the execution of duplicate certificates of incorporation by the corporators, one to be filed with the secretary of state, and the other in the office of the clerk of the county wherein the business of the corporation is to be carried on. And in *Edelhoff v. State*, 5 Wyo. 19, 36 Pac. 627, a prosecution

for embezzlement from a domestic corporation, it was held that the production of the original certificate filed with the county clerk of its domicile, and parol evidence that the corporation conducted and operated its business in that county, were sufficient. The court said: "Although the statute provides that the certified copy of the secretary of state is evidence of the existence of such corporation, it does not declare that this is the only evidence of such corporate existence that may be presented, and so other evidence may be introduced to show that fact. The law was doubtless enacted to dispense with the necessity of introducing the original certificate of incorporation, which is a matter of record, not for the purpose of establishing a new rule of evidence to prove the corporate existence. Surely, one of the duplicate certificates of incorporation is certainly as effective proof as a certified copy of the other, particularly as it is shown that the corporation was doing business as such, and that it employed the plaintiff in error."

37. *Savage v. Russell & Co.*, 84 Ala. 103, 4 So. 235; *Bank of Alabama v. Simonton*, 2 Tex. 531; *Gaines v. Bank of Mississippi*, 12 Ark. 769; *Law Guarantee & Tr. Soc. v. Hogue*, 37 Or. 544, 62 Pac. 380, 63 Pac. 690; *Eagle Works v. Churchill*, 2 Bosw. (N. Y.) 166.

See also *State v. Habib*, 18 R. I. 558, 30 Atl. 462.

**Proof of the Statute of a Sister State** under which a foreign corporation is organized, together with proof of its certificate of incorporation, issued thereunder, is sufficient to establish the existence of a corporation *de facto*. *Cozzens v. Chicago Hyd. P. B. Co.*, 166 Ill. 213, 46 N. E. 788. See also *Lafin & R. P. Co. v. Sinsheimer*, 46 Md. 315, 24 Am. Rep. 522.

38. *Law Guarantee & Tr. Soc. v.*

**The Non-Issuance of a License or Certificate** to a foreign corporation to transact business is a matter of defense, solely, in an action by a foreign corporation, the burden of proving which is upon the party asserting that fact.<sup>39</sup>

**Appointment of Resident Agent.**—So also is non-compliance with the law as to the appointment of an agent upon whom service of process may be had.<sup>40</sup> There is authority, however, to the effect that a foreign corporation suing in another state has the burden of showing a compliance with the statute of the latter state regulating the admission of foreign corporations to do business.<sup>41</sup>

Hogue, 37 Or. 544, 62 Pac. 380, 63 Pac. 690. And see *Wellersburg v. W. N. P. R. Co.*, 12 Md. 476.

In *Gaines v. Bank of Mississippi*, 12 Ark. 769, the court said: "The duly authenticated act of the General Assembly of Mississippi, read in evidence by the plaintiff, was certainly sufficient evidence to prove the grant of corporate power and its extent, but not that it actually went into existence as a corporation. To establish this latter fact, it was not necessary to show a compliance with the conditions of the charter under which it assumed to act, but that the corporation acted and transacted business as such, and for this purpose proof of one or more such acts was sufficient. The execution of the note in this instance by the defendants to the bank as such corporation, which was the only evidence of user, was in our opinion sufficient to sustain the issue, so far as proof that the bank went into operation was concerned." See also *U. S. Bank v. Stearns*, 15 Wend. (N. Y.) 314; *Swartwout v. Michigan A. L. R. Co.*, 24 Mich. 389.

39. *Northrup v. Will's Lumb. Co.*, 65 Kan. 769, 70 Pac. 879; *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207.

40. *Sidway v. Harris*, 66 Ark. 387, 50 S. W. 1,002. Compare *Pierce v. Southern Pac. R. Co.*, (Cal.), 47 Pac. 874, wherein a statute required as a prerequisite to the right of a foreign corporation to plead the statute of limitations, that it must have designated, as provided in the statute, some one on whom process against it may be served; and holding that where a foreign corporation seeks to avail itself of the statute,

it has the burden of showing compliance by it with this statute.

41. Where the statutes of a state require a foreign corporation to file with the secretary of state a duly certified copy of its articles of incorporation, as a prerequisite to its procuring a permit to do business in that state, a corporation sued in the courts of that state has the burden of showing compliance with that statute. *Taber v. Interstate Bldg. & Loan Ass'n*, 91 Tex. 92, 40 S. W. 954. The court said: "Every state has the right to prescribe the terms upon which any corporation created in another state or foreign country may do business within its limits, and may exclude such corporations entirely, with the exception of corporations engaged in interstate commerce, or such as are employed by the United States in the transaction of its business. Under this rule of law, about which there is no controversy, this state had the right to adopt such measures as it thought fit to enforce the provisions of its law, which required foreign corporations to deposit the articles of their incorporation with the secretary of state; and, the legislature having seen fit to prescribe as a condition to the maintenance of suits in its courts that such compliance should precede the transaction of business in the state, it follows that the filing of its articles of incorporation with the secretary of state is a condition precedent to the maintenance of suit upon any contract or right of action accruing to such foreign corporation; and, it being a condition precedent, the fact must be both alleged and proved to entitle the corporation to judgment in such case." *Cumber-*

**3. Presumptions.** — **A. IN GENERAL.** — Where an association of individuals have assumed to organize as a corporation and have exercised corporate powers, it will be presumed that all of the formal requisites have been complied with.<sup>42</sup>

land *Land Co. v. Canter Lumb. Co.*, (Tenn.), 35 S. W. 886; *Mullens v. American F. L. Mtge. Co.*, 88 Ala. 280, 7 So. 201; *Thorne v. Travelers' Ins. Co.*, 80 Pa. St. 15, 21 Am. Rep. 89; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Holloway v. Memphis, E. P. & P. R. Co.*, 23 Tex. 465, 76 Am. Dec. 68.

42. *Sampson v. Bowdoinham S. M. Corp.*, 36 Me. 78; *Busey v. Hooper*, 35 Md. 15, 6 Am. Rep. 350; *Packard v. Old Colony R. Co.*, 168 Mass. 92, 46 N. E. 433; *Dunning v. New Albany & S. R. Co.*, 2 Ind. 437; *Whitney v. Robinson*, 53 Wis. 309, 10 N. W. 512; *Ricketson v. Galigan*, 89 Wis. 394, 62 N. W. 87.

The court, in ruling that the presumption of regularity extends to the proceedings in the organization of corporations, said in *Narragansett Bank v. Atlantic S. Co.*, 3 Metc. (Mass.) 282: "The maxim of the law is that all things shall have been presumed to have been rightfully and correctly done, until the contrary is proved. This maxim is stated and explained, and many instances given of its application to corporations, and to acts and doings of their members, officers and agents, in *Bank of U. S. v. Dandridge*, 12 Wheat. 70. As the corporation could not proceed lawfully, until duly organized, and as they did proceed to act as a corporation, this presumption has its effect." *Packard v. Old Colony R. Co.*, 168 Mass. 92, 46 N. E. 433.

"Where it is shown that a charter has been granted, those in possession and actually in the exercise of those corporate rights shall be considered as rightfully there, against wrong-doers, and all those who have treated or acted with them in their corporate character; and even where it is shown that such charter has been granted upon a precedent condition, and persons are found in the quiet possession and exercise of those corporate rights, as against all but the sovereign the precedent condition

shall be taken as performed." *Tar River Nav. Co. v. Neal*, 10 N. C. 520.

**If the Corporators Have Omitted to Meet Any One of the Formal Statutory Prerequisites**, and notwithstanding such omission proceeded to transact business and hold themselves out to the world as a corporation, and subsequently when sued for breach of contract they seek to take advantage of such omission, the burden of showing the defect is upon them. *Wood v. Wiley Cons. Co.*, 56 Conn. 87, 13 Atl. 137.

**Liability of Members for Non-Compliance.** — Where liability is imposed on the stockholders of a corporation in case of non-compliance with the provisions of the statute under which the corporation was organized, it is incumbent on the plaintiff, in an action to enforce that liability, to show that the provisions of the statute have not been complied with. *Chase v. Lord*, 77 N. Y. 1.

In a suit by a mutual insurance company acting under a charter of incorporation, against one of its members to recover assessments, regular organization and right under its charter to act is, in the absence of proof to the contrary, to be presumed, and the fact that the minute book of the corporate proceedings does not affirmatively show that all the conditions precedent to its corporate existence had been performed, does not control this presumption. *National Mut. F. Ins. Co. v. Yeomans*, 8 R. I. 25, 86 Am. Dec. 610.

In *Locke v. Leonard S. Co.*, 37 Mich. 479, it was held that the fact of corporate existence of the plaintiff might be found from the testimony of a witness, based on information derived from the plaintiff in doing business for it; and from an examination of what appeared to be its articles of incorporation, that it was an incorporated company under the laws of another state.

B. LONG CONTINUED EXERCISE OF CORPORATE POWERS. — Corporate existence will be presumed from the long continued exercise of corporate powers under a claim of corporate existence.<sup>43</sup>

C. ELECTION OF OFFICERS. — Thus, the election of officers and directors as required by the charter, and the exercise of its corporate powers by the corporation, is at least *prima facie* evidence that the conditions precedent to its existence under the charter have been complied with.<sup>44</sup>

D. ABSENCE OF GENERAL STATUTE. — The presumption of corporate existence from reputation will not prevail where at the time the alleged corporation came into existence there was no general statute on the subject of corporations; and a private corporation could be called into existence only by a special act of the legislature.<sup>45</sup>

E. VOLUNTARY ASSOCIATION. — The rule that from a long continued exercise of certain acts corporate existence will be presumed has no application where every act in question is entirely reconcilable with the claim that it was done by persons, not by virtue of corporate authority, but as a voluntary association of individuals.<sup>46</sup>

F. NOTICE OF ORGANIZATION. — When the act of incorporation requires notice of the organization of the corporation to be given within a certain time, and the corporation is subsequently found in operation under the act, the presumption is that such notice was given as required.<sup>47</sup>

43. *England*. — *Crafts v. Mercer v. Hart*, 1 Car. & P. 113, 11 Eng. C. L. 335.

*United States*. — *U. S. Bank v. Dandridge*, 12 Wheat. 64; *U. S. v. Amedy*, 11 Wheat. 392.

*Connecticut*. — *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58.

*Illinois*. — *Rose Hill & E. R. Co. v. People*, 115 Ill. 133, 3 N. E. 725.

*Indiana*. — *White v. State*, 69 Ind. 273.

*Maine*. — *Brackett v. Persons Unknown*, 53 Me. 228; *Copp v. Lamb*, 12 Me. 312; *Trott v. Warren*, 11 Me. 227.

*Maryland*. — *Hagerstown Tpke. R. Co. v. Creeger*, 5 Har. & J. 122, 9 Am. Dec. 495.

*Massachusetts*. — *Packard v. Old Colony R. Co.*, 168 Mass. 92, 46 N. E. 433.

*New Hampshire*. — *Bow v. Allentown*, 34 N. H. 351, 69 Am. Dec. 489.

*Ohio*. — *Sasser v. State*, 13 Ohio 453.

*Vermont*. — *Bank of Manchester*

*v. Allen*, 11 Vt. 302; *Methodist Episcopal Soc. v. Lake*, 51 Vt. 353.

*Wisconsin*. — *Whitney v. Robinson*, 53 Wis. 309, 10 N. W. 512; *Ricketson v. Galligan*, 89 Wis. 394, 62 N. W. 87.

In *Bon Aqua Imp. Co. v. Standard F. Ins. Co.*, 34 W. Va. 764, 12 S. E. 771, it was held that the fact that the defendant caused the policies sued on to be signed by its president, and attested by its secretary, was alone sufficient to raise the presumption that it professed to act as a corporation.

44. *Memphis & St. F. P. R. Co. v. Rives*, 21 Ark. 302; *Trott v. Warren*, 11 Me. 227.

45. *Douthitt v. Stinson*, 63 Mo. 268.

46. *Clark v. Jones*, 87 Ala. 474, 6 So. 362; *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58; *Fredenburg v. Lyon Lake M. E. Church*, 37 Mich. 476.

47. *Bank of U. S. v. Lyman*, 1 Blatchf. 297, 2 Fed. Cas. No. 924, affirmed in 12 How. (U. S.) 225.

G. REGULARITY PRESUMED. — It will be presumed that the articles of association or incorporation were published,<sup>48</sup> and that the requisite number of shares and amount of capital stock were subscribed and paid for,<sup>49</sup> and duly recorded,<sup>50</sup> and that the corporators and officers chosen were stockholders<sup>51</sup> and citizens of the state, as required by law.<sup>52</sup>

H. USE OF NAME IMPORTING CORPORATION. — The weight of authority is to the effect that the use of a name ordinarily importing corporate existence is sufficient to raise a presumption of incorporation,<sup>53</sup> although there are decisions holding to the contrary.<sup>54</sup>

48. *Wood v. Wiley Cons. Co.*, 56 Conn. 87, 13 Atl. 137.

49. *Sweney v. Talcott*, 85 Iowa 103, 52 N. W. 106; *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328.

Where a corporation has been organized by those to whom the power of organization was confided, it is unnecessary, in an action by the corporation under the issue of *nul tiel* corporation, to show that the necessary amount of stock has been subscribed or paid for as directed by the charter. *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472.

50. *Bank of Monroe v. Gifford*, 72 Iowa 750, 32 N. W. 669. Compare *supra* note 47.

In the absence of any proof showing that the articles of incorporation were in fact filed with the recorder, it will be presumed that they were filed with the county clerk, as provided by law, notwithstanding a statement as to recording is signed by the officer as recorder, where the recorder and county clerk are one and the same person. *Marsh v. Mathias*, 19 Utah 350, 56 Pac. 1,074.

Where a statute requires all foreign corporations to file in offices designated a properly authenticated copy of their certificate or act of incorporation, it will be presumed, where the fact of corporate existence is collaterally in issue, that the corporation has filed the papers so required to be filed. *Evans v. Lee*, 11 Nev. 104.

51. *Welch v. Importers' & T. Nat. Bank*, 122 N. Y. 177, 25 N. E. 269.

52. *Sword v. Wickersham*, 29 Kan. 746.

53. *Indiana*. — *Norton v. State*, 74 Ind. 337; *White v. State*, 69 Ind. 273; *Stein v. Indianapolis Bldg. &*

*Loan F. & Sav. Ass'n*, 18 Ind. 237, 81 Am. Dec. 353; *Jones v. Cincinnati T. F. Co.*, 14 Ind. 89; *Adams Exp. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214; *Johnson v. State*, 65 Ind. 204.

*Missouri*. — *Stoutemore v. Clark*, 70 Mo. 471.

*Nebraska*. — *Platte Valley Bank v. Harding*, 1 Neb. 461.

*New Jersey*. — *State v. Helms*, 3 N. J. L. 600.

Under a Michigan Statute of 1871, whenever it became material or necessary in an action to prove the incorporation of any corporation, evidence that such an association or corporation was doing business under a certain name was *prima facie* proof of its due incorporation and of its name. *Lake Superior Bldg. Co. v. Thompson*, 32 Mich. 293.

A Mere Recital in a Contract to which an alleged corporation is a party, stating the name of the party as a "company" having its home office in another state, but which does not recite that it was incorporated under the laws of that state, or incorporated at all, is not sufficient to give rise to the inference of the fact of incorporation. *Cunyus v. Guenther*, 96 Ala. 564, 11 So. 649.

National Banks. — In *Slaughter v. First Nat. Bank*, 109 Ala. 157, 19 So. 430, it was held that as the National Banking Act imposes a very severe penalty upon any bank not organized thereunder for using in its title the term "National Bank," it will be presumed that a bank using that term was organized under that act.

54. *Briggs v. McCullough*, 36 Cal.

I. PRESIDENT AND SECRETARY TRANSACTING BUSINESS. — The fact that there were a president and secretary by whom all transactions by and for the association were conducted does not raise a presumption of corporate existence.<sup>55</sup>

J. ACCEPTANCE OF CHARTER. — a. *Organizing and Exercising Corporate Powers.* — The acceptance of a legislative grant or charter will be presumed from the fact of seeking corporate existence at the hands of the legislature,<sup>56</sup> signing a call for a meeting to organize,<sup>57</sup> organizing under the statute,<sup>58</sup> and exercising the powers conferred on the incorporators by the statute.<sup>59</sup> But this rule relates only to charters naming the incorporators and declar-

542; *Duke v. Taylor*, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484.

55. *Clark v. Jones*, 87 Ala. 474, 6 So. 362; *Duke v. Taylor*, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484. See also *Cunyus v. Guenther*, 96 Ala. 564, 11 So. 649.

56. *Logan v. McAllister*, 2 Del. Ch. 176; *Atlanta v. Gate City Gas. L. Co.*, 71 Ga. 106; *Middlesex Husbandmen & Mfrs. v. Davis*, 3 Metc. (Mass.) 133; *Perkins v. Sanders*, 56 Miss. 733; *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581.

57. *Gleaves v. Brick Church Tpke. Co.*, 1 Sneed (Tenn.) 491.

58. *Logan v. McAllister*, 2 Del. Ch. 176; *Glymont Imp. & Exc. Co. v. Toler*, 80 Md. 278, 30 Atl. 651; *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453, 44 Am. Rep. 454; *Quinnan v. Houston & T. C. R. Co.*, 89 Tex. 356, 34 S. W. 738; *Heath v. Silverthorn L. Min. & S. Co.*, 39 Wis. 146.

59. *England.* — *Rex v. Amery*, 1 Term R. 575, 2 Term R. 515.

*United States.* — *Dorsey Harv. Rev. Rake Co. v. Marsh*, 7 Fed. Cas. No. 4,014; *U. S. Bank v. Dandridge*, 12 Wheat. 64; *Louisville Trust Co. v. Louisville N. A. & C. R. Co.*, 75 Fed. 433.

*Alabama.* — *Talladega Ins. Co. v. Landers*, 43 Ala. 115.

*Delaware.* — *Logan v. McAllister*, 2 Del. Ch. 176.

*Kentucky.* — *Kenton Co. Court v. Bank Lick Tpke. Co.*, 10 Bush 529.

*Maine.* — *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 Am. Dec.

656; *State v. McAllister*, 24 Me. 139; *Lincoln & K. Bank v. Richardson*, 1 Me. 79, 10 Am. Dec. 34; *Hudson v. Carmen*, 41 Me. 84; *Trott v. Warren*, 11 Me. 227; *South Bay M. D. Co. v. Gray*, 30 Me. 547.

*Maryland.* — *Lyons v. Orange, A. & M. R. Co.*, 32 Md. 18; *Hammond v. Straus*, 53 Md. 1.

*Massachusetts.* — *Middlesex Husbandmen & Mfrs. v. Davis*, 3 Metc. 133; *Russell v. McLellan*, 14 Pick. 63.

*Michigan.* — *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. 124, 43 Am. Dec. 457.

*Minnesota.* — *State v. Sibley*, 25 Minn. 387; *Sons of Temp. v. Brown*, 11 Minn. 356.

*Mississippi.* — *Perkins v. Sanders*, 56 Miss. 733.

*Missouri.* — *St. Joseph & I. R. Co. v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *Sumrall v. Sun M. Ins. Co.*, 40 Mo. 27.

*New Hampshire.* — *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; *Woods v. Banks*, 14 N. H. 101.

*New York.* — *Demarest v. Flack*, 128 N. Y. 205, 28 N. E. 645.

*North Carolina.* — *Wilmington & M. R. Co. v. Saunders*, 48 N. C. 126; *Taylor v. Newberne Com'rs*, 55 N. C. 141, 64 Am. Dec. 566.

*South Carolina.* — *McKay v. Beard*, 20 S. C. 156.

*Tennessee.* — *Gleaves v. Brick Church Tpke. Co.*, 1 Sneed 491.

**In Order to Raise Such Inference,** however, such acts must clearly appear to have been done in pursuance and recognition of the legislation in question. *Mississippi & R. R. B. Co. v. Prince*, 34 Minn. 79, 24 N. W. 361.



ing them incorporated without preliminary steps, *ipso facto* by force of the charter.<sup>60</sup> And this presumption is not a conclusive one, but may be rebutted by evidence that there was not in fact such an acceptance.<sup>61</sup>

b. *Charter Beneficial to Corporators.*—Acceptance of a charter will be presumed in the absence of any evidence on the question where the charter is beneficial to the corporators.<sup>62</sup> But this rule relates only to charters directly creating the corporation.<sup>63</sup>

K. ACCEPTANCE OF AMENDMENT TO CHARTER.—a. *Choosing Officers, etc.*—The acceptance of an amendment to a charter may be presumed from the fact that officers have been chosen by the corporators,<sup>64</sup> or from the exercise of corporate franchises and powers,<sup>65</sup> or from the exercise of a power granted by the amendment,<sup>66</sup> such as the execution of a lease or conveyance of land to or by the corporation as authorized by the amendment,<sup>67</sup> or that the corporators have brought an action authorized by the amendment, but which was not previously authorized.<sup>68</sup>

b. *Intention Not to Accept.*—But no presumption of acceptance of an amended charter will arise where the acts relied upon are equally consistent with an intention on the part of the incorporators not to accept.<sup>69</sup>

60. *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

61. *Lyons v. Orange A. & M. R. Co.*, 32 Md. 18; *Palfrey v. Paulding*, 7 La. Ann. 363; *Newton v. Carbery*, 5 Cranch C. C. 626, 18 Fed. Cas. No. 10,189.

62. *Bangor O. & M. R. Co. v. Smith*, 47 Me. 34; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344; *San Antonio v. Jones*, 28 Tex. 19.

63. *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

64. *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450.

65. *United States v. Zabriskie v. Cleveland C. & C. R. Co.*, 23 How. 381; *Gibbs v. Baltimore Consol. Gas. Co.*, 130 U. S. 396.

*Alabama.*—*State v. Montgomery L. Co.*, 102 Ala. 594, 15 So. 347; *Wetumpka & C. R. Co. v. Bingham*, 5 Ala. 657.

*Illinois.*—*Illinois R. R. Co. v. Zimmer*, 20 Ill. 654.

*Kentucky.*—*Covington v. Covington & C. B. Co.*, 10 Bush 69.

*Louisiana.*—*State v. Louisiana State Bank*, 20 La. Ann. 468.

*Maine.*—*Bangor O. & M. R. Co. v. Smith*, 47 Me. 34.

*Maryland.*—*Jackson v. Walsh*, 75 Md. 304, 23 Atl. 778; *Lyons v. Orange A. & M. R. Co.*, 32 Md. 18.

*Massachusetts.*—*Blandford Third School Dist. v. Gibbs*, 2 Cush. 39.

*Minnesota.*—*State v. Sibley*, 25 Minn. 387.

*Ohio.*—*Goodin v. Evans*, 18 Ohio St. 150; *Cincinnati H. & D. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729.

*Pennsylvania.*—*Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450; *Fell v. McHenry*, 42 Pa. St. 41.

*Vermont.*—*Vermont & C. R. Co. v. Vermont C. R. Co.*, 34 Vt. 1.

*Wisconsin.*—*Madison W. & M. P. R. Co. v. Reynolds*, 3 Wis. 287.

66. *Wetumpka & C. R. Co. v. Bingham*, 5 Ala. 657.

67. *Cincinnati H. & D. R. Co. v. Cote*, 29 Ohio St. 126, 23 Am. Rep. 729; *Vermont & C. R. Co. v. Vermont C. R. Co.*, 34 Vt. 1.

68. *Lincoln & K. Bank v. Richardson*, 1 Me. 79, 10 Am. Dec. 34.

69. *Mississippi & R. R. B. Co. v. Prince*, 34 Minn. 79, 24 N. W. 361.

c. *Estoppel to Question Acceptance of Amendment.*—The proper acceptance of an amended charter cannot be questioned by one who has contracted with the corporation acting under such amended charter.<sup>70</sup> Nor can a corporation or its stockholders be heard to assert the invalidity of an amendment to the charter, after it has entered into a contract authorized by the amendment, and in which the stockholders have acquiesced.<sup>71</sup>

4. **Best and Secondary Evidence.**—A. ARTICLES OF ASSOCIATION. The general rule in civil actions by or against corporations is that when it becomes necessary to establish corporate existence, the best evidence of that fact is the original articles or certificate of association or incorporation, or a duly authenticated copy thereof;<sup>72</sup> although in the absence of a statute making such copies evidence of equal degree with the originals, the originals are the best evidence of the fact of corporate existence.<sup>73</sup>

B. RECORDS.—On the other hand, it has been held that on an issue as to corporate existence, the record of the organization is the best and suitable evidence of the fact,<sup>74</sup> and not the oral testimony of those who aided in its organization.<sup>75</sup>

70. *Eppes v. Mississippi G. & T. R. Co.*, 35 Ala. 33.

71. *Johnson v. Mercantile Tr. & Dep. Co.*, 94 Ga. 324, 21 S. E. 576.

72. *Owen v. Shepard*, 59 Fed. 746; *Gauthier Dec. Co. v. Ham*, 3 Colo. App. 559, 34 Pac. 484; *Jones v. Hopkins*, 32 Iowa 503; *Hallett v. Harrower*, 33 Barb. (N. Y.) 537; *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532; *Jackson v. Leggett*, 7 Wend. (N. Y.) 377.

In *Nebraska* a corporation is required by statute, previous to commencing any business except its own organization, to file its articles of incorporation for record in the office of the county clerk in the county or counties in which the business is to be transacted, and such record or a certified copy thereof is primary proof of the right of the corporation to transact business. *Equitable Bldg. & Loan Ass'n v. Bidwell*, 60 Neb. 169, 82 N. W. 384.

73. *Evans v. Southern Tpke. Co.*, 18 Ind. 101.

74. Where the fact of corporate existence is denied, no better evidence can be given to prove its existence than the acts of incorporation, entries in a book proved to contain the articles of association signed by the associates, a record of their pro-

ceedings including the acceptance of the charter and organization thereunder. *Foster v. White Cloud City Co.*, 32 Mo. 505.

A **Copy of a License to a Corporation**, recorded in the corporate books, is not inadmissible for the purpose of proving corporate existence as being secondary evidence in an action to charge a stockholder of the corporation for a corporate debt. "Being a record of the company it must be held binding upon the stockholders." *Culver v. Third Nat. Bank*, 64 Ill. 528.

As to the **Competency of the Records**, see *infra* this section.

75. *Warner v. Daniels*, 1 Woodb. & M. 90, 29 Fed. Cas. No. 17,181.

In *Illinois* the corporation law requires at least three corporators, prescribes various steps to be taken, and makes the certificate of the secretary of state to the complete organization of a corporation the legal evidence of that fact; and in *Owen v. Shepard*, 59 Fed. 746, an action before the federal court in the Indian Territory, it was held that oral evidence of two witnesses that they had taken a lawyer and gone into Illinois and there complied with the laws of that state, and got a charter, was a mere conclusion of law

**Acceptance of Charter.**—And again it is held that the best evidence of the fact of acceptance of a charter are the books and records of the corporation.<sup>76</sup>

Where the charter of a corporation requires that acceptance thereof be made in a manner designated therein, acceptance in that manner must be shown.<sup>77</sup>

**C. COPIES, ETC.**—Of course, in those jurisdictions where certified copies of the articles of association are not evidence of equal validity with the originals, they are nevertheless admissible as secondary evidence, upon the proper foundation being laid therefor.<sup>78</sup>

**D. RECITALS IN INSTRUMENTS EXECUTED BY CORPORATION.** And upon proper foundation laid therefor as secondary evidence, the fact of acceptance of the charter may be shown by a recital in an instrument executed by the corporation, stating the fact of acceptance.<sup>79</sup>

having no probative force. "If this alleged corporation ever had any legal existence, it was in the power of the defendants to furnish the proper evidence of the fact. They claim to be the original incorporators, and as such they would be the proper custodians of the legal evidence of the incorporation of the company. They neither produced this evidence nor accounted for its absence. If the secretary of state had ever issued his certificate, and it had been lost, a certified copy could have been procured."

Parol evidence to prove the fact of incorporation is not material error, where the corporation appears to the suit as such. *Gauthier Dec. Co. v. Ham*, 3 Colo. App. 559, 34 Pac. 484.

76. *Coffin v. Collins*, 17 Me. 440; *Hudson v. Carman*, 41 Me. 84.

77. As for example, by formal vote at meeting duly called. *Hudson v. Carman*, 41 Me. 84; *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450; *Shortz v. Unangst*, 3 Watts & S. (Pa.) 45.

78. *Walker v. Shelbyville & R. Tpke. Co.*, 80 Ind. 452; *Washer v. Allensville C. S. & V. Tpke. Co.*, 81 Ind. 78. See also *Evans v. Southern Tpke. Co.*, 18 Ind. 101.

**Where the Corporation Refuses Upon Notice to Produce the Certificate**, copies thereof may be introduced in evidence. *Dooley v.*

*Cheshire Glass Co.*, 15 Gray (Mass.) 494. And it is immaterial whether the originals are in the possession of the corporation, or whether they have passed into the hands of its assignees in bankruptcy. *Merrick v. Reynolds Eng. & Gov. Co.*, 101 Mass. 381.

**By Statute in New York Passed in 1848**, the certificate of incorporation was required to be filed in the office of the county clerk, and a duplicate thereof in the office of the secretary of state, and a copy of such certificate certified by the county clerk or his deputy to be a true copy, and the whole thereof was to be received in all courts and places as presumptive legal evidence of the facts therein stated. In *New York Car. Oil Co. v. Richmond*, 19 How. Pr. (N. Y.) 505, it was held that this provision did not necessarily exclude every other mode of proving the fact of incorporation, and that, accordingly, where a certificate duly executed and filed was subsequently lost, evidence of the filing and of the contents by the production of a copy sworn to be a true copy and that the original certificate was lost was proper evidence.

79. *Sinking Fund Com'rs v. Northern Bank of Kentucky*, 1 Metc. (Ky.) 174, where the books containing the corporate proceedings covering the time when the alleged acceptance took place, and containing the

**E. ORAL EVIDENCE.** — a. *In General.* — If it is shown that no record evidence of the organization ever existed, oral evidence may be received.<sup>80</sup> And it has been held competent to prove by parol evidence the fact that the articles of association had been filed in the proper office.<sup>81</sup> And oral evidence of steps taken to organize a corporation is not objectionable as calling for parol evidence of the contents of the articles of incorporation.<sup>82</sup> Parol evidence that an association has assumed to act as a corporation *de facto* is admissible.<sup>83</sup>

b. *Estoppel to Deny Corporate Existence.* — In actions by or against corporations, in which the parties, either the corporation or the adverse party, are estopped to deny the fact of corporate existence, parol evidence that the corporation was acting as such, or was dealt with as such, is admissible.<sup>84</sup>

c. *Foreign Corporation.* — Where the object is to prove the existence of a corporation in another state, it is no objection to the admissibility of oral testimony of the witness to the effect that he had corresponded with the corporation, that the act of incorporation would be better evidence.<sup>85</sup>

d. *Criminal Prosecutions.* — In criminal prosecutions for offenses charged to have been committed upon the property of a corporation, the fact of corporate existence may be proved by reputation,<sup>86</sup> or by the oral testimony of a witness who has knowledge of the fact;<sup>87</sup> although there is authority to the contrary,<sup>88</sup> and there is even

record thereof, were shown to have been lost.

80. *Weber v. Fickey*, 52 Md. 500.

81. *Miller v. Wild Cat G. R. Co.*, 52 Ind. 51.

In *Memphis & St. F. P. R. Co. v. Rives*, 21 Ark. 302, an amendment to the charter prescribed that the president of the corporation should file in the office of the secretary of state a declaration accepting the amendment; and it was held that evidence that an agent had filed such a declaration, and that his act had been subsequently ratified by the corporation, was admissible, the court stating that the law in such cases requires nothing more than a substantial compliance with the statute, and that the evidence offered was competent to show such substantial compliance.

82. *Miller v. Wild Cat G. R. Co.*, 52 Ind. 51.

83. *Lakeside Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Tipton Fire Co. v. Barnheisel*, 92 Ind. 88; *Swart-*

*wout v. Michigan A. L. Co.*, 24 Mich. 389.

84. *Rockville & W. Tpke. R. v. Van Ness*, 2 Cranch C. C. 449, 20 Fed. Cas. No. 11,986; *Walker Paint Co. v. Ruggles*, 48 Ill. App. 406; *French v. Donohue*, 29 Minn. 111, 12 N. W. 354; *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729; *Bon Aqua Imp. Co. v. Standard F. Ins. Co.*, 34 W. Va. 764, 12 S. E. 771.

85. *Philadelphia Bank v. Lambeth*, 4 Rob. (La.) 463.

86. *Fleener v. State*, 58 Ark. 98, 23 S. W. 1; *People v. Ah Sam*, 41 Cal. 645; *Sasser v. State*, 13 Ohio 453; *Burke v. State*, 34 Ohio St. 79; *Reed v. State*, 15 Ohio 217; *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121; *State v. Habib*, 18 R. I. 558.

87. *Reed v. State*, 15 Ohio 217; *Norton v. State*, 74 Ind. 337.

88. *Jones v. State*, 5 Sneed (Tenn.) 346; *Trice v. State*, 2 Head (Tenn.) 591.

express statutory authority for such proof.<sup>89</sup>

e. *As Secondary Evidence*. — But of course when the best evidence, referred to in the preceding sections, has been lost or destroyed, resort may be had to parol evidence.<sup>90</sup> And it has been held in such case that the evidence need not be so full and particular as to the statements in the certificate, that from it the certificate could be reproduced as it originally was. It is enough that the evidence shows satisfactorily that the certificate contained the statements required by law.<sup>91</sup> And in the absence of the evidence before shown as the best evidence of that fact, acceptance of the charter may be shown by oral evidence.<sup>92</sup>

**5. Documentary Evidence.** — A. DOMESTIC CORPORATIONS. — a. *Statutes*. — On an issue of corporate existence the statute incorporating the association is admissible.<sup>93</sup>

A Statute Recognizing an Association as an Existing Corporation, ratifying and confirming the organization of the association originally made under its act of incorporation, and expressly declaring the company to be a legal corporation is competent evidence of corporate existence.<sup>94</sup>

The List of Corporations Contained in a Statute is competent evidence of the existence of the corporations named therein.<sup>95</sup>

b. *Articles or Certificates of Association*. — (1.) *The Originals*. The original articles or certificates of association properly recorded<sup>96</sup> are competent evidence on an issue of corporate existence,<sup>97</sup> and it

89. *State v. Jackson*, 90 Mo. 156, 2 S. W. 128; *State v. Cheek*, 63 Mo. 364.

90. *Rose Hill & E. R. Co. v. People*, 115 Ill. 133, 3 N. E. 725.

Testimony of a witness that he was president of the plaintiff corporation is not the best evidence of the fact of corporate existence, but, in the absence of objection on that ground, is not to be rejected by the court in considering the evidence offered to establish the fact of corporate existence. *Stanford L. Co. v. Steidle*, 28 Wash. 72, 68 Pac. 178.

91. *Rose Hill & E. R. Co. v. People*, 115 Ill. 133, 3 N. E. 725.

92. *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64; *Talladego Ins. Co. v. Landers*, 43 Ala. 115; *Hammond v. Straus*, 53 Md. 1; *Woods v. Banks*, 14 N. H. 101; *Owen v. Purdy*, 12 Ohio St. 73; *State v. Habib*, 18 R. I. 558, 30 Atl. 462.

93. *Johnston v. Ewing Female Univ.*, 35 Ill. 518.

*Acts Incorporating Banks, Turnpike Companies, etc.*, although not

directly public laws, but being published as such in the statute book, may be proved by such book. *Bank of Wilmington & Brandywine v. Wollaston*, 3 Harr. (Del.) 90.

94. *Boykin v. State*, 96 Ala. 16, 11 So. 66. See also *Williams v. Union Bank*, 2 Humph. (Tenn.) 339.

95. *Tennessee A. L. Co. v. Massey*, (Tenn.) 56 S. W. 35.

96. Where it is in issue whether or not failure to incorporate a company was due to fraud, the articles of incorporation, although not recorded as required by law, but duly signed and acknowledged, are competent to rebut the charge. *Warren v. Syfers*, 23 Ind. App. 167, 55 N. E. 103.

97. *Jewell v. Rock River Paper Co.*, 101 Ill. 57; *Fortin v. U. S. Wind Eng. & Pump Co.*, 48 Ill. 451, 95 Am. Dec. 560; *Johnston v. Ewing Female Univ.*, 35 Ill. 518; *Com. v. Carroll*, 145 Mass. 403, 14 N. E. 618.

*And That the Original Should Be Produced*, see *Dundee Mtge. & Tr. Ins. Co. v. Cooper*, 26 Fed. 665.

needs no certificate that it is a true copy.<sup>98</sup> But it has been held that where a condition precedent to the right of incorporation is prescribed by law, it is not error to reject the certificate in the absence of evidence showing performance of the condition.<sup>99</sup>

(2.) *Copies, Records, etc.* — (A.) *GENERALLY.* — The use of copies of the articles or certificate of association or incorporation is very general under the modern practice, but as this practice is one sanctioned for the most part, if not entirely, by statute, no general rule can be stated. In the note below, however, some of these statutes, with the cases in which they have been construed and applied, are set out and cited.<sup>1</sup>

In an action to recover unpaid subscriptions to the capital stock of a corporation, the final certificate of complete incorporation issued by the secretary of state, and the proceedings attached thereto, had by the commissioners and subscribers for the purpose of effecting incorporation, including a copy of the notice to the subscribers of a meeting to organize, and a copy of the subscription list and the names of subscribers and their terms of office, is *prima facie* evidence that the full amount of the capital stock had been subscribed. *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 57 N. E. 1,043, 78 Am. St. Rep. 288, *affirming* 87 Ill. App. 605.

In *Boyce v. Trustees of M. E. Church*, 46 Md. 359, among other requisites to constitute a religious corporation under the Maryland statute regulating the formation of such corporation, it was provided that the agreement should be acknowledged by the trustees, or a majority of them, before two justices of the peace of the county or state in which the society, or the greatest number of the members, reside, or before a judge of certain courts named and certified by such justices or judge according to other provisions of the statute; and it was held that the certificate of the judge that the law had been complied with was not sufficient evidence that the defendant was a corporation.

In an action against a corporation on a foreign judgment rendered against the defendant under another name, but alleged to be the same corporation, the fact that the original

corporation had changed the corporate name to that by which it was sued in the present action may be shown by the original books of incorporation kept in the probate court of the county of its residence showing that the defendant was originally incorporated under the name in the original action and that subsequently its name was changed in accordance with the requirements of the statute. *Christian & C. G. Co. v. Coleman*, 125 Ala. 158, 27 So. 786.

<sup>98</sup> *Fortin v. U. S. Wind. Eng. & Pump Co.*, 48 Ill. 451, 95 Am. Dec. 560.

<sup>99</sup> *Raccoon River Nav. Co. v. Eagle*, 29 Ohio St. 238.

1. *Certified Copy Admissible Under Alabama Statute.* — *Willingham v. State*, 104 Ala. 59, 16 So. 116.

*Under the California Statute* a copy of any articles of incorporation filed in pursuance thereof, and certified as required thereby, is *prima facie* evidence of corporate existence. *Vance v. Kohlberg*, 50 Cal. 346; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, 8 Pac. 22; *Fresno C. & Irr. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37. But it must conform to the statute. *McCallion v. Hibernia Sav. & L. Soc.*, 70 Cal. 163, 12 Pac. 114.

*Colorado.* — Certified copy of articles competent to show date of incorporation, but not corporate existence. *Schiffer v. Adams*, 13 Colo. 572, 22 Pac. 964.

*In the District of Columbia*, a statute (Rev. Stat., § 535,) requires the certificate of incorporation of a religious society which is recorded, to state the date of the election or appointment of the trustees, the

length of time for which the trustees were elected or appointed, and to be verified by an affidavit of one of the parties making the certificate; and in *Fifth Baptist Church v. Baltimore & P. R. Co.*, 4 Mack. (D. C.) 43, it was held that a certificate of incorporation which omits any one of these requirements is not the paper which the law directs to be recorded, and hence the record of such a certificate is no evidence of the legal incorporation of a religious society under that statute.

**Kansas.**—A copy of the charter of a corporation created under the laws of Kansas, duly certified by the secretary of state under the great seal of the state, is evidence of the creation of the corporation by express statute; and it is not necessary to offer any evidence showing that the subscribers to the charter were citizens of the state. *McCune Min. Co. v. Adams*, 35 Kan. 193, 10 Pac. 468.

**Under the Massachusetts Statute**, a certificate of incorporation in due form is conclusive evidence of corporate existence. *Dolbear v. American Bell. Tel. Co.*, 126 U. S. 1.

**By Statute, in Michigan**, a copy of any articles of association duly filed, with a copy of the affidavit indorsed thereon, or annexed thereto, and certified by the secretary of state to be a true copy, and the whole of such articles of association and of the affidavit indorsed thereon, or annexed thereto, is *prima facie* evidence of the incorporation of such company, and of the facts therein stated. And it is immaterial that the certificate of the secretary of state calls the affidavit, to which the statute refers, a certificate, where it appears that the paper annexed or attached was in fact an affidavit such as the statute requires, and that the secretary certifies that it is a true copy of the original. *Canal St. G. R. Co. v. Paas*, 95 Mich. 372, 54 N. W. 907.

But a certificate, merely, that the certificate of acknowledgment to the articles of association was in the usual form, without giving a copy of it, is not in proper form, and hence will not be received as such pre-

sumptive evidence. *Doyle v. Mizner*, 42 Mich. 332, 3 N. W. 968.

**Minnesota.**—In *Brown v. Corbin*, 40 Minn. 508, 42 N. W. 481, a certified copy of the articles of association of a corporation, filed in the office of the secretary of state, and recorded in the office of the register of deeds of the county where the principal place of business of the corporation was to be, was held to sufficiently prove the organization of the corporation.

**Montana.**—Certified copy of articles of incorporation admissible and original need not be first accounted for. *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153.

**In North Carolina**, a statute provides that copies of the letters of incorporation certified by the clerk of the superior court of the county where the same was recorded, shall in all cases be admissible in evidence, and the letters be deemed *prima facie* evidence of the complete organization and incorporation of the company purporting thereby to have been established. *Marshall v. Macon Co. Sav. Bank*, 108 N. C. 639, 13 S. E. 182.

But when the letters or a duly certified copy thereof are not produced, the record of incorporation itself before referred to is competent as evidence, the same as the letters or a properly certified copy thereof would be. "The execution of the articles of agreement, the recording of the same, and the issue of the letters declaring the incorporators a body corporate, are the things essential to the creation of the corporation. The statute makes these recorded things, embodied in the form of letters, under the seal of the court, or an authenticated copy thereof, *prima facie* evidence of the complete organization of the corporation. Surely, the record or entry itself, is as certain and effective as a copy of it. Indeed, the record itself, and the fact that a copy of it issued, constitute the substance and life of the letters, and when the statute provides that these shall be such *prima facie* evidence, it implies that the record itself shall be." *Carolina Iron Co. v. Abernathy*, 94 N. C. 545.

**By Statute, in Oregon**, the articles

The record of the articles of association of a corporation is not inadmissible under a statute requiring their record in the book of record of deeds, because recorded in a book called a miscellaneous record where such book is not exclusively devoted to the record of instruments other than deeds.<sup>2</sup>

(B.) ALTERATIONS. — A copy of a certificate of incorporation by the secretary of state is not inadmissible in evidence to prove corporate existence because of an alteration therein, where the alteration consists of the erasure and interlineation in correcting a mistake as to the date of the filing of the certificate.<sup>3</sup>

(C.) NATIONAL BANKS. — The organization certificate of a national bank, certified and sealed by the controller of currency, is by express statute legal and sufficient evidence of the corporate existence of a national bank.<sup>4</sup> And his certificate is conclusive evidence of the

of incorporation or a certified copy of those filed with the secretary of state or a county clerk is evidence of the existence of such corporation. *Goodale Lumb. Co. v. Shaw*, 41 Or. 544, 69 Pac. 546.

In Washington, a statute provides that a copy of any certificate of incorporation, certified in the manner and by the officer therein specified, shall be received in all courts and places as *prima facie* evidence of the facts therein stated. *Spokane & I. Lumb. Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1,119. And in *Knapp, Burrill & Co. v. Strand*, 4 Wash. 686, 30 Pac. 1,063, the court in determining the meaning and effect of this statute said: "But under the more modern system, as adopted in this state, which is a common one at this time, while the proof of corporate existence and the right to transact business is required, if denied, the method of making *prima facie* proof is materially changed," and then goes on to set out the statute as before stated. And other courts have placed the same construction upon statutes substantially similar. See *Mokelumne H. C. & Min. Co. v. Woodbury*, 14 Cal. 424, 73 Am. Dec. 658; *Fresno C. & Irr. Co. v. Warner*, 72 Cal. 379, 14 Pac. 37; *Humphries v. Mooney*, 5 Colo. 282; *Leonardsville Bank v. Willard*, 25 N. Y. 574; *Harrod v. Hamer*, 32 Wis. 162.

Where the corporate existence of a corporation is not specifically denied by the adverse party, the fact

of incorporation as alleged may be established *prima facie* by the introduction in evidence of a certificate of the county auditor showing such certificate, under Bal. Wash. Code, § 4,252, providing that a copy of any certificate of incorporation, certified by the auditor of the county in which it is filed, shall be received in all the courts as *prima facie* evidence of the facts therein stated. *Spokane & I. Lumb. Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1,119.

2. "The reasonable and just construction of the statute is, that articles of association may be recorded in any public record of the recorder's office not exclusively devoted to the record of other instruments." *Tipton F. Ins. Co. v. Barnheisel*, 92 Ind. 88.

3. *Johnston v. Ewing Female Univ.*, 35 Ill. 518; *Merchants' Ex. Nat. Bank v. Cardoza*, 3 Jones & S. (N. Y.) 162; *National Bank of Commerce v. Galland*, 14 Wash. 502, 45 Pac. 35.

4. *First Nat. Bank v. Kidd*, 20 Minn. 234; *Mix v. National Bank of Bloomington*, 91 Ill. 20, 33 Am. Rep. 44; *Washington Co. Nat. Bank v. Lee*, 112 Mass. 521; *Hanover Nat. Bank v. Johnson*, 90 Ala. 549, 8 So. 42; *Keyser v. Hitz*, 2 Mack. (D. C.) 473, affirmed in 133 U. S. 138.

A Certificate by the Deputy Comptroller of the Currency, as acting comptroller, sufficiently meets the requirements of the statute. *Keyser v. Hitz*, 133 U. S. 138.



completeness of the organization.<sup>5</sup>

(D.) CONSOLIDATION. — By express statute, sometimes, a copy of the articles of consolidation between two or more corporations, properly certified, is *prima facie* proof of the existence of the consolidated corporation.<sup>6</sup>

c. *Corporate Books and Records*. — (1.) **Generally**. — The organization of a corporation and the performance of the conditions precedent by the corporators may be shown by the records and books of the corporation.<sup>7</sup>

5. *Casey v. Galli*, 94 U. S. 673; *Keyser v. Hitz*, 2 Mack. (D. C.) 473, affirmed 133 U. S. 138.

And in *Thatcher v. West River Nat. Bank*, 19 Mich. 196, it was held to be no objection to the certificate of organization that the notary public before whom it was acknowledged appeared to be one of the stockholders of the corporation; that that was a question for the comptroller.

6. And it is not necessary to prove the legal existence of the corporations entering into the articles of consolidation by any other evidence. *East St. Louis C. R. Co. v. Wabash, St. L. & P. R. Co.*, 24 Ill. App. 279.

7. *United States*. — *Owings v. Speed*, 5 Wheat. 420.

*Alabama*. — *Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894.

*Connecticut*. — *Lane v. Brainerd*, 30 Conn. 565.

*Georgia*. — *Hall v. Carey*, 5 Ga. 239.

*Illinois*. — *McCoy v. World's Columbian Exposition*, 186 Ill. 356, 57 N. E. 1,043, 78 Am. St. Rep. 288, affirming 87 Ill. App. 605.

*Indiana*. — *Washer v. Allensville C. S. & V. Tpke. Co.*, 81 Ind. 78.

*Kansas*. — *Dolan v. Wilkerson*, 57 Kan. 758, 48 Pac. 23.

*Maine*. — *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Hudson v. Carman*, 41 Me. 84; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587.

*Missouri*. — *Foster v. White Cloud City Co.*, 32 Mo. 505.

*New York*. — *McFarlan v. Triton Ins. Co.*, 4 Denio 392; *Wood v. Jefferson Co. Bank*, 9 Cow. 194.

*North Carolina*. — *Glenn v. Orr*,

96 N. C. 413, 2 S. E. 538; *Buncombe Tpke. Co. v. McCarson*, 18 N. C. 306.

*Vermont*. — *Reynolds v. Myers*, 51 Vt. 444.

*Virginia*. — *Crump v. U. S. Min. Co.*, 7 Gratt. 352, 56 Am. Dec. 116.

In *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472, the court said: "By the organization of a company, we understand the meeting of individuals claiming to be corporators, and their action in choosing officers and servants. If the books themselves were not evidence of these facts, it would be difficult, after a lapse of time, to establish them in any other mode."

**Rule Stated**. — "It is generally held that the proceedings taken by the directors and stockholders of a corporation can be shown by the books of the corporation in which such proceedings are recorded; and usually the books or certified transcripts therefrom are the only appropriate evidence of such proceedings. For the same reason that corporate books are admitted to prove the action of its stockholders and directors, I think they should be admitted to show the preliminary action taken to organize the corporation, when such action is recorded in the same books subsequently used by the corporation to record the proceedings of its governing body, and when a record appears to have been regularly made of the various steps taken towards organization. A record of that description, as a general rule, will prove more reliable evidence of what was done than the oral testimony of any one who may have participated in the organization. By incorporating such proceedings into its record, the corporation gives

(2.) **Acceptance of Charter.** — Acceptance of a charter may be shown by the books or records of the corporation if it appears thereby and they are properly identified and authenticated.<sup>8</sup> So also may the acceptance of an amendment be thus shown.<sup>9</sup>

(3.) **User.** — And the corporate records are likewise competent evidence to show user.<sup>10</sup>

(4.) **Authentication of Books.** — But before the corporation books are evidence for this purpose, it must be made to appear that they are the books of the corporation, kept as such by the proper officer, or by some other person authorized to make the entries in his necessary absence,<sup>11</sup> and it is not sufficient to prove merely that the books offered are in the handwriting of a person stated in the book itself to be the secretary, but not otherwise shown to be the proper officer.<sup>12</sup>

d. *Ex Parte Affidavits.* — The organization of a corporation cannot be established by *ex parte* affidavits.<sup>13</sup>

them an authenticity which they would not otherwise have. It stamps them as genuine, and in such case no substantial reason can be given why the record of what was done after complete organization should be entitled to greater weight than the record of what occurred previously. I have concluded, therefore, to admit the class of entries now under consideration, for the purpose above mentioned. They are entitled to the same credence which attaches to other entries in the same books, purporting to be proceedings taken by the governing body after full organization." *Glenn v. Liggett*, 47 Fed. 472.

8. *Golder v. Bressler*, 105 Ill. 419; *Hudson v. Carman*, 41 Me. 84.

9. *Dows v. Naper*, 91 Ill. 44.

10. *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472; *Lake-side Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Ramsey v. Peoria M. & F. Ins. Co.*, 55 Ill. 311; *Narragansett Bank v. Atlantic S. Co.*, 3 Metc. (Mass.) 282; *Foster v. White Cloud City Co.*, 32 Mo. 505; *Reynolds v. Myers*, 51 Vt. 544.

11. *Glenn v. Orr*, 96 N. C. 413, 2 S. E. 538; *Buncombe Tpke. Co. v. McCarson*, 18 N. C. 306.

**A Book Purporting to Be Corporate Records** in the handwriting of the clerk, found among his papers after his decease, and remaining ever since in the hands of his executor,

is sufficiently proved to justify its admission in evidence as such record, in the absence of proof that there was another record or clerk. *Brackett v. Persons Unknown*, 53 Me. 228.

The records and books of a corporation are competent evidence to prove corporate existence, and the offer in evidence, by a corporation, of its records, cannot be objected to because the minutes entered therein were first made on loose sheets of paper and kept in a drawer several months before they were copied into the records, where it nowhere otherwise appears that such minutes did not truly represent the action of the meeting, or that the record was not adopted by the board, or that there was anything improper in the transaction. *Vawter v. Franklin College*, 53 Ind. 88.

12. *Highland Tpke. Co. v. McKean*, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324.

13. *Bowyer v. Giles, F. & K. Tpke. Co.*, 9 Gratt. (Va.) 109.

A clause in a charter authorizing the exercise of corporate franchises as soon as the governor, after receiving the certificate of certain commissioners, shall proclaim the right, the proclamation and certificate by itself is not evidence of the organization of the corporation. *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472.

B. FOREIGN CORPORATIONS. — a. *Generally.* — The incorporation of a foreign corporation may be shown by a copy of the corporate charter granted in the foreign state,<sup>14</sup> and authenticated as required by act of congress;<sup>15</sup> and it is not necessary to the admissibility of a special act of another state creating a corporation that it be shown that the legislature of that state had constitutional power to pass a

14. Where the statute of the state of a corporation's domicile provides that a copy of the certificate of incorporation, certified as required thereby, shall be received in all courts and places in that state as presumptive legal evidence of corporate existence, a certificate thus duly certified will be received in the courts of another state to prove the fact of such incorporation; and the fact that the copy offered in evidence does not show that a duplicate thereof had been filed in the office of the secretary of state is immaterial. *Bartlett v. Wilbur*, 53 Md. 485.

In *Parchen v. Peck*, 2 Mont. 567, an action against the defendant as surviving partner of a firm named, the defendant claimed that the firm had been incorporated under the laws of another state, which required that the articles of incorporation be recorded in the offices of the secretary of state and recorder of deeds of the proper county. And it was held that inasmuch as the statutes of Montana did not prescribe the manner of authentication of the articles, in order to entitle them to be received in evidence, the laws of the United States applied, and that accordingly the articles of incorporation could not be received in evidence to prove corporate existence when not authenticated in the manner prescribed by the United States laws.

A certificate, under the hand of the secretary of state and the great seal of the state where a foreign corporation was incorporated, to the effect that the party litigant was duly incorporated, and had filed the necessary articles with the proper officers, and the statutes of such state providing that such certificate should be taken as evidence of the corporate existence of the corporation, is competent to show that it was a *de facto* corporation, which is all that is necessary where corporate existence is a

collateral matter. *Petty v. Hayden*, 115 Iowa 212, 88 N. W. 339; *citing Cozzens v. Chicago Hyd. P. B. Co.*, 166 Ill. 213, 46 N. E. 788.

In the case of a foreign corporation, the certificate of the secretary of state stating that it was duly incorporated, and a certificate signed and acknowledged by several persons described as incorporators, duly filed in his office, is not sufficient to establish corporate existence, in the absence of proof that by the laws of that state these papers established that fact; but if accompanied by proof of user by the corporation of corporate powers, the corporate existence is *prima facie* established. *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537, 38 N. E. 729.

A copy of an amended charter to plaintiff as a corporation to do a banking business, signed by the auditor of the state of its residence, and certified to by the recorder of deeds of the county of its residence as a true copy from his records, accompanied by the deposition of the cashier of the bank that it had been duly organized, and acted under charter, and had been for many years previous doing business under a previous charter; that from its first existence he had been connected with it; that it had regularly paid taxes as a bank; had never been dissolved and was still doing business as a bank, to which was also appended a copy of the minutes of the meeting at which the plaintiff organized under state charter containing a copy under seal of the original charter, sufficiently proves that the plaintiff bank was a corporation. *Bank v. Carr*, 130 N. C. 479, 41 S. E. 876.

15. *McClerkin v. State*, 105 Ala. 107, 17 So. 123; *Pacific Guano Co. v. Mullen*, 66 Ala. 582.

And see *Rafferty v. State*, 91 Tenn. 655, 16 S. W. 728.

It is not essential to the admissi-

special act of incorporation, although there may be such a provision in the constitution of the state where the action is pending.<sup>16</sup>

b. *Seal of Officer.* — The certificate of incorporation of a foreign corporation made by the proper officer of the country of the corporation's residence is admissible, though not under seal of that officer, when there was no evidence that he had an official seal; on the contrary, such an objection, to be available, must be supported by evidence that the officer had such a seal.<sup>17</sup>

c. *Opinion of Certifying Officer.* — A certificate of the secretary of another state to the effect that certain individuals therein named filed proper articles of incorporation in his office, and were thereby made an existing corporation, although made *prima facie* evidence in that state of the existence of such corporation, is not admissible for that purpose in another state.<sup>18</sup>

d. *Appointment of Resident Agent.* — A certificate stating that the officer is legal custodian of the appointment of agents for foreign corporations, and that he found no appointment filed by a certain corporation, is not admissible.<sup>19</sup>

6. **Admissions.** — A. BY CONTRACT. — The current of authority is that corporate existence and character may be proved *prima facie*, at least, by the recognition and admissions of parties contracting and dealing with an alleged corporation.<sup>20</sup>

bility of such copy that it is not contained in a book purporting to be published by the authority of the state granting the charter, or that the act was not properly certified to by the clerk of the legislature as being a full, complete and correct copy of the act. *McClerkin v. State*, 105 Ala. 107, 17 So. 123.

Duly authenticated copies of the articles of incorporation of a foreign corporation from the secretary of state where incorporated, and of the register of deeds, are sufficient, in the absence of any evidence to the contrary to show the plaintiff's corporate existence and to entitle it to maintain an action. *Dowagiac Mfg. Co. v. Higinbotham*, (S. D.), 91 N. W. 330.

16. *Fidelity Ins. T. & S. Dep. Co. v. Nelson*, 30 Wash. 340, 70 Pac. 961.

17. *Anglo-American L. Mtg. & A. Co. v. Dyer*, 181 Mass. 593, 64 N. E. 416, 92 Am. St. Rep. 437.

18. "It is a narrative of long-past occurrences and the expression of an opinion as to their legal effect. If admissible for any purpose in the courts of Minnesota, it is in those of Connecticut mere hearsay, and should

have been excluded. No statute of Minnesota could give it the force of evidence in another jurisdiction." *Fish v. Smith*, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161. It was held, however, that the admission of this certificate was non-prejudicial error inasmuch as another proper certificate had been introduced without objection and the jury had also been informed as to what were the laws of Minnesota under which incorporation had been sought.

19. *North Mercer Nat. Gas. Co. v. Smith*, 27 Ind. App. 472, 61 N. E. 10.

Non-compliance of a foreign corporation with the provision of a statute requiring the filing with the secretary of state of a writing designating an agent on whom service in that state may be had, is not shown by the production of a defective certificate of the appointment of an agent without proof that it is the only certificate in existence, since the presumption is that the statute was complied with. *Sidway v. Harris*, 66 Ark. 387, 50 S. W. 1,002.

20. *United States.* — *Chubb v. Up-ton*, 95 U. S. 665.

**B. BY APPEARANCE.** — In an action against an association as a corporation, the appearance by it, under a name importing a corporation, is an admission by it that it is in fact a corporation.<sup>21</sup>

*Alabama.* — Cahall *v.* Citizens' Mut. Bldg. Ass'n, 61 Ala. 232; Central A. & M. Ass'n *v.* Alabama G. L. Ins. Co., 70 Ala. 120; McDonnell *v.* Alabama G. L. Ins. Co., 85 Ala. 401, 5 So. 120; Harris *v.* Gateway L. Co., 128 Ala. 652, 29 So. 611.

*Arkansas.* — Fleener *v.* State, 58 Ark. 98, 23 S. W. 1; Searcy *v.* Yarnell, 47 Ark. 269.

*Colorado.* — Plummer *v.* Struby-Estabrooke Mer. Co., 23 Colo. 190, 47 Pac. 294.

*Illinois.* — Mitchell *v.* Deeds, 49 Ill. 416, 95 Am. Dec. 621; West Side Auction H. Co. *v.* Connecticut M. L. Ins. Co., 186 Ill. 156, 57 N. E. 839; Ward *v.* Minnesota & N. W. R. Co., 119 Ill. 287, 10 N. E. 365.

*Indiana.* — Jones *v.* Cincinnati Type Fdy. Co., 14 Ind. 89.

*Kentucky.* — Woodson *v.* Bank of Gallipolis, 4 B. Mon. 203; Jones *v.* Bank of Tennessee, 8 B. Mon. 122, 46 Am. Dec. 540.

*Maryland.* — Franz *v.* Teutonia Bldg. Ass'n, 24 Md. 259.

*Michigan.* — Kalamazoo *v.* Kalamazoo H. L. & P. Co., 124 Mich. 74, 82 N. W. 811; Wyandotte El. L. Co. *v.* Wyandotte, 124 Mich. 43, 82 N. W. 821; Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Doug. 124, 43 Am. Dec. 457.

*Minnesota.* — Richards *v.* Minnesota Sav. Bank, 75 Minn. 196, 77 N. W. 822; French *v.* Donohue, 129 Minn. 111, 12 N. W. 354.

*Missouri.* — West Missouri Land Co. *v.* Kansas City Sb. B. R. Co., 161 Mo. 595, 61 S. W. 847; Hamtramck *v.* Bank of Edwardsville, 2 Mo. 169; St. Louis *v.* Shields, 62 Mo. 247.

*New Hampshire.* — Congregational Soc. *v.* Perry, 6 N. H. 164, 25 Am. Dec. 455.

*New Jersey.* — Stout *v.* Zulick, 48 N. J. L. 599, 7 Atl. 362; Way *v.* American G. Co., 60 N. J. Eq. 263, 47 Atl. 44.

*New York.* — Methodist Episcopal U. Ch. *v.* Pickett, 19 N. Y. 482; Dutchess Cotton Fac. *v.* Davis, 14 Johns. 238, 7 Am. Dec. 459.

*Pennsylvania.* — Cochran *v.* Arnold, 58 Pa. St. 399.

*Tennessee.* — Automatic L. Co. *v.* Massey, (Tenn.), 56 S. W. 35.

*Texas.* — Reynolds *v.* Shelton, 2 Tex. 516.

*Wisconsin.* — Whitney *v.* Robinson, 53 Wis. 309, 10 N. W. 512; Ricketson *v.* Galligan, 89 Wis. 394, 62 N. W. 87.

Evidence that a party, dealing with a company of individuals who assert their corporate existence, made the contract on the representation of one of them that the company was a co-partnership, is competent as tending to show that the dealings were not with the company as a corporation, but as a partnership, and that hence the party so dealing is not estopped to show by other competent evidence that the company was not in fact a corporation. Christian & C. G. Co. *v.* Fruitdale Lumb. Co., 121 Ala. 340, 25 So. 566.

**A Contract of Subscription** with a corporation to its capital stock is an act performed, and an admission by both parties which necessarily assumes the corporate character, and as against the subscriber in an action by the corporation against him to enforce payment of the subscription operates to prove that the plaintiff was, as stated in the agreement, a corporation. U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537, 38 N. E. 729.

**Transaction of Business With a Bank** has been held to be an admission by the parties so transacting that the bank had capacity to transact business as a corporation. U. S. Bank *v.* Stearns, 15 Wend. (N. Y.) 314.

**21. Colorado.** — Western U. Tel. Co. *v.* Eyser, 2 Colo. 141; Gauthier Dec. Co. *v.* Ham, 3 Colo. App. 559, 34 Pac. 484.

*Illinois.* — Ward *v.* Minnesota & N. W. R. Co., 119 Ill. 287, 10 N. E. 365; Supreme Lodge A. O. U. W. *v.* Zuhlke, 30 Ill. App. 98; U. S. Exp. Co. *v.* Bedbury, 34 Ill. 459.

C. BY PLEA TO MERITS. — And the existence of a corporation is admitted by a plea to the merits in an action by the corporation.<sup>22</sup>

D. BY STIPULATION IN COURT. — A stipulation during the trial of an action upon a subscription by the defendants to the capital stock of the plaintiff, that the assessments and calls upon the defendants' subscription had been duly and legally made, in accordance with the by-laws of the plaintiff, and the laws of the state, is a full and complete admission of corporate existence.<sup>23</sup>

7. **Circumstantial Evidence to Prove User.** — Proof of user must necessarily consist of evidence of corporate acts showing that they are doing business under their charter. Any acts tending to show this are admissible for that purpose, as for example, maintaining an office, having officers acting in the name and as the agents of the corporation, executing instruments for and on behalf of the corporation, and for purposes for which the corporation was organized;<sup>24</sup> in other words, doing the very business and in the very manner pointed out by the statute, and in the name of the corporation. All such acts would be direct evidence of user, and should not be excluded on the ground that the acts were matters of record, and could be proved

*Indiana.* — *Mud Creek Drg. Co. v. State*, 43 Ind. 236; *First Nat. Bank v. Dovetail B. & G. Co.*, 143 Ind. 534, 42 N. E. 924.

*Iowa.* — *State v. Independent S. Dist.*, 44 Iowa 227.

*Louisiana.* — *Jones v. Congregation of Mt. Zion*, 30 La. Ann. 711.

*Missouri.* — *Seaton v. Chicago R. I. & P. R. Co.*, 55 Mo. 416.

*North Carolina.* — *Rush v. Halcyon S. B. Co.*, 84 N. C. 702.

*Tennessee.* — *Shoun v. Armstrong*, (Tenn.), 59 S. W. 790.

*Wisconsin.* — *Black River Imp. Co. v. Holway*, 85 Wis. 344, 55 N. W. 418.

22. *West Winsted Sav. Bank & Bldg. Ass'n v. Ford*, 27 Conn. 282, 71 Am. Dec. 66.

And in *Darrell v. Hilligoss M. M. & R. G. R. Co.*, 90 Ind. 264, where the defendant's plea of *nul tiel* corporation admitted that he had signed the plaintiff's articles of association, but stated no facts sufficient to show that the plaintiff had ceased to be a corporation, it was held that it must be presumed that the plaintiff had continued to be and still was a corporation at the time of the suit, and as such was in the possession of its corporate rights, property and franchises.

23. *Rikhoff v. Brown's R. S. S. M. Co.*, 68 Ind. 388.

24. *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

User may be shown by the production of a note given to the corporation upon a subscription to its capital stock. *Ramsey v. Peoria M. & F. Ins. Co.*, 55 Ill. 311.

**Deed of Trust.** — On an issue of corporate existence a deed of trust executed by the alleged corporation under its seal which recites that the corporation had been organized in pursuance of law is admissible as evidence. Such a deed is at least *prima facie* evidence of the corporate existence, and in the absence of evidence rebutting this presumption, is conclusive evidence. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

**Deed.** — In *Pilbrow v. Pilbrow A. R. & C. P. Co.*, 5 Man. G. & S. 440, 57 Eng. C. L. 439, an action of covenant based on a deed purporting to be the deed of a corporation, the court held not only that the deed was evidence of the existence of a corporation, but that as it recited that the company had been duly formed, it was conclusive evidence of that fact, the corporation being estopped

only by the production of the records.<sup>25</sup>

**Unconstitutional Statute.** — Evidence that an association of individuals conducted business in the corporate name cannot be received as evidence of user to establish a *de facto* corporation, where the statute under which the corporation was created is unconstitutional.<sup>26</sup>

**8. Parol Evidence.** — A. PURPOSES OF CORPORATION. — The terms and provisions of the articles of association, fixing the purposes for which the corporation was organized, cannot be limited by oral evidence.<sup>27</sup> And where under the articles the stockholders are individually liable for corporate debts, oral evidence of an agreement at the time of signing that they would not be so liable is inadmissible.<sup>28</sup>

B. CERTIFICATE AS TO CAPITAL STOCK FIXED AND PAID IN. — A certificate by the proper officers prescribed by statute, stating the amount of the capital fixed and paid in, and sworn to and recorded within the proper time, and in the proper office, is conclusive evidence for the stockholders of the facts therein stated, so far as to exempt them from liability for corporate debts subsequently contracted.<sup>29</sup>

C. FRAUD IN PROCUREMENT OF CHARTER. — A subscriber to the

by it from denying its existence as a corporation.

25. *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124, 43 Am. Dec. 457.

26. *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638.

27. *Kalamazoo v. Kalamazoo H. L. & P. Co.*, 124 Mich. 74, 82 N. W. 811.

Where a corporation has been incorporated under the provisions of a statute governing the formation of corporations for pecuniary profit, and upon the face of its articles of association appears to be an ordinary business corporation, evidence showing that it was in fact a charitable association is inadmissible. *Craig v. Benedictine S. H. Ass'n*, (Minn.), 93 N. W. 669. "We have held in several cases that the nature and character of the corporation must be determined from its articles of association, and that its character cannot be changed or modified by parol evidence that it was not in fact such a corporation as its articles purported to make it; that in determining the character of corporations, the articles of association are the sole guide. *Gould v. Fuller*, 79 Minn. 414, 82 N. W. 673. We are unable to distinguish that and other similar cases from the case at bar. The liability sought to be enforced in the case

just cited arose out of contract. That sought to be enforced in the case at bar arises from the alleged negligence of defendant and its officers. Logically, there can be no difference between the cases; and if in the *Fuller* case it was incompetent to vary the character of the corporation by parol evidence, it is equally so here. To be consistent, we must hold that as it appears from its articles of association that defendant is an ordinary business corporation, formed under title 2, c. 34, Gen. St. 1894, its nature and character cannot be shown to be different by parol evidence."

28. *Oswald v. Minneapolis Times Co.*, 65 Minn. 249, 68 N. W. 15.

29. *Stedman v. Eveleth*, 6 Metc. (Mass.) 114.

*Compare Veeder v. Mudgett*, 95 N. Y. 295, wherein it was held that a certificate by the proper officers of a corporation filed in compliance with the law, stating the amount of the capital stock of the corporation, and that the whole amount thereof was paid in, is not conclusive evidence of such payment in an action by a creditor to enforce liability for a corporate debt imposed upon stockholders by the law, because of failure to pay in the full amount of the capital stock. In which case it was also said that such a certificate

stock of a corporation who has accepted the charter and assisted in its organization cannot show as a defense in an action against him by the company that the charter was obtained by fraud.<sup>30</sup> Nor can the corporation show the falsity of the certificate of organization filed in compliance with law.<sup>31</sup>

## II. MATTERS AS TO MEMBERS OF A CORPORATION.

**1. Burden of Proof and Presumptions.** — A. THE FACT OF MEMBERSHIP. — On a proceeding instituted for the purpose of charging a person with some liability imposed upon him by virtue of his being a member of a corporation, the burden of proving the fact of membership is upon the party asserting it.<sup>32</sup> So also in an action against a corporation for dividends, the plaintiff must show his ownership of the stock at the time the dividends accrued.<sup>33</sup> And a person seeking the inspection of the corporate books must show that he is a *bona fide* stockholder.<sup>34</sup> But persons once shown to have been members will be presumed to have continued to be such until the contrary is shown.<sup>35</sup>

B. CREDITOR WITHOUT FURTHER REMEDY AGAINST CORPORATION. And creditors of a corporation seeking to charge the stockholders individually for corporate debts have the burden of showing that they have exhausted their legal remedies against the corporation without satisfaction, or that it is insolvent.<sup>36</sup>

C. GENUINENESS OF ISSUE OF STOCK. — The presumption is in favor of the validity of certificates of stock bearing the genuine signatures of the proper officers and the corporate seal,<sup>37</sup> and in an action to charge the members and officers of a corporation, individually, for fraudulently overissuing stock, it must be shown that the certificate in question did not represent genuine stock.<sup>38</sup>

did not even have the force of presumptive evidence of the fact of payment.

Where the charter of a bank provides that a board of commissioners named therein shall receive subscriptions to the capital stock, apportioning the stock among the subscribers and certifying their result in a manner provided therein, the decision of the commissioners that the whole of the capital stock has been legally subscribed is conclusive on the question whether the corporation was in that respect legally organized. *Litchfield Bank v. Church*, 29 Conn. 137.

30. *Smith v. Heidecker*, 39 Mo. 157.

31. *Dooley v. Cheshire G. Co.*, 15 Gray (Mass.) 494.

32. As, for example, liability for

unpaid subscriptions to the capital stock. *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827, 36 S. E. 256. Or for corporate debts. *Diven v. Lee*, 36 N. Y. 302.

33. *Dow v. Gould & C. Silv. Min. Co.*, 31 Cal. 629.

34. *People v. Northern Pac. R. Co.*, 18 Jones & S. (N. Y.) 456.

35. *Barron v. Paine*, 83 Me. 312, 22 Atl. 218. And in *Strong v. Wheaton*, 38 Barb. (N. Y.) 616.

36. *Fletcher v. Bank of Lonoke*, (Ark.), 69 S. W. 580.

37. *Hall v. Rose Hill & E. R. Co.*, 70 Ill. 673. See also *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

38. *Bruff v. Mali*, 36 N. Y. 200, holding also that after it has been shown that the whole amount of



D. TRANSFER OF STOCK. — So, also, one who attacks a *prima facie* valid transfer of stock on the ground of invalidity has the burden of proof.<sup>39</sup>

E. STOCK PAID FOR BY PROPERTY OVERVALUED. — In an action to charge the members of a corporation individually for corporate debts on the ground that the property for which stock was issued was turned in at an overvaluation, it must be shown that the purchase was in bad faith and to evade the law; it is not enough to show mere mistake or error of judgment.<sup>40</sup>

F. INSPECTION OF CORPORATE BOOKS. — Where a stockholder applies for the inspection of the corporate books, the presumption is that the inspection is sought in the interests of the corporation.<sup>41</sup>

2. **Best and Secondary Evidence.** — A. CONTRACT OF SUBSCRIPTION. — Where there is written evidence of the subscription to the capital stock of a corporation, such written evidence is the best evidence to prove the subscription.<sup>42</sup>

**Written Evidence Lost.** — But if the written evidence of subscription to the capital stock of a corporation is lost, parol evidence is admissible.<sup>43</sup> And within this rule the testimony of an officer may

stock authorized to be issued had been in fact issued prior to the issuing of the stock in question, it is then incumbent on the defendants to show definitely and affirmatively that the certificate in question represented genuine stock.

39. *Walker v. Detroit T. R. Co.*, 47 Mich. 338, 11 N. W. 187.

In an action against a corporation for refusal to transfer stock on its books, the presumption is that the stock was transferred and the certificate delivered in the ordinary course of business, and the plaintiff has not the burden of showing the title of his immediate transferrer. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

40. *Douglass v. Ireland*, 73 N. Y. 100.

In an action to charge the holders of stock in a corporation, issued upon and for the purchase of property individually, for corporate debts, on the ground that the property was purchased at an over-valuation, the value of the property purchased must be determined, and evidence thereof is competent. *Douglass v. Ireland*, 73 N. Y. 100. For a full discussion of the mode of proving value, see article "VALUE."

Where it is in issue whether property turned over to a corporation in payment of stock was turned in at an excessive valuation, official assessment lists on which the stockholders who had turned it in had paid taxes on the property, are competent evidence, notwithstanding that they are not sworn to. *Steam Stone Cutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1,076.

41. And when the refusal is based on the ground that the inspection is sought for purposes antagonistic to the corporation, the burden is upon the officers refusing inspection to show that the stockholder is not proceeding in good faith. *State v. Pacific B. & M. Co.*, 21 Wash. 451, 58 Pac. 584.

42. *Pittsburgh & S. R. Co. v. Gazzam*, 32 Pa. St. 340. See also *Coffin v. Collins*, 17 Me. 440.

43. *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440.

Where the charter of a corporation prescribes that subscriptions to its capital stock shall be subscribed in a book for that purpose, parol evidence cannot be received to prove the fact of subscription. *State v. Hancock*, 2 Pen. (Del.) 252, 45 Atl. 851.

be received.<sup>44</sup> And in case of the loss or destruction of the original stock subscription book, or of the commissioners' book, other books of record of the corporation are competent.<sup>45</sup> So also in such case is parol evidence,<sup>46</sup> or a certified copy of the recorded list of stockholders.<sup>47</sup>

A stipulation in a subscription to stock, making an order of the board of directors evidence of the performance of the condition on which the subscription becomes binding, does not preclude other competent evidence of that fact.<sup>48</sup>

**B. PAROL EVIDENCE.** — There is authority to the effect that membership in a corporation may be shown by parol evidence.<sup>49</sup>

**3. Documentary Evidence.** — **A. SUBSCRIPTION TO CAPITAL STOCK.** The original subscription to the capital stock of a corporation is competent evidence to show that the persons whose names appear thereon were subscribers to the capital stock.<sup>50</sup>

So also the subscription or stock book of a corporation, or the book of the commissioners appointed pursuant to law to receive subscriptions, is competent evidence of the fact that the persons whose names appear thereon were subscribers.<sup>51</sup>

**B. REQUISITE AMOUNT SUBSCRIBED.** — That the number of shares required by law or the charter of a corporation have been subscribed may be shown by the records of the corporation,<sup>52</sup> or by a certificate made and filed pursuant to law.<sup>53</sup>

44. *Congdon v. Winsor*, 17 R. I. 236, 21 Atl. 540.

45. *Congdon v. Winsor*, 17 R. I. 236, 21 Atl. 540.

**One Who Was Present at the Meeting** of commissioners in charge of the subscription books to corporate stock, may testify whether or not any money was paid in his presence on account of such subscriptions. *State v. Hancock*, 2 Pen. (Del.) 252, 45 Atl. 851.

**The Payment of a Subscription** to corporate stock may be proved by the parol testimony of the subscriber without the production of the corporate books. *State v. Hancock*, 2 Pen. (Del.) 252, 45 Atl. 851.

46. *Haynes v. Brown*, 36 N. H. 545.

47. *Cleveland v. Burnham*, 64 Wis. 347, 25 Mo. 407.

48. *Moore v. New Albany & S. R. Co.*, 15 Ind. 78.

49. *Chaffin v. Cummings*, 37 Me. 76.

50. *Partridge v. Badger*, 25 Barb. (N. Y.) 146.

51. *United States v. Hawley v.*

*Upton*, 102 U. S. 314; *Turnbull v. Payson*, 95 U. S. 418.

*Alabama.* — *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44.

*Georgia.* — *Wood v. Coosee & C. R. R. Co.*, 32 Ga. 273.

*Iowa.* — *Iowa & M. R. Co. v. Perkins*, 28 Iowa 281.

*Massachusetts.* — *Marlborough Br. R. Co. v. Arnold*, 9 Gray 159, 69 Am. Dec. 279.

*Virginia.* — *Grays v. Lynchburg & S. Tpke. Co.*, 4 Rand. 578; *Stuart v. Valley R. Co.*, 32 Gratt. 146.

*West Virginia.* — *Pittsburgh W. & K. R. Co. v. Applegate*, 21 W. Va. 172.

52. *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

53. Where a statute creating a corporation fastens liability on the stockholders for corporate debts until the whole amount of the capital stock fixed shall be paid, and a certificate thereof made and filed as provided by the statute, a certificate duly executed and filed as thus provided showing that the whole of the capital stock had been paid in is ad-

C. THE FACT OF MEMBERSHIP. — a. *Stock Books*. — (1.) **Non-Statutory Rule**. — In the absence of any statute on the question, the general rule is that the stock books of a corporation, containing the names of the holders of its stock, the number of shares issued, the amounts paid, etc., are competent *prima facie*<sup>54</sup> evidence of the ownership of the stock.<sup>55</sup> There is authority, however, to the effect that

missible for the purpose of determining the time when the stockholders' liability under the statute shall cease. *Booth v. Campbell*, 37 Md. 522.

54. That they are only *prima facie* evidence, see *Stephens v. Follett*, 43 Fed. 842; *Mudgett v. Horrell*, 33 Cal. 25; *Chaffin v. Cummings*, 37 Me. 76. Compare *Stratton v. Lyons*, 53 Vt. 130.

55. *United States*. — *Turnbull v. Payson*, 95 U. S. 418; *Glenn v. Liggett*, 47 Fed. 472.

*Alabama*. — *Lehman, Durr & Co. v. Glenn*, 87 Ala. 618, 6 So. 44.

*Colorado*. — *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

*Georgia*. — *Wood v. Coosee* C. R. R. Co., 32 Ga. 273; *Thornton v. Lane*, 11 Ga. 459; *Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156.

*Kansas*. — *Plumb v. Bank of Enterprise*, 48 Kan. 484, 29 Pac. 699.

*Maine*. — *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Coffin v. Collins*, 17 Me. 440.

*Maryland*. — *Weber v. Fickey*, 47 Md. 196; *Hammond v. Straus*, 53 Md. 1.

*Massachusetts*. — *Holyoke Bank v. Goodman P. Mfg. Co.*, 9 Cush. 576.

*Minnesota*. — *Holland v. Duluth I. Min. & D. Co.*, 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480.

*New Hampshire*. — *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *Haynes v. Brown*, 36 N. H. 545.

*New Jersey*. — *Downing v. Potts*, 23 N. J. L. 66; *In re Consolidated Tel. & T. Co.*, (N. J.), 43 Atl. 433.

*New York*. — *Hamilton & D. P. R. Co. v. Rice*, 7 Barb. 157; *Chapman v. Porter*, 69 N. Y. 276.

*North Carolina*. — *Glenn v. Orr*, 96 N. C. 413, 2 S. E. 538.

*Pennsylvania*. — *Bank of Commerce Appeal*, 73 Pa. St. 59.

*West Virginia*. — *Pittsburgh W. & K. R. Co. v. Applegate*, 21 W. Va. 172; *South Branch R. Co. v. Long*, 43 W. Va. 131, 27 S. E. 297.

"The Rule of Evidence Underlying This and Similar Decisions seems to be founded on convenience, and to rest upon the further ground that corporations in this country are the creatures of statute, with prescribed rights and powers, subject, to an important extent, to public control and supervision, and are therefore presumed to exercise their powers as alleged and required by law, and to copy their records properly and truly." *Glenn v. Orr*, 96 N. C. 413, 2 S. E. 538.

"It May Be Disputed, on Principle, or well recognized rules of evidence, to maintain the proposition that when the name of an individual appears on the books of a corporation as a stockholder, the presumption is that he is the owner of the stock and casts on him, in a suit against him as a stockholder, the burden of rebutting the presumption, without showing that it was placed there by his authority, express or implied, or that he had any notice of his name appearing on the books; but the proposition is upheld by great weight of authority, and should now be regarded as placed beyond the pale of discussion." *Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894.

After the introduction in evidence of a certificate of stock issued to the defendant, in an action for unpaid subscriptions, the corporation's stock certificate books and stock ledgers are admissible to show that the defendant was an original stockholder and that his stock was only partly paid. *Fish v. Smith*, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161.

On a proceeding to compel a corporation to permit the inspection of its books by a stockholder, in which

they alone are not *prima facie* evidence of membership; they should be accompanied by other evidence in order to satisfy the rule, such as evidence of participation in corporate affairs, and the like.<sup>56</sup> And under the latter rule a statute providing that "as regards the company" a person in whose name stock or shares stand on the books of a corporation shall be deemed the owner thereof, does not make the books admissible.<sup>57</sup>

**Transfer of Stock.**— So, also, the stock book kept as required by law is competent evidence of the transfer of stock,<sup>58</sup> although it is not conclusive evidence of ownership.<sup>59</sup>

**Right to Vote.**— It has been held that the stock books are *prima*

the president and manager of the corporation who was summoned by subpoena *duces tecum* produces the corporate books, the fact that the statute provides another mode of securing the production of the books in evidence is no objection to their admission under the circumstances. *Cobb v. Lagarde*, 129 Ala. 488, 30 So. 326.

**National Banks.**— In *Davis v. Essex Bap. Soc.*, 44 Conn. 582, it was held that the comptroller of the currency, in ordering assessments on stockholders as provided by law, must, in the absence of fraud or mistake, take the stock ledgers and certificates as showing who were members at the time the bank failed.

**56. Stock Books Alone Not Prima Facie Evidence of Membership.** *Carey v. Williams*, 79 Fed. 906; *Siqua Iron Co. v. Greene*, 104 Fed. 854; *Neilson v. Crawford*, 52 Cal. 248; *Mudgett v. Horrell*, 33 Cal. 25; *Weber v. Fickey*, 52 Md. 500; *Wheeler v. Walker*, 45 N. H. 355.

**Rule Stated.**— "If such books and entries were accompanied with other proof, such as that the alleged subscriber to the stock attended the meetings of stockholders or otherwise participated in organizing the company, or applied for or received the certificate of stock of the National Express and Transportation Company after it was organized, or had paid assessments upon the stock of the company, then the books of the company and the entries therein, made in due course of business, would have been evidence upon which the jury could have found that the alleged subscriber to the stock was a member of the corporation, though

the charter had been amended and changed subsequent to the time of the alleged original subscription." *National Exp. & Transp. Co. v. Morris*, 15 D. C. App. 262.

57. "But it is contended by the plaintiff that the statute of Virginia, which provides that 'a person in whose name stock or shares stand on the books of a company shall be deemed the owner thereof as regards the company,' authorized the introduction of the books of the corporation as evidence against the defendant. To this we cannot agree. It is manifest, we think, that this provision of the statute has no application to a case like the present. It does not profess, in terms, to make the books of the company admissible as evidence in favor of the company in actions against third parties. And as was said by the court in the case of *Carey v. Williams*, *supra*, where the same contention was urged as is urged here: 'This statute only means that a corporation which has acknowledged such a person as stockholder and admitted him to be such upon its records, shall not be at liberty to dispute the relation. Its language does not require any broader meaning to be given it.'" *National Exp. & Transp. Co. v. Morris*, 15 D. C. App. 262.

58. *Preston v. Cutter*, 64 N. H. 461, 13 Atl. 874.

**Date of Transfer.**— It is also competent evidence of the date of the transfer. *Kraft v. Coykendall*, 26 N. Y. St. 79, 7 N. Y. Supp. 140.

59. *May v. McQuillan*, 129 Mich. 392, 89 N. W. 45; *Baker's Appeal*, 108 Pa. St. 510, 1 Atl. 78, 56 Am. Rep. 231.

*facie* evidence of the right to vote of the persons in whose name the shares stand;<sup>60</sup> but in the absence of a statute otherwise, they are only *prima facie* evidence.<sup>61</sup>

(2.) **Statutory Rule.**— Sometimes the stock books just referred to are made *prima facie* evidence of the facts of membership by express statute.<sup>62</sup> And in some jurisdictions there are express statutes making the stock books of a corporation conclusive evidence of membership, so far as concerns the right of the member to vote at corporate meetings.<sup>63</sup>

b. *Other Documents.*— **Books of the Corporation, Other Than the Stock Books**, if unsupported by other evidence, are not admissible to prove membership in the corporation.<sup>64</sup>

A **Contract** indicating on its face that one of the parties thereto was a stockholder of a corporation at a certain time, and which, in connection with other evidence, tends to rebut his contention as to the time when his membership ceased, is relevant evidence on an

**60. Stock Books Prima Facie Evidence of Right to Vote.**— *People v. Robinson*, 64 Cal. 373, 1 Pac. 156; *State v. Ferris*, 42 Conn. 560; *Reynolds v. Bridenthal*, 57 Neb. 280, 77 N. W. 658; *Com. v. Dalzell*, 152 Pa. St. 217, 25 Atl. 535, 34 Am. St. Rep. 640; *Hoppin v. Buffum*, 9 R. I. 513.

**61. Books Only Prima Facie Evidence of Right to Vote in Absence of Statute.**— *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309.

**62. Bain v. Whitehaven & F. J. R. Co.**, 3 H. L. Cas. 1.

Persons sued as stockholders of a corporation are shown to be such by the production of the stockholders' book kept as provided by Mill's Ann. Stat., § 508, which makes it presumptive evidence of the facts therein stated, and by the testimony of a corporate officer that the book represented its stockholders and was the only book kept for that purpose; that it was kept in the ordinary course of business, and that the persons named took part in the meeting of the stockholders during the time their names appeared on the book. *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

**63. Stock Books Conclusive Evidence of Right to Vote.**— *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; *State v. Cronan*, 23 Nev. 437, 49 Pac. 41; *In re Cedar Grove Cemetery Co.*, 61

N. J. L. 422, 39 Atl. 1,024; *In re Leslie*, 58 N. J. L. 609, 33 Atl. 954; *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429. *Ex parte Willocks*, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; *People v. Tibbetts*, 4 Cow. (N. Y.) 358; *In re Argus Prtg. Co.*, 1 N. D. 434, 48 N. W. 347, 26 Am. St. Rep. 639.

**Under the New Jersey Statute**, the books of a corporation constitute the only evidence as to whom the stockholders are entitled to vote for at an election of directors; and the fact that the stock books were prepared by the secretary under direction of the board of directors, not at the time of its organization, but long afterwards, and from information collected from the cash ledger and other available sources, does not affect the admissibility of the books under the statute. *In re Cedar Grove Cem. Co.*, 61 N. J. L. 422, 39 Atl. 1,024.

**64. Hinsdale Sav. Bank v. New Hampshire Bkg. Co.**, 59 Kan. 716, 54 Pac. 1,051, 68 Am. St. Rep. 391. See also *Dowing v. Potts*, 23 N. J. L. 66.

**Entries in the Cash Book of a Corporation** purporting to be an account of moneys received by the corporation from various persons, on account of assessments on stock, are admissible to show that a person credited therein with such payments

issue of his membership.<sup>65</sup>

**Certificates of Stock** are also competent evidence of the fact of membership of the holder,<sup>66</sup> although it is also held that the certificate is but secondary evidence.<sup>67</sup> And they have been also held to be competent evidence of the transfer of the stock represented thereby.<sup>68</sup>

**4. Declarations and Admissions.**—That a certain person was a subscriber to the capital stock of a corporation cannot be shown by mere declarations of officers of the corporation.<sup>69</sup> But on an issue as to membership in a corporation, declarations of the chief executive officer of a corporation, made while in the performance of his duties as such officer, and denying the fact of membership, are admissible against the corporation.<sup>70</sup> But it may be shown by the admissions and declarations of the person himself.<sup>71</sup>

**5. Parol Evidence.**—A. IN GENERAL.—The rule prohibiting the reception of parol evidence to vary or contradict the terms of a contract applies to a written subscription to the capital stock of a corporation.<sup>72</sup>

is a stockholder. *Glenn v. Liggett*, 47 Fed. 472.

**65.** *Fouche v. Merchants' Nat. Bank*, 110 Ga. 827, 36 S. E. 256.

In an action to recover unpaid assessments upon shares of stock subscribed by the defendant in the plaintiff corporation, on an issue as to membership, an agreement between the defendant and a third party, by which the former guaranteed to the latter dividends on stock subscribed and taken by the latter in the plaintiff corporation is admissible in evidence. *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

**66.** *United States*.—*Turnbull v. Payson*, 95 U. S. 418.

*California*.—*Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.

*Illinois*.—*Dows v. Naper*, 91 Ill. 44.

*Kansas*.—*Baker v. Woolston*, 27 Kan. 185.

*Maine*.—*Bates v. Androscoggin & K. R. Co.*, 49 Me. 491.

*Massachusetts*.—*Boston & M. R. Co. v. Pearson*, 128 Mass. 445.

*Minnesota*.—*Minneapolis Hdw. Wks. v. Libby*, 24 Minn. 327.

*Missouri*.—*Vanstone v. Goodwin*, 42 Mo. App. 39.

*New Hampshire*.—*Haynes v. Brown*, 36 N. H. 545.

*New Jersey*.—*Mount Holly L. & M. Tpk. Co. v. Ferree*, 17 N. J. Eq. 117. *In re St. Lawrence S. B.*

*Co.*, 44 N. J. L. 529; *Burr v. Wilcox*, 22 N. Y. 551.

**67.** *Bank of Commerce's Appeal*, 73 Pa. St. 59. See also *Cleveland v. Burnham*, 64 Wis. 347, 25 N. W. 407.

**68.** *Thompson v. Alger*, 12 Metc. (Mass.) 428, so holding in an action for the price of stock claimed to have been sold by the plaintiff to the defendant.

**69.** *Troy & R. R. Co. v. Kerr*, 17 Barb. (N. Y.) 581.

**70.** *Tipton Fire Ins. Co. v. Barnheisel*, 92 Ind. 88. See also *Bates v. Androscoggin & K. R. Co.*, 49 Me. 491.

**71.** *Barron v. Burrill*, 86 Me. 66, 29 Atl. 939. See also *Congdon v. Winsor*, 17 R. I. 236, 21 Atl. 540.

**72.** *United States*.—*Davis v. Shafer*, 50 Fed. 764.

*Alabama*.—*Wurtzburger v. Aniston Rolling Mills*, 94 Ala. 640, 10 So. 129.

*Florida*.—*Martin v. Pensacola & G. R. Co.*, 8 Fla. 370, 73 Am. Dec. 713.

*Illinois*.—*Jewell v. Rock Paper Co.*, 101 Ill. 57; *Dill v. Wabash Val. R. Co.*, 21 Ill. 91.

*Indiana*.—*Johnson v. Crawfordsville F. K. & F. W. R. Co.*, 11 Ind. 280.

*Iowa*.—*Langford v. Ottumwa W. P. Co.*, 59 Iowa 283, 13 N. W. 303.

*Kansas*.—*Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 Pac. 601.

**An Unambiguous Writing** which is, on its face, not a subscription to the capital stock of a corporation cannot be shown to be such by parol evidence.<sup>73</sup>

**A Certificate of Commissioners Appointed Pursuant to Law** to receive subscriptions to the capital stock of a corporation, and to certify when the required amount has been subscribed, is conclusive evidence as to the validity of the subscriptions received, and the amounts thereof as against subscribers, at least in the absence of fraud.<sup>74</sup>

**Necessity of Assessment.** — In an action against a shareholder to recover an assessment levied on stock held by him, the necessity or wisdom of the assessment cannot be contradicted where it is within the power of the directors to make the assessment, at least in the absence of fraud.<sup>75</sup>

*Kentucky.* — *Wight v. Shelby R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522.

*Maryland.* — *Scarlett v. Academy of Music*, 46 Md. 132.

*Minnesota.* — *Masonic Temple Ass'n v. Channell*, 43 Minn. 353, 45 N. W. 716.

*Mississippi.* — *Thigpen v. Mississippi C. R. Co.*, 32 Miss. 347.

*New Hampshire.* — *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491.

*New Jersey.* — *Grosse Isle Hotel Co. v. P'Anson*, 43 N. J. L. 442.

*New York.* — *New York Ex. Co. v. DeWolf*, 5 Bosw. 593.

*North Carolina.* — *North Carolina R. Co. v. Leach*, 49 N. C. 340.

*South Carolina.* — *Marshall Fdry. Co. v. Killian*, (S. C.), 6 S. E. 680; *Carolina C. G. & C. R. Co. v. Seigler*, 24 S. C. 124.

*Vermont.* — *Connecticut & P. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

**Representations of One Soliciting Subscriptions** to the capital stock of a corporation made previous to, or contemporaneous with, the execution of the contract of subscription, are not admissible in evidence to vary the written contract. *Shattuck v. Robbins*, 68 N. H. 565, 44 Atl. 694; citing *White Mountain R. Co. v. Eastman*, 34 N. H. 124; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491.

Where the charter requires subscriptions to be subscribed in a book for that purpose, and fixes the minimum amount of the stock which must be paid in in cash before the organization shall be effected, parol evidence

is not admissible to vary the amount subscribed in the book. *State v. Hancock*, 2 Pen. (Del.) 252, 45 Atl. 851.

**Agreement to Take Part of Stock Subscribed.** — A subscriber to the capital stock of a corporation cannot show by parol that it was agreed between himself and the other promoters that he was to take only part of the stock subscribed by him. *Phoenix Whsg. Co. v. Badger*, 6 Hun (N. Y.) 293.

Although the act of incorporation requires the payment of a portion at the time of subscribing for the capital stock, a subscriber who subsequently exercised the rights of a stockholder will be estopped to deny the validity of his contract of subscription on the ground that such advance payment was not exacted. *Clark v. Monongahela Nav. Co.*, 10 Watts (Pa.) 364.

**A Non-Assenting Share Holder** is not estopped to deny the validity of bonds issued by a second corporation, to which the original corporation has transferred all its property, by the mere fact that he holds some of the bonds, where he has never asserted any rights thereunder. *Morris v. Elyton Land Co.*, 125 Ala. 263, 28 So. 513.

<sup>73</sup>. *Crane v. Elizabeth Lib. Ass'n.*, 29 N. J. L. 302.

<sup>74</sup>. *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

<sup>75</sup>. *Anglo-American L. Mtge. & Agency Co. v. Dyer*, 181 Mass. 593, 64 N. E. 416, 29 Am. St. Rep. 437.

**Knowledge of Charter.** — Where a corporate charter was duly recorded with the secretary of state, a subscriber to its capital stock, who has paid installments thereon, or participated in a stockholders' meeting, cannot be heard to deny knowledge of the provisions in the charter, although the corporate objects as set out in the charter differ from those stated in the prospectus and the subscribers' contract of subscription.<sup>76</sup>

**The Recital in the Articles of Incorporation** of the payment by the stockholders, who were also the directors, of the capital stock of a corporation, is only *prima facie* evidence of such payment in the absence of elements of estoppel, and hence is disputable by oral testimony.<sup>77</sup>

**B. CONDITIONAL DELIVERY OF SUBSCRIPTION.** — Parol evidence is not admissible to show that a subscription to the capital stock of a corporation, which is absolute on its face, was in fact made conditionally,<sup>78</sup> except in the case of fraud<sup>79</sup> or mistake.<sup>80</sup> Otherwise, however, when the subscription was delivered in escrow.<sup>81</sup>

**Fraud.** — The rule permitting parol evidence to show fraud in the procurement of a written contract applies to subscriptions to the capital stock of a corporation.<sup>82</sup>

**6. Circumstantial Evidence.** — Membership may be shown by circumstantial evidence, such as that the alleged member participated in the organization of the corporation, was elected an officer and acted as such.<sup>83</sup>

76. *West End R. E. Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900.

77. *Hequembourg v. Edwards*, 155 Mo. 514, 56 S. W. 490, reversing 50 S. W. 908, an action by the voluntary assignee of the corporation against the directors to recover the sum certified by the articles as having been paid in full, and holding that it was competent to show that only a portion of the capital stock had in fact been paid.

78. *United States*. — *Brewers F. Ins. Co. v. Clauson*, 4 Fed. Cas. No. 1,851.

*Connecticut*. — *Fairfield Co. Tpke. Co. v. Thorp*, 13 Conn. 173.

*Illinois*. — *Corwith v. Culver*, 69 Ill. 502.

*Indiana*. — *Cincinnati U. & F. W. R. Co. v. Pearce*, 28 Ind. 502; *McAlister v. Indianapolis & C. R. Co.*, 15 Ind. 11.

*Kentucky*. — *Wight v. Shelby R. Co.*, 16 B. Mon. 4, 63 Am. Dec. 522.

*Maine*. — *Kennebec & P. R. Co. v. Waters*, 34 Me. 369.

*Maryland*. — *Baile v. Calvert College Ed. Soc.*, 47 Md. 117.

*Nebraska*. — *Nebraska Expos. Ass'n v. Townley*, 46 Neb. 893, 65 N. W. 1,062.

79. See *infra* note 82.

80. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 606, 15 Pac. 544.

81. *Ottawa O. & F. R. Co. v. Hall*, 1 Ill. App. 612.

82. *New York Ex. Co. v. DeWolf*, 31 N. Y. 273; *Davis v. Meade*, 13 Serg. & R. (Pa.) 281.

Parol evidence offered for the purpose of showing that a stock subscription had been induced by false representations, by the one soliciting the subscription, is not objectionable upon the ground that it tends to vary or contradict the terms of a written instrument. *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607.

83. *Haynes v. Brown*, 36 N. H. 545. See also *Lexington & W. C. R. Co. v. Chandler*, 13 Metc. (Mass.) 311.



### III. MATTERS AS TO OFFICERS AND AGENTS.

**1. Judicial Notice.** — Judicial notice will be taken of an officer of a public corporation elected by the legislature,<sup>84</sup> but not of a mere officer or agent of a private corporation.<sup>85</sup>

**Duties.** — The duties of an officer of a private corporation cannot be judicially noticed.<sup>86</sup>

**2. Burden of Proof and Presumptions.** — A. THE RELATIONSHIP. — Persons acting publicly as officers of a corporation will be presumed rightfully in office, so far as it regards other persons.<sup>87</sup>

B. AUTHORITY TO ACT FOR CORPORATION. — a. *In General.* Where the authority of an officer or agent of a corporation to bind the corporation by his acts is challenged, that authority must be shown by competent evidence, and is not to be presumed as a matter of law.<sup>88</sup> Thus as a prerequisite to the admission in evidence of admissions and declarations of an officer or agent of a corpora-

84. *Roberts v. State Bank*, 9 Port. (Ala.) 312.

85. *Crawford v. Planters' & Merchants' Bank*, 6 Ala. 289.

The appointment by the board of directors as president *pro tempore* of the state bank, of a person named as a director by the legislature cannot be judicially noticed, but must be proved. *Crawford v. Branch Bank*, 7 Ala. 205.

86. *Brown v. Missouri K. & T. R. Co.*, 67 Mo. 122.

87. *Hall v. Carey*, 5 Ga. 239; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 282.

See fully on the question of election of officers of a corporation, the article "ELECTIONS."

**A Compliance With the Law by a Corporation** in respect of giving notice of and conducting the election of officers, and the qualifications of the electors and returning officers, will be presumed from the record and continued user under it. *Methodist Episcopal U. Ch. v. Pickett*, 19 N. Y. 482.

Where a certificate of incorporation states that the presiding officers were elected by a plurality of votes, the presumption is that they were elected by a majority vote in the absence of contrary evidence. *Methodist Episcopal U. Ch. v. Pickett*, 19 N. Y. 482.

The presumption is that the board

of directors of a corporation were elected at the time and place fixed by the by-laws, in the absence of anything to the contrary. *Jones v. Hillsdale Cem. Soc.*, 23 Ky. L. Rep. 1,486, 65 S. W. 838.

88. *City Elec. St. R. Co. v. First Nat. Ex. Bank*, 62 Ark. 33, 34 S. W. 89, 54 Am. St. Rep. 282, 31 L. R. A. 535.

**Directors.** — While it is not necessary that the acts of the directors of a corporation should be formal ones, nor necessarily in formal meetings, nor that they should be proved by record, but may be shown by circumstances or conduct, the directors must act as a board, and not as individuals; and accordingly in an action on an alleged contract which the plaintiff claims he made with the defendant corporation through its acting agent, the plaintiff has the burden to show either that the person acting as such agent was such in fact, to make the contract relied on, or was held out by the directors as having authority, or that the contract was assented to and ratified by the directors after it was made. *Peirce v. Morse-Oliver Bldg. Co.*, 94 Me. 406, 47 Atl. 914.

**Authority of Vice-President.** — In an action against a corporation to recover on transactions had with its vice-president, the corporation cannot be charged with indebtedness growing out of the same, unless plaintiff shows affirmatively that the

tion, it must be shown that he was in fact such officer or agent at the time and was acting within the scope of his agency.<sup>89</sup>

b. *Presumption From Exercise of Authority.* — The presumption is in favor of the authority of an officer or agent to act for the corporation in matters within the scope of his office or agency.<sup>90</sup> But

defendant had authorized the vice-president to engage in any of the transactions out of which the items charged grew, or that it had been benefited by them, or that with knowledge of them it had ratified his action. *Shavaliar v. Grand Rapids B. & L. Co.*, 128 Mich. 230, 87 N. W. 212.

**Management Vested in President and Directors.** — Where the articles of incorporation and the by-laws of a corporation vest the general management of the corporation in the president and board of directors only, the burden in an action against the corporation on a contract made with the secretary and treasurer is on the plaintiff to establish that the contract was binding on the corporation. *Extension Gold Min. & Mill. Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198.

**Power of General Manager to Convey Lands.** — There is no presumption that the general manager of a corporation has power to convey its lands or to grant an easement, or to give licenses therein. *Butte & B. Consol. Min. Co. v. Montana O. P. Co.*, (Mont.), 55 Pac. 112.

**Authority of Agent to Contract.** In an action against a corporation for breach of a contract alleged to have been made by an agent of the defendant, the burden of proof is on the plaintiff to show that the agent who made the contract had authority to do so and to bind the company, or that there was a ratification of the agreement by the company. *Savannah F. & W. R. Co. v. Humphreys*, 114 Ga. 681, 40 S. E. 711. "Corporations act entirely through their agents. They have agents in different departments of their service. Whether these agents have power to make certain contracts depends entirely upon the power given them by the corporation. When one of them makes a contract, the corporation is bound only when the making of a

contract was within the power of the agent, or when the contract has been, with full knowledge of the facts, ratified by the corporation."

An architect suing for services rendered a corporation in drawing plans for a new building at the instance of the president, is not entitled to recover without other evidence of the president's authority to make the contract than the fact that he had previously employed the plaintiff to improve or remodel another building belonging to the corporation. *Mathias v. White Sulphur Sprgs. Ass'n*, 19 Mont. 359, 48 Pac. 624. "The mere circumstance that once before the president had had some repairs or remodeling done by plaintiff upon a building belonging to the company is not enough to warrant the presumption that he had the power to enter upon this contract. Needed repairs of a building, already built and belonging to the company, may very appropriately be deemed within the ordinary scope of the business of the corporation, pertaining to the best preservation of its property; but the right of contracting for plans for a valuable new building is a step in the acquisition of new property, which is an entirely different matter, and one upon which the board could alone ordinarily act, unless it delegated the power to do so to some one else."

89. *Hannibal & St. J. R. Co. v. Green*, 68 Mo. 169; *Mobile & G. R. Co. v. Cogsbill*, 85 Ala. 456, 5 So. 188.

See further on this question *infra* this article, *Matters as to the Management of the Corporation*. And see articles "ADMISSIONS;" "DECLARATIONS."

90. **Presumption of Authority from Exercise Within Scope of Office or Agency.** — *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334; *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680, affirming 40 Ill. App. 350; *National*

such presumption does not arise from the mere fact of his exercising it.<sup>91</sup> But it cannot be presumed that an agent of a corporation had authority to transact business which the corporation itself was not, by its charter, authorized to engage in.<sup>92</sup>

*c. Presumption From Execution of Instrument Under Corporate Seal.*—A corporation can, however, act only through its proper officers, and any act, such as the execution of a written instrument, on behalf of the corporation, which is regular on its face and not clearly, or shown to be, foreign to the regular business of the corporation, will, in the absence of evidence to the contrary, be presumed to have been authorized to be done or executed by the corporate body,<sup>93</sup> although it is held that where an instrument

*State Bank v. Vigo Co. Nat. Bank*, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; *Louisville E. & St. L. R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770; *Fayles v. National Ins. Co.*, 49 Mo. 380; *Lucky Queen Min. Co. v. Abraham*, 26 Or. 282, 38 Pac. 65; *Carrigan v. Port Crescent Imp. Co.*, 6 Wash. 590, 34 Pac. 148.

<sup>91.</sup> *City Elec. St. R. Co. v. First Nat. Ex. Bank*, 62 Ark. 33, 34 S. W. 89, 54 Am. St. Rep. 282, 31 L. R. A. 535.

<sup>92.</sup> *Alexander v. Cauldwell*, 83 N. Y. 480.

<sup>93.</sup> *United States v. Mickey v. Stratton*, 5 Sawy. 475, 17 Fed. Cas. No. 9,530.

*California.*—*Miners D. Co. v. Zellerbach*, 37 Cal. 543.

*Illinois.*—*Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48 N. E. 154; *Anderson Trans. Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251; *Goodrich v. Reynolds*, 31 Ill. 490.

*Iowa.*—*Morse v. Beale*, 68 Iowa 463, 27 N. W. 461.

*Kansas.*—*Sherman C. T. Co. v. Swigart*, 43 Kan. 292, 23 Pac. 569; *Neosho Val. Inv. Co. v. Hannum*, 10 Kan. App. 499, 63 Pac. 92; *Nat. Bank of Commerce v. Atkinson*, 8 Kan. App. 30, 54 Pac. 8.

*Maine.*—*New Eng. W. & C. Co. v. Farmington E. C. L. & P. Co.*, 84 Me. 284, 24 Atl. 848.

*Massachusetts.*—*Hamilton v. McLaughlin*, 145 Mass. 20, 12 N. E. 424.

*Minnesota.*—*Morris v. Keil*, 20 Minn. 474.

*New York.*—*Canandarqua Academy v. McKechnie*, 90 N. Y. 618.

*West Virginia.*—*Lamb v. Cecil*, 25 W. Va. 288.

In the absence of evidence to the contrary, the presumption is in favor of the authority of the president of a corporation to act for it in all matters within the ordinary course of its business. *White v. Elgin C. Co.*, 108 Iowa 522, 79 N. W. 283. And the corporation cannot be heard to deny in any particular instance, that its president has the power which it has customarily allowed him to exercise in the face of the public. *St. Clair v. Rutledge*, 115 (Wis.) 583, 92 N. W. 234.

*Submission to Arbitration.*—In *Fryeburg Canal v. Frye*, 5 Me. 38, a committee properly chosen by a corporation entered into a submission of demands to arbitrators as provided by statute, representing themselves in the submission as duly authorized so to do, and the corporation was heard upon the merits before the arbitrators, and it was held that the presumption was that the committee had due authority to make such submission.

In *Conover v. Mut. Ins. Co.*, 1 N. Y. 290, it was held that although a policy of insurance prohibited an assignment of the interest of the insured except on the written consent of the company, yet, where the secretary, on an application to him at the office of the company, indorsed on the policy and subscribed such a consent, his authority to do so would be presumed in the absence of evidence to the contrary.

Unless otherwise provided by statute, the charter of the corporation,

executed by the proper officers of the corporation, although reciting authority to execute it, has not the corporate seal attached, the authority to execute it will not be presumed, and must be proved *aliunde*.<sup>94</sup>

or its by-laws, the deed of a corporation may be executed by its vice-president as well as by its president, and when so executed, with other necessary formalities, it will be presumed that the vice-president had authority to act on behalf of the corporation. *Ellison v. Branstrator*, 153 Ind. 146, 54 N. E. 433.

Where a contract is consummated entirely through correspondence, the fact that the letters were signed individually by one who was president and manager of the corporation, alleged to be a party to the contract, is not conclusive evidence that he acted in his individual capacity. *Towers v. Steven's Cattle Co.*, 83 Minn. 243, 86 N. W. 88. "No doubt, where the instrument evidencing the contract is complete, and it appears from its terms that the party who signed it is the contracting party, parol evidence cannot be introduced to change it . . . ; but where the manager of a corporation, acting for it, uses his own signature, and it is doubtful even then whether he was using such signature for corporate or individual purposes, such doubt may be resolved, if the evidence justifies, in favor of the conclusion that he made use of the same for the corporation. We think the views stated above find support in the case of *Bank v. Boardman*, 46 Minn. 293, 48 N. W. 1,116, where it was held that the signature of the officer of the bank was *prima facie* the official act of such treasurer and the contract of the corporation; but being only *prima facie* evidence of such relation, it might, of course, be shown to be an individual instead of an official act."

**Where the Name of a Corporation as Grantor**, together with its common seal, is affixed to a deed by one signing his name as treasurer of the corporation, the presumption is that such officer had authority to execute the instrument in behalf of the corporation. *Carr v. Georgia L.*

& T. Co., 108 Ga. 757, 33 S. E. 190.

<sup>94</sup>. *American Sav. & L. Ass'n v. Smith*, 122 Ala. 502, 27 So. 919. Compare *Catlett v. Starr*, 70 Tex. 485, 7 S. W. 844.

**Where the Common Seal of a Corporation Appears to Be Affixed to an Instrument**, and the signature thereto of the proper officer is proved, the seal is *prima facie* evidence that it was affixed by proper authority. *Canandargua Academy v. McKechnie*, 90 N. Y. 618.

**The Secretary of a Corporation Is the Proper Custodian of the Corporate Seal**, and when he affixes it to an instrument purporting to be executed by the corporation, the presumption is that he did it by authority, and those who undertake to dispute such authority have the burden of proving that fact. *Evans v. Lee*, 11 Nev. 194.

**A Corporation Mortgage** duly executed under the hands of the proper executive officers of the company, attested by its corporate seal and delivered to the mortgagee, and for which valuable consideration passed to the corporation co-incidental with its delivery, will not be held invalid in an action to foreclose the mortgage because there is no proof that a resolution of the board of directors was passed authorizing and directing the making of the mortgage. *Reed v. Heloise Carbide Specialty Co.*, (N. J.), 53 Atl. 1,057.

**An Assignment of a Cause of Action in Favor of a Corporation** for breach of a contract is presumed to have been authorized by the corporation, where it is executed by the president, and attested by the secretary, with the corporate seal affixed thereto. *Texas & P. R. Co. v. Davis*, (Tex. Civ. App.), 54 S. W. 381; *reversed* on other grounds, 55 S. W. 562.

**Where a Note and Warrant of Attorney** are executed in the name and under the seal of a corporation

**3. Best and Secondary Evidence.**—It was formerly the rule that a corporation could appoint an agent only under seal, and that his authority could not be shown by parol,<sup>95</sup> but this doctrine has long since been abandoned, and it is now generally held that in the absence of a charter or statutory restriction, the appointment of an agent of a corporation, and his authority to bind it in a particular transaction, may be shown by parol,<sup>96</sup> the same as in the case of

by its president, authority to execute them will be presumed. *Anderson Trans. Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251.

Compare *Raub v. Blairstown C. Ass'n*, 56 N. J. L. 262, 28 Atl. 384, holding that there is no presumption of authority on the part of the president of a corporation arising from his attaching a common paper seal to a cognovit and stating in the certificate, "witness the corporate seal of said defendant," there having been in fact no delegation of authority to him by the corporation to sign the cognovit or attach the seal.

**95. The Records of a Manufacturing Corporation Are the Best Evidence** of the authority of its officers and agents to bind the corporation by contract; but if the plaintiff in an action against the corporation notifies it to produce its records, which it refuses to do, he may give other competent evidence of the authority of such agents. *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. (Mass.) 282.

**96. United States.**—*Leroy & C. V. A. L. R. Co. v. Sidell*, 66 Fed. 27, 13 C. C. A. 308; *Pennsylvania R. Co. v. Keokuk & H. B. Co.*, 131 U. S. 371.

*Connecticut.*—*Union Mfg. Co. v. Pitkin*, 14 Conn. 174; *Hart v. Stone*, 30 Conn. 94.

*Indiana.*—*Ross v. Madison*, 1 Ind. 281, 48 Am. Dec. 361.

*Maine.*—*Badger v. Bank of Cumberland*, 26 Me. 428; *Baker v. Cotter*, 45 Me. 236.

*New York.*—*Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544.

*Oregon.*—*Columbia River & P. S. Nav. Co. v. Vancouver Transp. Co.*, 32 Or. 532, 52 Pac. 513; *Calvert v. Idaho Stage Co.*, 25 Or. 412, 36 Pac. 24.

*Texas.*—*Hamm v. Drew*, 83 Tex. 77, 18 S. W. 434.

**Rule Stated.**—"The existence of such authority in subordinate officers may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the board. It may be established by proof of the course of business between the parties themselves; by the usages and practices which the company may have permitted to grow up in its business; and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation." *Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192.

In *Cabot v. Given*, 45 Me. 144, an action by an indorsee against the maker of a note, payable to a corporation, and indorsed and transferred for the corporation by the president, it was held that parol evidence that he was acting as president at the time of the indorsement was admissible without producing the corporate records.

Parol evidence is admissible for the purpose of showing that at a certain time certain persons were acting as officers of a corporation. *Ca-hill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich) 124, 43 Am. Dec. 457; *White v. State*, 69 Ind. 273.

Parol evidence is admissible to show the nature and extent of the duties of the general manager of a corporation, where it is shown that his duties had never been defined by resolution of the board of directors. *Clarke v. Lexington S. Wks.*, 24 Ky. L. Rep. 1,755, 72 S. W. 286, 73 S. W. 288.

a private individual.<sup>97</sup>

4. **Documentary Evidence.** — The authority of corporate officers to act for the corporation may be shown by the corporate records.<sup>98</sup> So also may the ratification of the acts of corporate agents.<sup>99</sup>

5. **Admissions and Declarations.** — The authority of an officer or agent of a corporation cannot be established by evidence of the admissions and declarations of the officer or agent himself, where they were not known to, or acquiesced in by, the corporation.<sup>1</sup> But the authority of others to act for the corporation may be established by evidence of the admissions and declarations of officers and agents of the corporation.<sup>2</sup>

**An Agent of a Corporation Acting Under a Parol Authority** is a competent witness to prove his own agency. *Gould v. Norfolk L. Co.*, 9 Cush. (Mass.) 338, 57 Am. Dec. 50.

97. For a Full Discussion as to matters of evidence to establish agency, see the article "PRINCIPAL AND AGENT."

98. See *State v. Manhattan Rubber Mfg. Co.*, 149 Mo. 181, 50 S. W. 321.

Authority of corporate officers to execute a mortgage is proved by the corporate records reciting that at a meeting of the stockholders held on a date named, when all of the stockholders were present, the mortgage having been drawn up was read and a motion was made and carried, approving the same. *Crossette v. Jordan*, (Mich.), 92 N. W. 782.

Where it is in issue whether or not a certain person was agent of a corporation at the time he was transacting certain business as its purported agent, the minutes of the board of directors and its articles of incorporation referring to him as such agent, and letters written by him as such agent in respect of the transaction in question and his own testimony are sufficient to raise a question of fact for the jury. *Clark v. Lexington Stove Works*, 24 Ky. L. Rep. 1,755, 72 S. W. 286, 73 S. W. 288.

**By-Laws.** — The scope of authority of a corporate officer may be shown by the by-laws. *Railway E. & Pub. Co. v. Lincoln Nat. Bank*, 63 N. Y. St. 338, 31 N. Y. Supp. 44.

99. *Howard Ins. Co. v. Hope Mut. Ins. Co.*, 22 Conn. 394.

1. *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 106 Iowa 229, 76 N. W. 696; *Bank of N. Y. Nat. Bank Ass'n v. American D. & T. Co.*, 143 N. Y. 559, 38 N. E. 713.

Where the articles of incorporation and by-laws of the corporation vest the general management of the corporation in the president and board of directors only, evidence of declarations by the secretary and treasurer of the corporation are not admissible to prove his authority to make a contract for the corporation. *Extension Gold Min. & Mill. Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198, citing *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565; *Columbia Nat. Bank v. Rice*, 48 Neb. 428, 67 N. W. 165.

**The Admissions of the President and Principal Stockholder** and general manager of a corporation as to the extent of his authority are admissible against the corporation. *Texas S. C. O. Co. v. National C. O. Co.*, (Tex. Civ. App.), 40 S. W. 159.

2. *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565. See also *Laredo El L. & Mach. Co. v. U. S. Elec. L. Co.*, (Tex. Civ. App.), 26 S. W. 310.

Where it is in issue whether or not the plaintiff was in the employ of the defendant corporation, a record of a stockholders' meeting reporting the action of the stockholders on work done by the plaintiff, is admissible as an admission of employment. *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887. "It is to be remembered with reference to this and other exceptions that admissions are evi-

**6. Circumstantial Evidence.** — A. AUTHORITY. — Upon an issue as to whether or not an officer had authority to bind the corporation in any particular transaction, evidence of recognition by the corporation of such officer's authority<sup>3</sup> in other similar transactions is admissible.<sup>4</sup>

B. RATIFICATION OF UNAUTHORIZED ACTS. — So on an issue of ratification by a corporation of unauthorized acts of its agents, the fact that the corporation had recognized other similar acts as binding on it about the same time is material and competent.<sup>5</sup> So also is evidence that it failed to disclaim or repudiate such acts when advised of them.<sup>6</sup>

#### IV. POWERS OF CORPORATIONS.

**1. Judicial Notice.** — Where the charter of a domestic corporation is a public law, judicial notice will be taken of its powers,<sup>7</sup> but not

dence against the party making them, although they related to the contents of a written paper or to a corporate vote. This vote may require a special notice in order to be good, but an admission made by the corporation at any time is evidence that the necessary conditions were performed."

**3. Recognition by Corporation of Acts of Officers.** — *Talledago Ins. Co. v. Peacock*, 67 Ala. 253; *Equitable Gas L. Co. v. Baltimore C. & T. Mfg. Co.*, 65 Md. 73, 3 Atl. 108; *Melledge v. Boston I. Co.*, 5 Cush. (Mass.) 158, 51 Am. Dec. 59; *Washington M. F. Ins. Co. v. St. Mary's Sem.*, 52 Mo. 480; *Nicholas v. Oliver*, 36 N. H. 218.

**4.** *Scribner v. Flagg Mfg. Co.*, 175 Mass. 536, 56 N. E. 603; *Allen v. Citizens' Steam Nav. Co.*, 22 Cal. 28; *Williams v. Christian Female College*, 29 Mo. 250, 77 Am. Dec. 569.

Where it is in issue whether or not the officers of a corporation had authority to execute certain promissory notes in the name of the corporation, evidence that other notes than those in question had been given by the same officers and recognized by the directors, is competent. *Moss v. Averell*, 10 N. Y. 449.

Evidence that an officer of the corporation, he being the sole agent thereof, in transacting business at his office has been in the uniform habit of doing certain acts, making regular entries thereof in the books of the

company without any objection or repudiation on the part of the company, is competent evidence on an issue as to his authority to do those acts. *Conover v. Mutual Ins. Co.*, 1 N. Y. 290.

In *Clarke v. Warwick Cy. Mfg. Co.*, 174 Mass. 434, 54 N. E. 887, the question whether or not a certain person was president of a corporation in 1898 became material, and the only election of officers that appeared was in 1894, and it was held that the fact that such person continued to act in 1896, coupled with his assuming to carry out a vote in 1898, giving authority to the president, tended to show that he still held the office in 1898.

**The Payment of an Unaccepted Draft** on a corporation by its agent is no evidence of his authority to accept drafts on the corporation, and the fact that such acceptor acted as general agent has little tendency to show such authority. *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 338, 57 Am. Dec. 50.

**5.** *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565.

**6.** *McMahan v. Canadian P. R. Co.*, 40 Or. 148, 66 Pac. 708. See also *Lee v. Pittsburgh C. & Min. Co.*, 56 How. Pr. (N. Y.) 373.

**7.** *Beaty v. Knowler*, 4 Pet. (U. S.) 152; *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74; *State Bank v. Watkins*, 6 Ark. 123; *Washington v. Finley*, 10 Ark. 423, 52 Am. Dec. 244.

where the statute is a private one.<sup>8</sup>

**Foreign Corporations.**—Judicial notice cannot be taken of the powers of a foreign corporation.<sup>9</sup>

**2. Burden of Proof and Presumptions.**—A. IN GENERAL. *Prima facie* the acts<sup>10</sup> and contracts of a corporation are valid, there being no presumption of excess of power attached to them;<sup>11</sup> and

And see *Kelley v. Alabama & C. R. Co.*, 58 Ala. 489.

**The Fact That a Railroad Company Is a Common Carrier**, authorized as such to transport freight and passengers, may be judicially noticed by the courts. *Caldwell v. Richmond & D. R. Co.*, 89 Ga. 550, 15 S. E. 678; *Boyle v. Great Northern R. Co.*, 13 Wash. 383, 43 Pac. 344.

**Free Masons.**—In *Burdine v. Grand Lodge*, 37 Ala. 478, it was held that the courts would take judicial notice of the fact that the society of free masons is a purely charitable corporation.

**Bank.**—Where a corporation is by public law made a bank of discount and deposit, judicial notice of that fact will be taken. *Gordon v. Montgomery*, 19 Ind. 110.

In *People v. Terney*, 32 N. Y. St. 605, 10 N. Y. Supp. 940, it was held that a court cannot take judicial notice of the existence or operation of a telegraph company outside of its territorial jurisdiction. "The fact," said the court, "that an act of congress has made it possible for a telegraph company, which is purely a private corporation, created under general laws, by which certain restrictions and limitations are imposed, to, under certain restrictions, establish business relations with the federal government, does not, we think, without proof that such relations have been formed, justify the court in assuming that it extends beyond the limits of the state, and has assumed such relations with the United States as to deprive the state, by which it was created, and within which it is proved to have property liable to taxation, from exercising its taxing powers."

8. Corporate powers will not be judicially noticed where the corporation derives its existence from a special act of incorporation, although if it be shown to have been formed

under the general laws which authorize the formation and define the powers of corporations, these are public laws of which notice must be taken, and of course to these the powers of the corporation must be referred. *Kelley v. Alabama & C. R. Co.*, 58 Ala. 489.

9. It is held in *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74, that although the courts of that state take judicial notice of the powers of corporations so far as defined by the laws of Michigan, no such notice could be taken of powers conferred by statutes of other states, for that would be taking judicial notice of foreign laws.

10. *Ginn v. Hamock*, 31 Me. 42; *Star Brick Co. v. Riddsale*, 36 N. J. L. 229.

"In the ordinary dealings of trading corporations, and within the scope and purview of their chartered powers, the same intendments and implications arise as would spring out of similar acts or conduct of natural persons." *Tennessee River Transp. Co. v. Kavanaugh*, 93 Ala. 324, 9 So. 396.

"Courts cannot disregard as illegal or unauthorized the dealings and the acts of private corporations which, on their face, or according to their apparent import, are within their charter or articles. In the absence of proof there is no legal presumption that the law has been violated. On the contrary, artificial bodies, like natural persons, are entitled to the benefit of the rule which imports honesty rather than wrong to the conduct of men." *Fink v. Canyon R. Co.*, 5 Or. 301.

11. Where a contract of a corporation does not disclose on its face that it is *ultra vires*, the burden of proof that it is so is on the party asserting that fact. *Allen v. West Point Min. & Mfg. Co.*, 132 Ala. 292, 31 So. 462. "It is well settled that capacity to make contracts necessary



parties seeking to avoid or impeach such acts or contracts because they are thought to be beyond the scope of its powers, must do so by an affirmative showing, the burden being with them to show such a condition if they would prevail.<sup>12</sup> This presumption,

and proper to enable a corporation to accomplish the purposes of its creation is an incidental corporate power. There is no presumption of illegality, or abuse, . . . or excess of power attaching to its contracts. *Prima facie* they are valid and the burden of showing invalidity rests on those impeaching them." *Citing Alabama G. L. Ins. Co. v. Central A. & Mech. Ass'n*, 54 Ala. 75; *Boulware v. Davis*, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601.

**A Debt Due to a Corporation** will be presumed to have been contracted in the lawful course of business until the contrary is shown. *New York F. Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664. See also *Dockery v. Miller*, 9 Humph. (Tenn.) 731.

**Bills and Notes.**—Where corporations, unless expressly prohibited by charter, have power to make and receive bills and notes in carrying on their lawful business, the presumption is in favor of the validity of notes and bills made by or to such corporations, and that they were made in lawful course of business, until the contrary is shown. *Oxford Iron Co. v. Spradley*, 46 Ala. 98; *Mitchell v. Rome R. Co.*, 17 Ga. 574; *Safford v. Wyckoff*, 4 Huil (N. Y.) 442. Compare *McCullough v. Moss*, 5 Denio (N. Y.) 567.

**An Assignment of a Chose in Action** will, in absence of proof to the contrary, be presumed to have been valid. *Blake v. Holley*, 14 Ind. 383.

In *Farmers' L. & T. Co. v. Perry*, 3 Sandf. Ch. (N. Y.) 339, the plaintiff corporation was created by statute with power to make life and fire insurance, grant annuities, and to make loans and invest its capital in bonds and mortgages; and it was held that, in an action by it to foreclose a bond and mortgage executed to it, it was not necessary for it to show that the loan secured thereby was made out of trust funds. See also *McFarlane v. Triton Ins. Co.*, 4 Denio (N. Y.) 392.

## 12. Presumption in Favor of Power of Corporation Generally.

*England.*—*Scottish N. E. R. Co. v. Stewart*, 3 Macq. H. L. 382.

*United States.*—*Tappan v. Cleveland C. & C. R. Co.*, 1 Flip. 74, 24 Fed. Cas. No. 14,099; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258; *Express Co. v. Railroad Co.*, 99 U. S. 191.

*Alabama.*—*Alabama G. L. Ins. Co. v. Central Agri. & Mech. Ass'n*, 54 Ala. 73.

*California.*—*Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620.

*Georgia.*—*White v. Barlow*, 72 Ga. 887.

*Iowa.*—*Wardner v. Jack*, 82 Iowa 435, 48 N. W. 729.

*Michigan.*—*Harrison Wire Co. v. Moore*, 55 Mich. 610, 22 N. W. 62.

*Minnesota.*—*Baker v. Northwestern G. L. Co.*, 36 Minn. 185, 30 N. W. 464; *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207.

*Mississippi.*—*Bank of Augusta v. Conrey*, 6 Cushm. 667.

*Nebraska.*—*Gorder v. Plattsmouth C. Co.*, 36 Neb. 548, 54 N. W. 830.

*New Hampshire.*—*Downing v. Mt. Washington R. Co.*, 40 N. H. 230.

*New Jersey.*—*Ellerman v. Chicago J. C. R. & U. S. Co.*, 49 N. J. Eq. 217, 23 Atl. 287; *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 241; *Morris & E. R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542.

*New York.*—*DeGraff v. American Linen Thread Co.*, 21 N. Y. 127; *Rider L. R. Co. v. Roach*, 97 N. Y. 378.

*Ohio.*—*Straus v. Eagle Ins. Co.*, 5 Ohio St. 60.

*Oregon.*—*U. S. Mortgage Co. v. McClure*, (Or.), 70 Pac. 543.

*Wisconsin.*—*Howard v. Boorman*, 17 Wis. 459.

Where it is in issue whether or not an accommodation indorsement by a corporation was *ultra vires*, the burden of showing that fact is

however, only arises in cases where it appears the corporation is empowered to contract under the authority of its charter, or the laws of the state.<sup>13</sup>

**B. CARRYING ON BUSINESS.** — And where a corporation is found to be engaged in a certain kind of business, it will be presumed, at least as against the corporation, in the absence of definite and positive proof to the contrary, that the carrying on of such business is one of the powers with which it is endowed.<sup>14</sup>

**C. POWER TO TAKE AND HOLD PROPERTY.** — Again, the presumption is in favor of the power of a corporation to take and hold property; the presumption being that it is held to carry out the purposes for which the corporation was formed.<sup>15</sup>

not imposed on the corporation by the production of the note with the indorsement of the payee, where the evidence of the payee discloses in detail the facts and circumstances surrounding the execution and endorsement of the note. *Carney v. Duniway*, 35 Or. 131, 57 Pac. 192, 58 Pac. 105.

**A Borrower from a National Bank** who has given real estate security for the loan cannot be heard to deny the right of the bank to enforce the provisions of the mortgage because of the section of the United States Statutes prohibiting the taking of real estate security for a loan negotiated by a national bank. *First Nat. Bank v. Grosshans*, 61 Neb. 575, 85 N. W. 542. See also *Bank v. Flathers*, 45 La. Ann. 75, 12 So. 243, 40 Am. St. Rep. 216.

**Where a Corporation Contests the Validity of an Obligation** by it, on the ground that it violates an agreement between the stockholders for the creation of no debt exceeding a certain amount, except with the consent of a certain proportion of all the stockholders, the corporation has the burden of showing that the obligation in question was within the meaning of the agreement. *King Co. L. & L. S. Co. v. Thomson*, 21 Tex. Civ. App. 473, 51 S. W. 890.

**Proof of Dealings.** — Where the issue is as to the powers of a corporation, proof of the exercise of such powers by the corporation is not enough where such powers are not necessarily implied by corporate existence, but depend on the franchises actually bestowed on the corporation.

*Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74.

13. *Tappan v. Cleveland C. & C. R. Co.*, 1 Flip. 74, 24 Fed. Cas. No. 14,099.

**Prima Facie** all corporate bodies are bound by contracts under their common seal; but this *prima facie* power to contract cannot be insisted upon as to matters which, from the nature of the corporate body or the object of its incorporation, it is expressly or impliedly "by reasonable inferences, prohibited from contracting." *Shrewsbury & B. R. Co. v. Northwestern R. Co.*, 6 H. L. Cas. 113.

**Notes Given by a Corporation for Individual Obligations of the Members** of the corporation will be presumed to be *ultra vires*. *McLellan v. Detroit File Works*, 56 Mich. 579, 23 N. W. 321.

14. *Union Trust Co. v. Kendall*, 20 Kan. 515.

15. **Presumption of Power to Take and Hold Property.** — *Myers v. Croft*, 13 Wall. (U. S.) 291; *Stockton Sav. Bank v. Staples*, 98 Cal. 189, 32 Pac. 936; *New Haven S. B. Transp. Co. v. Vanderbilt*, 16 Conn. 421; *Hart v. Missouri State Mut. F. & M. Ins. Co.*, 21 Mo. 91; *Chautauqua Co. Bank v. Risley*, 19 N. Y. 369; *Yates v. Van de Bogert*, 56 N. Y. 526; *Mallett v. Simpson*, 94 N. C. 37, 55 Am. Rep. 594.

Where a railroad corporation is authorized by its charter to acquire by purchase such real estate as may be necessary for the construction of the road, it will be presumed that lands deeded to it are acquired for

D. POWER TO ALIENATE PROPERTY. — And the power of a corporation to alienate property will be presumed.<sup>16</sup>

E. POWER TO TAKE CORPORATE STOCK. — And since corporations are sometimes allowed to take and hold stock of another corporation, their power to do so will be presumed,<sup>17</sup> and the burden of showing its lack is on one who questions the power.<sup>18</sup> And the rule has been held to apply to power to purchase its own stock.<sup>19</sup>

3. **Documentary Evidence.** — The articles of incorporation are admissible in evidence to show what business the corporation was authorized to transact.<sup>20</sup>

4. **Best Evidence.** — The best evidence of the powers of a corporation is the charter defining those powers.<sup>21</sup>

5. **Circumstantial Evidence.** — Where it is in issue whether or not the making of a certain contract was within the incidental powers of a corporation, evidence that the corporation had executed previous similar contracts with other persons is admissible, as tending to show that the contract in controversy was executed within the implied powers of the corporation.<sup>22</sup>

that purpose. *Yates v. Van de Bogert*, 56 N. Y. 526.

In *Trenton Bkg. Co. v. Woodruff*, 2 N. J. Eq. 117, the charter of the plaintiff corporation declared that it should "not directly or indirectly deal or trade in anything except bills of exchange, promissory notes, gold or silver bullion, or in the sale of goods which shall be the produce of its lands;" but it was held that it might nevertheless receive and hold bonds and mortgages by way of security for debts due to it, and that in the absence of proof to the contrary, it would be presumed to have come into possession of such securities lawfully and within the scope of its chartered powers.

16. **Presumption of Power to Alienate Property.** — *Wood v. Wellington*, 30 N. Y. 218; *Farmers' Loan & T. Co. v. Curtis*, 7 N. Y. 466; *State University v. Detroit Y. M. Soc.*, 12 Mich. 138; *McIntire v. Preston*, 10 Ill. 48, 48 Am. Dec. 321.

17. In *Rochester H. & L. R. Co. v. Babcock*, 110 N. Y. 119, 17 N. E. 678, it was held that a railroad construction company which had subscribed to the capital stock of a railroad company and paid a portion of the amount due, would be presumed to have acted within its powers.

18. **Presumption of Power to**

**Take Corporate Stock.** — *Evans v. Bailey*, 66 Cal. 112, 4 Pac. 1,089; *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17.

19. A corporation which attempts to avoid its contract for the purchase of its own stock, on the ground of *ultra vires*, has the burden of showing that its articles of incorporation did not authorize it. *West v. Averill Grocery Co.*, 109 Iowa 488, 80 N. W. 555.

20. *Mahoney v. Butte Hdwe. Co.*, 19 Mont. 377, 48 Pac. 545.

21. *Union T. Co. v. Kendall*, 20 Kan. 515, holding also that in the absence of that evidence, the next best evidence, at least as against the corporation, is the business in which it actually engages, the powers it actually exercises.

22. *Central Lumb. Co. v. Kelter Co.*, 201 Ill. 503, 66 N. E. 543, affirming 102 Ill. App. 333.

In *McCluer v. Manchester & L. R. Co.*, 13 Gray (Mass.) 124, 74 Am. Dec. 624, on an issue as to whether a foreign corporation was a common carrier, it was held proper to receive evidence that it had, through its agents, held itself out as such carrier, had received other goods for carriage from the plaintiff, which it had carried and for which it had been paid.

## V. MATTERS AS TO THE MANAGEMENT OF THE CORPORATION.

**1. Judicial Notice.** — Judicial notice will not be taken of the by-laws of a corporation,<sup>23</sup> nor of the acts of its board of directors.<sup>24</sup>

**2. Burden of Proof and Presumptions.** — A. **REGULARITY.** — a. *Meetings of Stockholders.* — Under the rule presuming regularity it will be presumed that a meeting of a corporation was regularly and fairly conducted, and that the provisions of its charter, by-laws, and the governing statutes were fully complied with, in the absence of evidence to the contrary;<sup>25</sup> as, for example, that a meeting was properly called;<sup>26</sup> that proper notice of the meeting was given,<sup>27</sup> or that the number of members were present that were required to be present.<sup>28</sup> So also it will be presumed that stockholders who, acting under the charter or by-laws, removed an officer of the corporation, acted on due and sufficient grounds.<sup>29</sup>

b. *Acts of Directors.* — Irregularity or illegality in the acts of the directors of a corporation acting as a board must be affirmatively shown, as regularity and legality in such cases will be presumed.<sup>30</sup> But when the result of their acts is to forever secure to themselves

**23.** *Simpson v. South Carolina Mut. Ins. Co.*, 59 S. C. 195, 37 S. E. 18, 225; *Portage Lake M. & M. B. Soc. v. Phillips*, 36 Mich. 22.

**24.** *Dunlap v. Wilson*, 32 Ill. 517. In *Topp v. Watson*, 12 Heisk. (Tenn.) 411, it was held that although the court would take judicial knowledge of an act directing the officers and directors of a corporation to make an assignment of its assets, it could not judicially know that the assignment had been made.

**25.** *Brackett v. Persons Unknown*, 53 Me. 228; *Blanchard v. Dow*, 32 Me. 557.

**26.** *Forest Glen B. & T. Co. v. Gade*, 55 Ill. App. 181; *Dunn v. New Orleans Bldg. Co.*, 8 La. 483.

The reception in evidence of the record of a special meeting of stockholders authorizing the president to file a petition in insolvency, and of the schedule of creditors filed with the petition for the purpose of showing that the plaintiff was a creditor, is not error as against the objection that the special meeting in question was not called as provided by law, since the regularity of the call will be presumed in the absence of any objection by a stockholder. *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887.

**27.** *Cushman v. Illinois Starch Co.*, 79 Ill. 281; *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; *Wells v. Rodgers*, 60 Mich. 525, 27 N. W. 671; *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

**Evidence That a Notice of a Stockholders' Meeting Was Deposited in the Mails**, postage prepaid, and properly directed, is presumptive evidence that it was received in due course of mail. *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 45 N. E. 410, 56 Am. St. Rep. 187.

**28.** *Packard v. Old Colony R. Co.*, 168 Mass. 92, 46 N. E. 433.

Although the law may require a stockholders' meeting to consist of the number of persons entitled to a majority of all the votes which could be given on all the shares subscribed, where the minutes of the meeting recite "a majority of the stockholders" it will be presumed that the phrase means the holders of a majority of the stock. *Grays v. Lynchburg & S. Tpke. Co.*, 4 Rand. (Va.) 578.

**29.** *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

**30.** *California.* — *Stockton Com. Harv. & Agri. Works v. Houser*, 109

and their chosen successors in office great influence and emoluments, they have the burden, in an action to enjoin the carrying into effect thereof, to show that their acts will be to the advantage of the corporation.<sup>31</sup>

So it will be presumed that proper notice of the meeting was given;<sup>32</sup> that the purpose of the meeting was specified as required;<sup>33</sup> that a quorum was present;<sup>34</sup> that the meeting was properly conducted, and that the act in question was the act of the majority of the board.<sup>35</sup>

c. *Adoption of By-laws.*—The regular and due adoption of a by-law of a *de facto* corporation, which has been acquiesced in and acted upon by the officers and members of the corporation for a

Cal. 1, 41 Pac. 809; *Granger v. Original Empire Min. Co.*, 59 Cal. 678.

. *Connecticut.*—*Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64.

. *Iowa.*—*Hardin v. Iowa R. & C. Co.*, 78 Iowa 726, 43 N. W. 543.

. *Louisiana.*—*Ross v. Crockett*, 14 La. Ann. 811.

. *Massachusetts.*—*Sargent v. Webster*, 13 Metc. 497, 46 Am. Dec. 743.

. *Minnesota.*—*Fletcher v. Chicago St. P. M. & O. R. Co.*, 67 Minn. 339, 69 N. W. 1,085.

. *New Hampshire.*—*Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

. *Utah.*—*Leavitt v. Oxford & G. S. Min. Co.*, 3 Utah 265, 1 Pac. 356.

When the officers of a corporation have done something which the law authorizes them to do, the presumption is that they have done it regularly; and if there is any by-law of the corporation which renders their action irregular, it is a matter of defense, the burden of proving which is on the party asserting such irregularity. *Puget Sound & C. R. Co. v. Ouellette*, 7 Wash. 265, 34 Pac. 929.

In an action against a director or trustee of a corporation to enforce a statutory liability imposed on him for failure of the corporation to make, file and publish an annual report as required by law, the burden is on the plaintiff to show the default. Nothing can be presumed as against such trustee or director, and every fact necessary to establish his liability, must be affirmatively proved, and it matters not that

this could only be done by proof negative. *Whitney Arms Co. v. Barlow*, 68 N. Y. 34.

There is no presumption that a meeting of the directors of a corporation was a special meeting, in the absence of evidence as to whether or not it was a regular or special meeting, and the burden of proving that the meeting was a special meeting is upon the party asserting that fact. *Barrell v. Lake View L. Co.*, 122 Cal. 129, 54 Pac. 594.

31. *Robotham v. Prudential Ins. Co.*, (N. J.), 53 Atl. 842.

32. *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 Allen (Mass.) 217; *Stockton Com. Harv. & Agric. Wks. v. Houser*, 109 Cal. 1, 41 Pac. 809; *Wells v. Rodgers*, 60 Mich. 525, 27 N. W. 671; *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628; *Chouteau Ins. Co. v. Holmes*, 68 Mo. 601, 30 Am. Rep. 807; *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; *Barrell v. Lake View L. Co.*, 122 Cal. 129, 54 Pac. 594.

33. *Chase v. Tuttle*, 55 Conn. 455, 12 Atl. 874, 3 Am. St. Rep. 64.

34. *Lane v. Brainerd*, 30 Conn. 565; *Baile v. Calvert Coll. Educ. Soc.*, 47 Md. 117.

Where the statute requires not less than a certain number of directors of a corporation, the presumption is that there were at least that many directors. *Barrell v. Lake View L. Co.*, 122 Cal. 129, 54 Pac. 594.

35. *Rollins v. Shaver Wagon & C. Co.*, 80 Iowa 380, 45 N. W. 1,037, 20 Am. St. Rep. 427; *Baile v. Calvert Coll. Educ. Soc.*, 47 Md. 117; *VanHook v. Somerville Mfg. Co.*,

long time, will be presumed.<sup>86</sup>

d. *Knowledge of Unauthorized Acts.* — Knowledge on the part of the officer or officers of a corporation having authority to authorize or ratify any transaction otherwise unauthorized, but which appears on the corporate books, which are subject to inspection by such officer or officers, will be presumed.<sup>87</sup>

**3. Admissions and Declarations by Officers and Agents.** — A. GENERAL RULE STATED. — The general rule is that admissions and declarations of an officer or agent of a corporation against the interest of the corporation are binding upon it, and admissible in evidence against it, provided that at the time they were made the officer or agent was acting for and on behalf of the corporation, and within the scope of his authority, or, although at the time when they were made, they were not expressly authorized or provided for, they had been since ratified by the corporation.<sup>88</sup> And it is also held that

57 N. J. Eq. 137; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

36. *Marsh v. Matjias*, 19 Utah 350, 56 Pac. 1,074.

37. *Racine Co. Bank v. Lathrop*, 12 Wis. 466.

38. *England.* — *Kirkstall Brewery Co. v. Furness R. Co.*, L. R. 9 Q. B. 468.

*United States.* — *Dubuque & S. C. R. Co. v. Pierson*, 70 Fed. 303; *Anvil Min. Co. v. Humble*, 153 U. S. 540.

*Alabama.* — *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163; *Ricketts v. Birmingham St. & R. Co.*, 85 Ala. 600, 5 So. 353.

*Arkansas.* — *St. Louis I. M. & S. R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587.

*California.* — *Hawley v. Gray Bros. A. S. Pav. Co.*, 106 Cal. 337, 39 Pac. 609; *People v. Stockton & C. R. Co.*, 49 Cal. 414; *Bullock v. Consumers Lumb. Co.*, (Cal.), 31 Pac. 367; *Abbott v. Seventy-six L. & W. Co.*, 87 Cal. 323, 25 Pac. 693.

*Colorado.* — *Denver & R. G. R. Co. v. Wilson*, 4 Colo. App. 355, 36 Pac. 67; *Webb v. Smith*, 6 Colo. 365; *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565.

*Connecticut.* — *Toll Bridge Co. v. Betsworth*, 30 Conn. 380.

*Delaware.* — *Randel v. Chesapeake & D. Canal Co.*, 1 Har. 233.

*Florida.* — *Jacksonville T. & K. W. R. Co. v. Lockwood*, 33 Fla. 573, 15 So. 327.

*Georgia.* — *Imboden v. Etowah &*

*B. B. Min. Co.*, 70 Ga. 86; *Fulton B. & L. Assoc. v. Greenlea*, 103 Ga. 376, 29 S. E. 932; *Louisville & N. R. Co. v. Tift*, 100 Ga. 86, 27 S. E. 765.

*Illinois.* — *Lake Shore & M. S. R. Co. v. Baltimore & O. C. R. Co.*, 149 Ill. 272, 37 N. E. 91; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688.

*Indiana.* — *Wabash R. Co. v. Kelley*, 153 Ind. 119, 52 N. E. 152, 54 N. E. 782; *Adams Express Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214; *Pennsylvania Co. v. Weddle*, 100 Ind. 138.

*Iowa.* — *Deere v. Wolf*, 77 Iowa 115, 41 N. W. 588; *Black v. Des Moines Mfg. & Supp. Co.*, (Iowa), 77 N. W. 504.

*Kansas.* — *Donnell v. Clark*, 12 Kan. 154; *Water Power Co. v. Brown*, 23 Kan. 676; *Atchison T. S. & F. R. Co. v. Consolidated C. Co.*, 59 Kan. 111, 52 Pac. 71.

*Maine.* — *Lime Rock Bank v. Hewett*, 52 Me. 531; *Franklin Bank v. Cooper*, 36 Me. 179.

*Massachusetts.* — *Buffum v. York Mfg. Co.*, 175 Mass. 471, 56 N. E. 599; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Blanchard v. Blackstone*, 102 Mass. 343.

*Michigan.* — *Oakland Co. Sav. Bank v. State Bank of Carson City*, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463; *McCammon v. Detroit L. & N. R. Co.*, 66 Mich. 442, 33 N. W. 728.

evidence of admissions and declarations of corporate officers and agents is admissible in evidence against the stockholders and members of the corporation.<sup>39</sup>

**An Insurance Company**, as any other corporation, can only act or speak through its officers or agents, and evidence of their doings and sayings, done and made while in the discharge of their duties as such, and within the scope of their authority, is admissible against the company;<sup>41</sup> but of course they must be unobjectionable in other

*Mississippi*. — *Moore v. Chicago St. L. & Mo. R. Co.*, 59 Miss. 243.

*Missouri*. — *Northrup v. Mississippi Val. Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 377; *Western Boatmen's Ben. Assoc. v. Kribben*, 48 Mo. 37.

*New Hampshire*. — *Pike Co. v. Baty*, 69 N. H. 453, 43 Atl. 623; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67.

*New Jersey*. — *Halsey v. Lehigh Val. R. Co.*, 45 N. J. L. 26; *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158, 26 Atl. 27, 39 Am. St. Rep. 637.

*New York*. — *Bank of New York v. American Dock Co.*, 143 N. Y. 559, 38 N. E. 713; *Hall v. Herter Bros.*, 90 Hun 280, 35 N. Y. Supp. 769; *Hall v. Harter Bros.*, 157 N. Y. 694, 51 N. E. 1,091; *Schroepnell Highway Comm'rs v. Oswego & S. P. R. Co.*, 7 How. Pr. 94; *Pierson v. Atlantic Nat. Bank*, 77 N. Y. 304; *Wild v. New York & A. S. Min. Co.*, 59 N. Y. 644.

*North Carolina*. — *Porter v. Richmond & D. R. Co.*, 97 N. C. 46, 2 S. E. 374.

*North Dakota*. — *Paulson Merc. Co. v. Seaver*, 8 N. D. 215, 77 N. W. 1,001.

*Ohio*. — *Sturges v. Bank of Circleville*, 11 Ohio St. 153, 78 Am. Dec. 296.

*Pennsylvania*. — *O'Toole v. Post Prtg. & Pub. Co.*, 179 Pa. St. 271, 36 Atl. 288; *Kilpatrick v. Home, B. & L. Assoc.*, 119 Pa. St. 30, 12 Atl. 754; *Harrisburg Bank v. Tyler*, 3 Watts & S. 373.

*South Carolina*. — *Lipscomb v. South Bound R. Co.*, 65 S. C. 148, 43 S. E. 388; *Crawford v. Southern R. Co.*, 56 S. C. 136, 34 S. E. 80; *Beckham v. Southern R. Co.*, 50 S. C. 25, 27 S. E. 611.

*Tennessee*. — *Sewanee Min. Co. v. McMahon*, 1 Head 582.

*Texas*. — *Houston E. & W. T. R. Co. v. Campbell*, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225; *Western Union Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558, 21 S. W. 699.

*Utah*. — *Liter v. Ozorkerite Min. Co.*, 7 Utah 487, 27 Pac. 590.

*Washington*. — *Hall v. Union Cent. L. Ins. Co.*, 23 Wash. 610, 63 Pac. 505, 83 Am. St. Rep. 844.

*West Virginia*. — *Coyle v. Baltimore & O. R. Co.*, 11 W. Va. 94.

*Wisconsin*. — *McGowan v. Sup. Ct. I. O. F.*, 104 Wis. 173, 80 N. W. 603.

*Wyoming*. — *Rock Spring Nat. Bank v. Luman*, 5 Wyo. 159, 38 Pac. 678.

**Claim Agent**. — Where a corporation invests an agent with general authority to adjust claims against it, the declarations of that agent, made while endeavoring to secure an adjustment of a claim against the corporation, are competent evidence against the corporation. *Adams Exp. Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 16 Am. St. Rep. 315, 7 L. R. A. 214.

The fact that the witness testifying to admissions by corporate officers, when asked if certain admissions had not been made to him by such officer, replies that he thought they had, does not render the answer inadmissible, but merely goes to the credit of the evidence. *Imoden v. Etowah & B. B. Min. Co.*, 70 Ga. 86.

<sup>39</sup>. *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401.

<sup>41</sup>. *Mut. Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264; *Garretson v. Merchants' & B. Ins. Co.*, 92 Iowa 253, 60 N. W. 540; *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

respects within the rules herein discussed.<sup>42</sup>

**Carriers.**—And the same rule applies to evidence of admissions and declarations by the officers and agents of a carrier,<sup>43</sup> provided, of course, it is not otherwise objectionable.<sup>44</sup>

**Conversations with the Local Agent of a Fire Insurance Company,** at the time of making an oral contract for insurance, are admissible against the company to show what the contract was. *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358.

42. *Walker v. Farmers' Ins. Co.*, 51 Iowa 679, 2 N. W. 583; *Hartford Life & A. Ass'n v. Hayden*, 90 Ky. 39, 13 S. W. 585; *Fogg v. Pew*, 10 Gray (Mass.) 409, 71 Am. Dec. 662; *Idaho For'd Co. v. Firemen's Fund Ins. Co.*, 8 Utah 41, 29 Pac. 826. And see article "INSURANCE."

43. *Lake Shore & M. S. R. Co. v. Baltimore O. & C. R. Co.*, 149 Ill. 272, 37 N. E. 91; *Norwich & W. R. Co. v. Cahill*, 18 Conn. 484; *Jacksonville T. & K. W. R. Co. v. Lockwood*, 33 Fla. 573, 15 So. 327; *Charleston & S. R. Co. v. Blake*, 2 Rich. L. (S. C.) 634; *Wards Cent. & Pac. Lake Co. v. Elkins*, 34 Mich. 439, 22 Am. Rep. 544.

**What the Conductor of a Railroad Train Says** in the exercise of the duties imposed upon him as such conductor, is competent evidence against the company. *Beckham v. Southern R. Co.*, 50 S. C. 25, 27 S. E. 611.

In *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163, an action against the defendant company to recover the statutory penalty for wrongfully cutting trees on lands belonging to the plaintiff, but which the company claimed constituted a part of its right of way, it was held that evidence of the declarations and conduct of the defendant's agent while cutting trees, was admissible, in connection with independent proof that he had been ordered to clear the right of way, and that the cutting was done while in the exercise of this authority.

In an action to recover damages from a railroad company for injuries to cattle caused by delay in their transportation, the declarations of the train men as to matters in the

line of their respective duties, and relating to the cause of delay made at the time, and while they were charged with the duty of running the train, are admissible against the company. *Atchison T. & S. F. R. Co. v. Consolidated C. Co.*, 59 Kan. 111, 52 Pac. 71.

44. As not being within the scope of the authority of the person making the declarations. *Blitch v. Central R. Co.*, 76 Ga. 333; *Boston & M. R. Co. v. Ordway*, 140 Mass. 510, 5 N. E. 627; *Taylor v. Chicago & N. W. R. Co.*, 74 Ill. 86.

Or as not being part of the *res gestae*. *Hematite Min. Co. v. East Tennessee V. & G. R. Co.*, 92 Ga. 268, 18 S. E. 24; *Union Pac. R. Co. v. Fray*, 35 Kan. 700, 12 Pac. 98; *Jammison v. Chesapeake & O. R. Co.*, 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813. See more fully article "NEGLIGENCE."

In an action against a railroad company for damages for personal injuries, statements of the president of the company to the plaintiff, after the act complained of, that he thought the company would give the plaintiff something, are not admissible in evidence against the corporation. Such evidence is "at most a mere expression of private opinion and wholly immaterial. It necessarily implied a want of authority in the witness to act for the corporation in regard to the claim of the plaintiff for damages, and implied that the corporation would take action for themselves on the subject." *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92.

In *Lombard & S. S. P. R. Co. v. Christian*, 124 Pa. St. 114, 16 Atl. 628, an action to recover damages for injuries alleged to have been suffered by the plaintiff through the negligence of a driver of the defendant street car, in which the driver testified that he had been discharged immediately after the accident, it was held that a statement by the president of the company to



**B. RULE APPLIED AS TO AUTHORITY OF OFFICER OR AGENT.** — As stated in the general rule just stated, such admissions and declarations must, however, have been made in the course of the transaction, on behalf of the corporation, and within the scope of the authority of the officer or agent making them, or have been expressly authorized at the time, or have since been ratified by the corporation.<sup>45</sup>

the driver in response to a question as to why the driver had been discharged, to the effect that the plaintiff was thrown from the car, was not admissible as evidence, either that the accident was the result of the driver's negligence, or any negligence at all, because it was not shown that the president had any personal knowledge of the facts of the occurrence; that the evidence in question might tend to prove what the president thought, but that what he thought would depend upon the correctness of the information which he had received from others, and to which, of course, he could not testify directly, and most certainly not indirectly, by way of admission.

In *American S. S. Co. v. Landreth*, 102 Pa. St. 131, 48 Am. Rep. 196, an action by a passenger against a steamship company to recover damages for an injury sustained on board the vessel, it was held error to admit the declaration of the captain, made to the plaintiff and another passenger immediately after the accident, that the place where it occurred was a very dangerous part of the ship and that he would have it remedied immediately, for the reason, in part, that it was a mere expression of opinion on the part of the master.

The statements of agents of a railroad company are admissible against the company only when made in the particular business entrusted to them and while engaged in that business; and accordingly, in order to warrant the reception of written endorsements by such agents upon a bill of lading referred from one agent to another as to the condition of the property when received by the company sought to be charged for injuries thereto, it must be shown that it was the business of such agents to investigate the condition of the

freight and to endorse the result of their investigations upon such bill of lading. *Evans v. Atlanta & W. P. R. Co.*, 56 Ga. 498.

**45. United States.** — *Holmes v. Montauk S. B. Co.*, 93 Fed. 731; *Goddard v. Creffield Mills*, 75 Fed. 818; *Tuthill Spr. Co. v. Shaver W. Co.*, 35 Fed. 644.

*Alabama.* — *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87; *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844; *Brush Elec. L. & P. Co. v. Montgomery*, 114 Ala. 433, 21 So. 960.

*Arkansas.* — *Pacific Mut. L. Ins. Co. v. Walker*, 67 Ark. 147, 53 S. W. 675.

*California.* — *Love v. Anchor R. V. Co.*, (Cal.), 56 Pac. 1,044; *Green v. Ophir C. S. & G. M. Co.*, 45 Cal. 522.

*Colorado.* — *Extension Gold M. & M. Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198.

*Connecticut.* — *Hartford Bridge Co. v. Granger*, 4 Conn. 142.

*Delaware.* — *Lieberman v. First Nat. Bank*, (Del.), 40 Atl. 382.

*Georgia.* — *First State Bank v. Carver*, 111 Ga. 876, 36 S. E. 960; *Amicalola Marble & P. Co. v. Coker*, 111 Ga. 872, 36 S. E. 950; *Florida M. & G. R. Co. v. Varnedoe*, 81 Ga. 175, 7 S. E. 129.

*Illinois.* — *Momence Stone Co. v. Groves*, 197 Ill. 88, 64 N. E. 335; *Wheeler v. Home Sav. & St. Bank*, 188 Ill. 34, 58 N. E. 598; *Grayville & M. R. Co. v. Burns*, 92 Ill. 302; *Lincoln Coal & M. Co. v. McNally*, 15 Ill. App. 181.

*Indiana.* — *Chicago St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; *Ohio & M. R. Co. v. Levy*, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20.

*Iowa.* — *Lee v. Marion Sav. Bank*, 108 Iowa 716, 78 N. W. 692; *First*

Nat. Bank *v.* Booth, 102 Iowa 333, 71 N. W. 238.

*Kansas*.—Atchison T. & S. F. R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286.

*Kentucky*.—Chesapeake & O. R. Co. *v.* Smith, 101 Ky. 104, 39 S. W. 832.

*Louisiana*.—New Orleans O. & G. W. R. Co. *v.* Williams, 16 La. Ann. 315.

*Maine*.—Polleys *v.* Ocean Ins. Co., 14 Me. 141.

*Maryland*.—City Bank *v.* Bateman, 7 Har. & J. 104; Merchants' Bank *v.* Marine Bank, 3 Gill. 96, 43 Am. Dec. 300.

*Massachusetts*.—Wellington *v.* Boston & M. R. Co., 158 Mass. 185, 33 N. E. 393; Gilmore *v.* Miltineague P. Co., 169 Mass. 471, 48 N. E. 623.

*Michigan*.—Detroit G. H. & M. R. R. Co. *v.* Mott, 120 Mich. 127, 79 N. W. 3; Maxson *v.* Michigan Cent. R. Co., 117 Mich. 218, 75 N. W. 459.

*Minnesota*.—Gray *v.* Minnesota T. Co., 81 Minn. 333, 84 N. W. 113; Browning *v.* Hinkle, 48 Minn. 544, 51 N. W. 605, 31 Am. St. Rep. 691.

*Missouri*.—Kearney Bank *v.* Froman, 129 Mo. 427, 31 S. W. 769, 50 Am. St. Rep. 456.

*Nebraska*.—Grant *v.* Cropsey, 8 Neb. 205.

*Nevada*.—Meyer *v.* Virginia & T. R. Co., 16 Nev. 341.

*New Hampshire*.—Nebonne *v.* Concord R. Co., 67 N. H. 531, 38 Atl. 17.

*New Jersey*.—Stults *v.* New Brunswick & N. B. Tpke. Co., 48 N. J. L. 596, 9 Atl. 193; Ashmore *v.* Pennsylvania S. T. Transp. Co., 38 N. J. L. 13.

*New York*.—Washington L. Ins. Co. *v.* Clason, 162 N. Y. 305, 56 N. E. 765; Niagara Falls Susp. Br. Co. *v.* Bachman, 66 N. Y. 261; Kay *v.* Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. 751; First Nat. Bank *v.* Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Harvey *v.* West Side Elec. R. Co. 13 Hun 392; Alexander *v.* Cauldwell, 83 N. Y. 480.

*North Carolina*.—Rumbough *v.* Southern Imp. Co., 112 N. C. 751, 17 S. E. 536, 34 Am. St. Rep. 528.

*Oregon*.—First Nat. Bank *v.* Linn Co. Nat. Bank, 30 Or. 296, 47 Pac. 614.

*Pennsylvania*.—Lombard & S. S. P. R. Co. *v.* Christian, 124 Pa. St. 114, 16 Atl. 628; Hanover Water Co. *v.* Ashland Iron Co., 84 Pa. St. 279; Baltimore & O. E. R. Co. *v.* Post, 122 Pa. St. 579, 15 Atl. 885, 9 Am. St. Rep. 147, 2 L. R. A. 44.

*South Dakota*.—Plymouth Co. Bank *v.* Gilman, 3 S. D. 170, 52 N. W. 869, 44 Am. St. Rep. 782.

*Tennessee*.—Jones *v.* Planters Bank, 9 Heisk. 455.

*Texas*.—Southwestern Tel. & T. Co. *v.* Gotcher, 93 Tex. 114, 53 S. W. 686; East Line & R. R. R. Co. *v.* Garrett, 52 Tex. 133.

*Vermont*.—Hardwick Sav. Bank & Tr. Co. *v.* Drenan, 72 Vt. 438, 48 Atl. 645.

*Washington*.—Cosh-Murray Co. *v.* Adair, 9 Wash. 686, 38 Pac. 749.

*Wisconsin*.—Consolidated Mill. Co. *v.* Fogo, 104 Wis. 92, 80 N. W. 103.

**Rule Stated.**—"The mere fact that one is a director, president, secretary or other officer of the corporation, does not make all his acts or declarations, even though relating to the affairs of the corporation, binding upon the latter. Such persons are mere agents, and their declarations are binding upon the corporation only when made in the course of the performance of their authorized duties as agents so that the declarations constitute a part of their conduct as agents—a part of the *res gestae*." Browning *v.* Hinkle, 48 Minn. 544, 51 N. W. 605, 31 Am. St. Rep. 691.

**"The Rule Rests on the Doctrine of Agency;** for such officers are mere agents, and their declarations are binding upon the corporation only when made in the course of or connected with the performance of the authorized duties of such officers." Whitney *v.* Wagener, 84 Minn. 211, 87 N. W. 602, 87 Am. St. Rep. 351. Citing Browning *v.* Hinkle, 48 Minn. 544, 51 N. W. 605, 31 Am. St. Rep. 691.

**Testimony of an Officer of a Corporation** in a former action in which neither he nor the corporation was a party, in answer to the compulsory process of the court requiring his presence and commanding his answers, is not admissible as ad-

**A Statement Made by an Employee as a Mere Spectator, and at another time and place, is not admissible against the corporation.**<sup>46</sup>

**C. RULE APPLIED AS TO TIME WHEN MADE.** — a. *Generally.* The admissions and declarations, in order to be received as evidence against the corporation, must not relate to past events; they must have been made in the course of the transaction, so as to constitute a part of the *res gestae*.<sup>47</sup> The declarations and admissions them-

missions or declarations against the corporation in a subsequent suit between it and another person. *Bangs Milling Co. v. Burns*, 152 Mo. 350, 53 S. W. 923. "Neither the voluntary statement of an agent or officer of a corporation acting outside of and beyond the duties of his agency, nor those exacted and not afterwards ratified by the corporation, can be held and treated as declarations or admissions binding upon the corporation in a suit afterwards between the corporation and a stranger."

Where two corporations are sued jointly for injuries, but the grounds of their liability are wholly separate and distinct, the admissions of one company touching the cause of the action are not admissible on behalf of its co-defendant, especially where those admissions are made after a verdict in favor of the corporation whose agents made them. *Koplan v. Boston G. Co.*, 177 Mass. 15, 58 N. E. 183.

<sup>46</sup> *Verry v. Burlington C. R. & N. R. Co.*, 47 Iowa 549.

<sup>47</sup> *United States*. — *Holmes v. Montauk S. B. Co.*, 93 Fed. 731; *Tuthill Sprg. Co. v. Shaver W. Co.*, 35 Fed. 644; *Packet Co. v. Clough*, 20 Wall. 528.

*Alabama*. — *Stanton v. Baird Lumb. Co.*, 132 Ala. 635, 32 So. 299.

*Arkansas*. — *Ft. Smith O. Co. v. Slover*, 58 Ark. 168, 24 S. W. 106.

*Illinois*. — *Pennsylvania Co. v. Kenwood B. Co.*, 170 Ill. 645, 49 N. E. 215.

*Iowa*. — *Empire Mill Co. v. Lovell*, 77 Iowa 100, 41 N. W. 583; *Sweatland v. Illinois & M. Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285; *First Nat. Bank v. Booth*, 102 Iowa 333, 71 N. W. 238; *Schoep v. Bankers All. Ins. Co.*, 104 Iowa 354, 73 N. W. 825; *Lee v. Marion Sav. Bank*, 108 Iowa 716, 78 N. W. 692.

*Kansas*. — *Atchison T. & S. F. R.*

*Co. v. Consolidated C. Co.*, 59 Kan. 111, 52 Pac. 71.

*Maine*. — *Franklin Bank v. Steward*, 37 Me. 519; *Franklin Bank v. Cooper*, 36 Me. 179.

*Massachusetts*. — *Stiles v. Western R. Corp.*, 8 Metc. 44; *Robinson v. Fitchburg & W. R. Co.*, 7 Gray 92.

*Michigan*. — *Mott v. Detroit G. H. & M. R. Co.*, 120 Mich. 127, 79 N. W. 3.

*Minnesota*. — *Jackson v. Mutual Ben. L. Ins. Co.*, 79 Minn. 43, 81 N. W. 545, 82 N. W. 366; *Reene v. St. Paul C. R. Co.*, 77 Minn. 503, 80 N. W. 638.

*New Hampshire*. — *Pemigewasset Bank v. Rogers*, 18 N. H. 255; *Nebonne v. Concord R. Co.*, 67 N. H. 531, 38 Atl. 17.

*New York*. — *Alexander v. Cauldwell*, 83 N. Y. 480; *Uten v. Forty-second & G. St. R. Co.*, 1 Hun 227; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710.

*North Carolina*. — *Smith v. North Carolina R. Co.*, 68 N. C. 107; *Darlington v. Western Union Tel. Co.*, 127 N. C. 448, 37 S. E. 479.

*Oregon*. — *First Nat. Bank v. Linn Co. Nat. Bank*, 30 Or. 296, 47 Pac. 614.

*Pennsylvania*. — *Bank of Northern Liberties v. Davis*, 6 Watts & S. 285; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Oil City F. S. Co. v. Boudy*, 122 Pa. St. 449, 15 Atl. 865, 98 Am. Dec. 229.

*South Carolina*. — *Aiken v. Western U. Tel. Co.*, 5 S. C. 358.

*Texas*. — *Southwestern Tel. & T. Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686.

*Vermont*. — *Hardwick Sav. Bank & Tr. Co. v. Drenan*, 72 Vt. 438, 48 Atl. 645.

*Virginia*. — *Rensch v. Roanoke C. S. Co.*, 91 Va. 534, 22 S. E. 358; *Virginia & T. R. Co. v. Sayers*, 26

selves are not competent as independent evidence to prove that they were made contemporaneously with the act, or to show that they were *res gestae*; this must be proven by evidence *aliunde*.<sup>48</sup>

b. *Declarations Forming Part of Transaction*.—Although the declaration may have been as to a past event, if it in fact forms part of the transaction involved in the litigation it is deemed to be a verbal act, and as part of the *res gestae* is admissible against the corporation.<sup>49</sup>

Gratt. 328; Jammison v. Chesapeake & O. R. Co., 92 Va. 327, 32 S. E. 758, 53 Am. St. Rep. 813.

West Virginia.—Coyle v. Baltimore & O. R. Co., 11 W. Va. 94.

Wisconsin.—Milwaukee & M. R. Co. v. Finney, 10 Wis. 388; Hazleton v. Union Bank, 32 Wis. 34.

Under this rule it was accordingly held in *Empire Mill Co. v. Lovell*, 77 Iowa 100, 41 N. W. 583, 14 Am. St. Rep. 272, an action on an attachment bond for the wrongful suing out of the writ, that statements by the attachment plaintiff's attorney, made after the attachment was sued out, were not admissible as against his client to show malice in suing out the writ. "It may be conceded that the one making the statements was responsible for the suing of the writ, because the act was done by his firm. The declarations, however, were not of the *res gestae*, and the statements and admissions of an agent are not admissible against the principal except they are made at the time of the transaction to which they relate and such transaction is within the scope of the agent's employment."

In *Haney-Campbell Co. v. Preston Cr. Ass'n*, 119 Iowa 188, 93 N. W. 297, an action to recover the balance on a contract for the erection of machinery, liability for which the defendant denied because of the defects in the machinery, it was held that evidence of what certain of the defendant's officers and stockholders, who were present at the installation of the machinery, stated in respect to the workings of the machines, was properly ruled out, because these individual random statements by persons having nothing directly to do with the operation of the machines could not be treated or considered as the statements or admissions of the corporation.

In *Reene v. St. Paul C. R. Co.*, 77 Minn. 503, 80 N. W. 638, an action to recover for injuries suffered by a passenger from being pushed off the platform of a crowded street car, it was held error to permit a witness to testify as to an admission by the defendant's claim agent made concerning the case, but long after the accident, it not being shown that he was at the time transacting any business which would make the admission part of the *res gestae*.

In *Great Western R. Co. v. Willis*, 18 C. B. N. S. 748, an action against a carrier for damage for unreasonable delay in delivering goods, it was held that evidence of a conversation between the plaintiff and a night inspector at one of the stations, whose duty it was to forward the goods, in which the latter, in answer to a question as to why he had not forwarded the goods, stated that he had forgotten them, was improperly admitted since it was not within the scope of the agent's authority to make admissions as to bygone transactions.

48. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299, 30 Am. St. Rep. 87.

49. *Tutthill Spr. Co. v. Shaver W. Co.*, 35 Fed. 644.

The declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation. *Xenia Bank v. Stewart*, 114 U. S. 224.

In an action against a carrier to recover for property alleged to have been lost through its negligence, the admissions and declarations by agents whose duty it was to deliver property,

c. *Declarations by an Officer After Termination of Office.* — The admissions or declarations of an officer or agent of a corporation, made after the termination of his relationship of such officer or agent, are not binding on the corporation.<sup>50</sup>

D. RULE APPLIED TO PROMOTORS. — Evidence of declarations by the promoters of a corporation is not admissible against the corporation subsequently formed, except when they are shown to have been ratified by the corporation, or responsibility therefor otherwise assumed.<sup>51</sup>

E. RULE APPLIED TO MEMBERS. — Evidence of acts and declarations of stockholders or members of a corporation is not admissible against the corporation,<sup>52</sup> unless made when they were acting as agents of the corporation and within the scope of their authority.<sup>53</sup>

F. RULE APPLIED TO PARTICULAR OFFICERS. — a. *Directors.* Directors when acting individually cannot bind the corporation, and hence evidence of acts and declarations by them when so acting is not competent against the corporation;<sup>54</sup> although it may be so received if the director or directors were at the time acting as authorized

and to account for the same, if missing, made in response to inquiries by the owner, are admissible in evidence against the company. *Morse v. Connecticut R. R. Co.*, 6 Gray (Mass.) 450; *Lane v. Boston & A. R. Co.*, 112 Mass. 455.

50. *Card v. New York & H. R. Co.*, 50 Barb. (N. Y.) 39; *Sterling v. Marietta & S. T. Co.*, 11 Serg. & R. (Pa.) 179.

If the right of the officer or agent to act in the particular matter in question has ceased, his declarations are mere hearsay which do not affect the corporation. *Smith v. North Carolina R. R. Co.*, 68 N. C. 107.

51. *First Nat. Bank v. Armstrong*, 42 Fed. 193; *Fogg v. Pew*, 10 Gray (Mass.) 409, 71 Am. Dec. 362.

52. *California.* — *Shay v. Tuolumne Co. W. Co.*, 6 Cal. 73; *Dean v. Ross*, 105 Cal. 227, 38 Pac. 912.

*Connecticut.* — *Hartford Bank v. Hart*, 3 Day 491, 3 Am. Dec. 274; *Beardsley v. Smith*, 16 Conn. 368, 41 Am. Dec. 148.

*Georgia.* — *Mitchell v. Rome R. Co.*, 17 Ga. 574; *New Ebenezer Ass'n v. Gress Lumb. Co.*, 89 Ga. 125, 14 S. E. 892.

*Maine.* — *Polleys v. Ocean Ins. Co.*, 14 Me. 141; *Ruby v. Abyssinian Rel. Soc.*, 15 Me. 306.

*Ohio.* — *Hogg v. Zanesville Mfg. Co.*, — *Wright* 139.

53. *Simmons v. Sisson*, 26 N. Y. 264.

54. *Connecticut.* — *Hartford Bank v. Hart*, 3 Day 491, 3 Am. Dec. 274; *Hartford Bridge Co. v. Granger*, 4 Conn. 142.

*Georgia.* — *Florida M. & G. R. Co. v. Varnedoe*, 81 Ga. 175, 7 S. E. 129.

*Illinois.* — *Grayville & M. R. Co. v. Burns*, 92 Ill. 302.

*Iowa.* — *Whittaker v. Johnson Co.*, 10 Iowa 161.

*Maine.* — *Franklin Bank v. Cooper*, 36 Me. 179; *Polleys v. Ocean Ins. Co.*, 14 Me. 141.

*Michigan.* — *Peek v. Detroit Nov. Wks.*, 29 Mich. 313.

*Minnesota.* — *Browning v. Hinkle*, 48 Minn. 544, 51 N. W. 605, 31 Am. St. Rep. 691.

*Missouri.* — *Kearney Bank v. Froman*, 129 Mo. 427, 31 S. W. 769, 50 Am. St. Rep. 456.

*New Hampshire.* — *Pemigewassett Bank v. Rogers*, 18 N. H. 255.

*New York.* — *Soper v. Buffalo & R. R. Co.*, 19 Barb. 310.

*Pennsylvania.* — *Stoystown & G. Tpke. R. Co. v. Craver*, 45 Pa. St. 386.

*Texas.* — *Salado College v. Davis*, 47 Tex. 131; *East L. & R. R. Co. v. Garrett*, 52 Tex. 133.

In an action on a note by a *bona fide* holder against a corporation

agents for the corporation, and within the scope of their authority.<sup>55</sup> Nor can evidence of the acts and declarations of a minority of a board of directors be received as the acts and declarations of the corporation.<sup>56</sup>

**But When the Directors Are Acting as a Board** at the time the acts and declarations were done or made, evidence thereof may be received against the corporation.<sup>57</sup>

b. *President*. — The president of a corporation has not, merely by virtue of his office, authority to act for the corporation or to bind it by his declarations, and hence evidence thereof is not competent as against the corporation.<sup>58</sup> But admissions of the president of a corporation in connection with the business of his office are admissible against the corporation.<sup>59</sup> And where the president of a corporation is entrusted with the management of a particular transaction, or with the general management of the corporate affairs, evidence of admissions and declarations made by him, when acting in and about the business of his office, and within the scope of his authority, may be received against the corporation.<sup>60</sup>

making the note, evidence of what one of the directors stated to the payee with reference to the execution of the note, or the consideration for it, is immaterial. *Barrell v. Lake View L. Co.*, 122 Cal. 129, 54 Pac. 594.

55. *Norwich & W. R. Co. v. Cahill*, 18 Conn. 484.

56. *Jones v. Planters' Bank*, 9 Heisk. (Tenn.) 455.

57. *Franklin Bank v. Cooper*, 36 Me. 179.

58. *Holmes v. Montauk S. S. Co.*, 93 Fed. 731; *Cunningham v. Cochran*, 18 Ala. 479; *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600, 5 So. 353; *Henry v. Northern Bank*, 63 Ala. 527; *Hartford Bank v. Hart*, 3 Day (Conn.) 491, 3 Am. Dec. 274; *Overman Min. Co. v. American Min. Co.*, 7 Nev. 312; *Low v. Connecticut & P. R. R. Co.*, 45 N. H. 370.

**The Power of a President or General Agent** of a corporation to make admissions or declarations which will be binding on the corporation, as to past events, cannot be inferred as incidental to the duties of an officer or agent superintending the current dealings and business of the corporation. *Smith v. North Carolina R. R. Co.*, 68 N. C. 107.

59. *Imoden v. Etowah & B. B. H. H. Min. Co.*, 70 Ga. 86.

In *Water Power Co. v. Brown*, 23

Kan. 676, an action by the plaintiffs against the defendant company as sureties for it on negotiable paper which the plaintiffs had been compelled to pay, it was held that "statements of the president of the defendant company to one of the plaintiffs, made after the maturity of the paper and in requesting him to protect it . . . were part of the *res gestae*; they were made by the president while negotiating concerning this paper. The fact that the conversation took place after the inception of the paper, and while the parties were negotiating for a renewal or protection, makes it none the less a part of the *res gestae*. That paper was the subject of negotiation, and declarations concerning it during such negotiations were part of the *res gestae*."

A statement by the president of the corporation that he sent such a telegram, as was shown by a copy of the original offered in evidence, and relied on as establishing the corporation's liability, is competent as an admission on his part as president of the corporation. *Ward-Courtney & Co. v. Tennessee C., I. & R. Co.*, (Tenn.), 57 S. W. 193.

60. *United States*. — *Dubuque & S. C. R. Co. v. Pierson*, 70 Fed. 303. *California*. — *Bullock v. Consumers Lumb. Co.*, (Cal.), 31 Pac. 367;

c. *Secretary or Treasurer.* — The general rule is that the secretary or treasurer of a corporation cannot bind the corporation by his admissions and declarations, except within the scope of his authority.<sup>61</sup> But when entrusted with the management of any particular transaction, or with the general management of corporate affairs, evidence of admissions and declarations made by him within the scope of his authority is admissible against the corporation.<sup>62</sup>

d. *General Manager.* — Evidence of the acts and declarations of the general manager or superintendent of a corporation is admissible in evidence against the corporation, when they were done or made within the scope of his authority;<sup>63</sup> otherwise not.<sup>64</sup>

e. *Cashier of Bank.* — Evidence of acts and declarations of the cashier of a bank is competent against the bank, when such acts and declarations are connected with the business of the bank and within the scope of his authority;<sup>65</sup> but not otherwise.<sup>66</sup>

G. RULE APPLIED TO PURPOSE OF PROOF. — a. *Contract Liability.*

Green v. Ophir Copper S. & G. Min. Co., 45 Cal. 522.

Georgia. — Dobbins v. Pyrolusite Mang. Co., 75 Ga. 450.

Iowa. — Deere v. Wolf, 77 Iowa 115, 41 N. W. 588.

Kansas. — Water Power Co. v. Brown, 23 Kan. 676.

Pennsylvania. — Spalding v. Bank of Susquehanna Co., 9 Pa. St. 28. And see Hoag v. Lamont, 60 N. Y. 96.

The President of a Railroad Corporation is treated by common usage as its head—and an officer *within* and a *part* of the corporation, a mere artificial person, incapable itself of acting or speaking—and admissions of such officer, made in the execution of the duties imposed upon him, and concerning a matter upon which he is called upon to act, and which matter is within the scope of the authority usually exercised by him are evidence against the corporation. Chicago B. & Q. R. Co. v. Coleman, 18 Ill. 297.

61. Tripp v. New Metallic Pkg. Co., 137 Mass. 499. And see Holmes v. Turner's Falls Co., 150 Mass. 535. 23 N. E. 305; Kalamazoo & Nov. Mfg. Co. v. Macalister, 36 Mich. 327.

62. Abbott v. Seventy-Six L. & W. Co., 87 Cal. 323, 25 Pac. 693; Des Moines & D. L. & T. Co. v. Polk Co. H. & Tr. Co., 82 Iowa 663, 45 N. W. 773.

63. Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98;

Planters R. M. Co. v. Olmstead, 78 Ga. 586, 3 S. E. 647; Tipton Fire Co. v. Barnheisel, 92 Ind. 88; McGinness v. Adriatic Mills, 116 Mass. 177. And see Roth v. Continental W. Co., 94 Mo. App. 236, 68 S. W. 594.

64. Gilmore v. Mittmeague P. Co., 169 Mass. 471, 48 N. E. 623; Walrath v. Champion Min. Co., 63 Fed. 552.

The Mere Fact that the Person Making the Declaration Was Superintendent of the corporation is not sufficient to show that he had authority to bind the corporation by his admissions or declarations, where the question of his authority is in issue. The burden of proving the authority is on the party asserting it, and in the absence of such proof it is not error to refuse evidence of such admissions and declarations. Blain v. Pacific Exp. Co., 69 Tex. 74, 6 S. W. 679.

65. Xenia Bank v. Stewart, 114 U. S. 224; Oakland Co. Sav. Bank v. State Bank, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463; Cochecho Nat. Bank v. Haskell, 51 N. H. 116, 12 Am. Rep. 67; Harrisburg Bank v. Tyler, 3 Watts & S. (Pa.) 373.

66. Hardwick Sav. Bank & Tr. Co. v. Drenan, 72 Vt. 438, 48 Atl. 645; Pemigewasset Bank v. Rogers, 18 N. H. 255; Sioux Valley State Bank v. Kellogg, 81 Iowa 124, 46 N. W. 859; Grafton Bank v. Woodward, 5 N. H. 301; Plymouth Co. Bank v. Gilman, 3 S. D. 170, 52 N. W. 860, 44 Am. St. Rep. 782.

A contract liability on the part of a corporation may be established by evidence of the admissions and declarations of the officer or agent of the corporation,<sup>67</sup> but not unless they are otherwise unobjectionable within the rules previously shown.<sup>68</sup> Such as, for example, liability on an account stated,<sup>69</sup> provided authority to bind the corporation by an account stated be shown.<sup>70</sup>

b. *Estoppel*. — An estoppel, as against a corporation, in favor of one who has acted on an admission or declaration by an officer or agent of the corporation may be shown by evidence thereof;<sup>71</sup> but as in other cases, the evidence must not be otherwise objectionable.<sup>72</sup>

**Knowledge on the Part of the Corporation** of the illegality of a contract into which it has entered may be shown by evidence of admissions and declarations by its officers and agents.<sup>73</sup>

c. *Negligence*. — Negligence, such as will impose a liability on a corporation, may be shown by admissions and declarations of its officers and agents, if otherwise unobjectionable;<sup>74</sup> provided they are part of the *res gestae* and made within the scope of and in the course of authority of such officer or agent.<sup>75</sup>

67. *Hix v. Edison Elec. L. Co.*, 50 N. Y. Supp. 592, 27 App. Div. 248, affirmed 163 N. Y. 570; *Dubueque & S. C. R. Co. v. Pierson*, 70 Fed. 303; *Bullock v. Consumers Lumb. Co.*, (Cal.), 31 Pac. 367; *Dobbins v. Pyrolusite Mang. Co.*, 75 Ga. 450.

68. *Tripp v. New Metallic Pkg. Co.*, 137 Mass. 499; *Maxson v. Michigan Central R. Co.*, 117 Mich. 218, 75 N. W. 459; *Tuthill Sprg. Co. v. Shaver W. Co.*, 35 Fed. 644. And see *Henry v. Northern Bank*, 63 Ala. 527.

**Amount Due on Mortgage**. — Declarations of the secretary of a corporation as to the amount due on a mortgage held by it are not admissible in a suit on the mortgage, unless it be shown that the secretary had authority to bind the corporation by his admission; and it is not enough to show merely that as secretary he had charge of the books and accounts of the corporation. *Johnston v. Elizabeth B. & L. Ass'n*, 104 Pa. St. 394.

69. *Davis v. Georgetown Bridge Co.*, 1 Cranch C. C. 147, 7 Fed. Cas. No. 3,637.

70. *Harvey v. West Side El R. Co.*, 13 Hun (N. Y.) 392.

71. *Garner v. Hall*, 122 Ala. 221, 25 So. 187; *Chicago & E. I. R. Co. v. Hay*, 119 Ill. 493, 10 N. E. 29.

**The Boundaries of Lands Con-**

**veyed by a Corporation** may be established by evidence of admissions and declarations by its officers and agents. *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 27 N. E. 305.

72. *People v. Stockton & S. R. Co.*, 49 Cal. 414; *Fulton B. & L. Ass'n v. Greenlea*, 103 Ga. 376, 29 S. E. 932; *Miller v. King*, 84 Hun 308, 32 N. Y. Supp. 332; *Oakland Co. Sav. Bank v. State Bank*, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67; *Morris & E. R. Co. v. Green*, 15 N. J. Eq. 469.

73. *Jones v. Planters Bank*, 9 Heisk. (Tenn.) 455, holding, however, that the declarations in question could not be received because not made by such officers or at such times as were binding on the corporation.

74. *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 25 N. E. 799, 23 Am. St. Rep. 688, 10 L. R. A. 696.

75. *Alabama*. — *Western Un. Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844. *Indiana*. — *Pittsburgh C. & St. L. R. Co. v. Theobald*, 51 Ind. 246.

*Iowa*. — *Sweatland v. Illinois & M. Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285.

*Massachusetts*. — *Robinson v. Fitchburg & W. R. Co.*, 7 Gray 92.

*Minnesota*. — *Parker v. Winona &*



d. *Liability of a Corporation for False Representations* by its officers and agents, by means of declarations, may be shown by evidence thereof.<sup>76</sup>

e. *Insolvency of Corporation*.—Again, on an issue as to the insolvency of a corporation at a particular time, evidence of statements by the managing agent of the corporation, when otherwise unobjectionable within the rules under discussion, is competent and material.<sup>77</sup>

f. *Corporate Knowledge of Management*.—So, for the purpose of establishing the fact that the officers of a corporation knew of the manner in which their president was conducting the business of the corporation, and that they acquiesced in and assented to such management, evidence of admissions and declarations of such officers is admissible.<sup>78</sup>

g. *Tampering With Witnesses*.—Evidence of an attempt by a corporate agent, whose duties were to see to the witnesses and procure evidence for the corporation, to bribe witnesses to testify falsely in favor of the corporation, is admissible against the corporation, although there is no proof of any corporate act expressly authorizing an agent to tamper with witnesses.<sup>79</sup>

St. P. R. Co., 83 Minn. 212, 86 N. W. 2.

Mississippi.—Moore v. Chicago St. L. & N. O. R. Co., 59 Miss. 243.

Missouri.—McDermott v. Hannibal & St. J. R. Co., 73 Mo. 516.

New York.—Luby v. Hudson River R. Co., 17 N. Y. 131.

Tennessee.—Travis v. Louisville & N. R. Co., 9 Lea 231.

Wisconsin.—Randall v. Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419.

76. Norwich & W. R. Co. v. Cahill, 18 Conn. 484.

When it is charged that the fraud of a corporate agent, acting for it, was instrumental in procuring a contract, evidence of his declarations made at the time, and within the scope of his authority, is admissible. Howe Mach. Co. v. Snow, 32 Mich. 433.

77. Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 888. And see National Bank of Merrill v. Illinois & W. L. Co., 101 Wis. 247, 77 N. W. 185. See also article "INSOLVENCY."

78. Evidence that the secretary of a corporation said in reply to an inquiry as to the president's authority to sign certain instruments, that there was a time when other officers as well as the president had signed

them, but that the others had too much other business to attend to, and that the entire authority had been placed in the president, if it is understood to relate to an instrument issued by the president to himself, is admissible, in an action on an instrument thus fraudulently issued. Corn Ex. Bank v. American D. & T. Co., 163 N. Y. 332, 57 N. E. 477.

79. Baltimore & O. R. Co. v. Rambo, 59 Fed. 75, 8 C. C. A. 6; Chicago C. R. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29.

In Nowack v. Metropolitan St. R. Co., 166 N. Y. 433, 60 N. E. 32, reversing 66 N. Y. Supp. 533, the court said: "A corporation can act only through agents, and where a branch of its business, whether broad or narrow, is intrusted to an agent, without any restriction, whatever he does which directly relates to that part of the corporate business, and tends to promote it, is binding upon the corporation. Under such circumstances he has control of the method of action, and that which he does, whether morally right or wrong, within the general scope of the matter intrusted to him, in legal effect is done by the corporation itself. Having authority to accomplish a certain result, with no lim-

**H. DECLARATIONS IN INTEREST OF OFFICER OR AGENT.** — Admissions and declarations by an officer or agent of a corporation, although against the interest of the corporation, but also in the interest of the officer or agent making them, are not competent evidence against the corporation, and in favor of the person to whom they were made.<sup>80</sup>

**4. Best and Secondary Evidence.** — **A. ACTS OF CORPORATION.**  
**a. In General.** — As a general rule, where it appears that the acts of a corporation, such as its constitution, by-laws,<sup>81</sup> formal votes, resolutions and the like, are matters of record, such records are the best evidence thereof.<sup>82</sup>

itation as to the means to be employed, his acts, so far as they directly contribute to that result, even if unlawful, are corporate acts. They are done for the corporation by an agent clothed with general authority to effect a certain purpose, which they aid in attaining. Any admission made by him through acts done to carry on his branch of the business, and which reasonably tend to advance it, is regarded in law as made by the corporate body which authorized him to act for it with reference to the subject of his employment. Kaufman was employed to look up and 'see to' witnesses for the defendant, so as to enable it to defeat the plaintiff's claim, among others. He was to find witnesses, if possible, who would swear to such a state of facts as would prevent a recovery against the defendant. The method of doing this was left to his judgment and discretion. If he adopted a method not contemplated by the defendant, still it is responsible for what he did, in the line of his employment, to promote its interest. In order to promote its interest, he saw fit, as we must now assume, to use the power intrusted to him by trying to bribe the most important witness for the plaintiff to testify, falsely, in favor of the defendant. He was employed 'to see to the witnesses,' and this was his manner of seeing to them. He was to procure evidence, the method not being specified, and he tried to get it by an unlawful method. The subject was left to his judgment, and he acted according to his judgment. The scope of the business intrusted to him included whatever he thought best to do in order to get

the right kind of witnesses. He was not working for himself, but for the defendant; and, as he represented it with reference to the subject of witnesses, his conduct not only tended to show that its case was weak, for witnesses are not bribed unless it is thought necessary, but to cast a doubt upon the testimony of the other witnesses who were looked up by him and sworn by the defendant. It indicated, as the result of his investigation for the defendant, that honest witnesses could not be procured who would swear to a defense. If he could not make a mere admission as such, he could do an act which had the effect of an admission. His declarations *dum fervet opus* were acts."

**80.** *Germania S. V. & T. Co. v. Boynton*, 71 Fed. 797; *Wheeler v. Home Sav. Bank*, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161; *State Sav. Bank v. Montgomery*, 126 Mich. 327, 85 N. W. 879; *Love v. Anchor R. V. Co.*, (Cal.), 45 Pac. 1,044.

**81. By-Laws.** — Testimony of an officer of a corporation cannot be received to show what the by-laws are, and the authority conferred by them. That is to be ascertained by the by-laws themselves. *Lumbard v. Aldrich*, 8 N. H. 31.

**82. Colorado.** — *Union Gold Min. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565.

*Georgia.* — *Banks v. Darden*, 18 Ga. 318.

*Illinois.* — *Trustees Soldiers' Orphans' Home v. Shaffer*, 63 Ill. 243.

*Maryland.* — *Harrison v. Morton*, 83 Md. 456, 35 Atl. 99.

*Mississippi.* — *Smith v. Natchez S. S. Co.*, 1 How. 479.

*New Hampshire.* — *Edgerly v.*

b. *Copies*. — It has been held, however, that because of the inconvenience that would result from the production of the original books, copies duly examined and authenticated<sup>83</sup> may be received.<sup>84</sup>

*Statutes*. — And sometimes this is a matter regulated by express statute.<sup>85</sup> But a statute does not make such a copy the only legal

Emerson, 23 N. H. 555, 55 Am. Dec. 207.

*New York*. — *Mengis v. Fifth Ave. R. Co.*, 63 N. Y. St. 192, 30 N. Y. Supp. 999.

*Oregon*. — *Bowick v. Miller*, 21 Or. 25, 26 Pac. 861.

*Rhode Island*. — *Dennis v. Joslen Mfg. Co.*, 19 R. I. 666, 36 Atl. 129, 61 Am. St. Rep. 805.

*South Carolina*. — *Dial v. Valley Mut. L. Ass'n*, 29 S. C. 560, 8 S. E. 27.

"It is the duly authenticated record in the books of the corporation which is the best evidence, and in the absence of such, any competent secondary evidence may be admitted to show what the act of the board was. The rough notes of the meetings were as much secondary evidence as the testimony of the witnesses, and if produced would only have been admissible like any other secondary fact as tending to show what took place." *Boggs v. Lakeport Agric. Pk. Ass'n*, 111 Cal. 354, 43 Pac. 1,106.

83. A party who offers in evidence a document purporting to be a copy of the rules of a foreign corporation has the burden to prove the copy before it is competent evidence.

But nothing short of such a copy is competent, and the statement of a witness that he has attached to his deposition a copy of such rules and regulations, although such copy is certified to as a true copy, but without any showing that the copy was taken from the original in the hands of the proper custodian, or that the witness had compared the copy with the original, or that the person certifying was such custodian, is not sufficient to let in the copy. *Miller v. Johnston*, (Ark.), 72 S. W. 371.

The correctness of a copy of the by-laws of a corporation cannot be established by the mere statement of the secretary, as a witness, that the pamphlet offered is an of-

ficial publication of such constitution and by-laws, but its correctness must be proved by one having knowledge of the fact. *Supreme Lodge K. of P. v. Robbins*, 70 Ark. 364, 67 S. W. 758.

Where it is in issue whether or not the board of directors of a corporation had ordered the institution of proceedings for the enforcement of a contract in favor of the corporation as provided by a by-law of the corporation, a general objection to a copy of a resolution adopted by the board, directing the institution of the proceeding in question, to which was appended the certificate of the secretary under the corporate seal, that the same was a true copy of the resolution, will not avail to exclude the copy on the ground that the certificate appended did not state that the secretary was the keeper of the records and official papers of the corporation, in accordance with the provisions of a statute governing the admission of such evidence. *Cantwell v. Welch*, 187 Ill. 275, 58 N. E. 414; *affirmed* 88 Ill. App. 247.

In *People v. Oakland Co. Bank*, 1 Doug. (Mich.) 282, a *quo warranto* proceeding to oust the defendant corporation from exercising corporate franchises, on the ground that it had not paid in the requisite capital stock within the required time, it was held that proof that such sum had in fact been so paid in might be made by entries in the corporate books to that effect.

84. *Supreme Lodge K. of P. v. Robbins*, 70 Ark. 364, 67 S. W. 758; *Miller v. Johnston*, (Ark.), 72 S. W. 371. Compare *Ruthven v. Clark*, 109 Iowa 25, 79 N. W. 454, holding a copy of a resolution inadmissible in the absence of proof showing a reason for failure to produce the original. See also *Beeler v. Highland University Co.*, (Kan. App.), 54 Pac. 295.

85. In Georgia a statute (Civil

evidence of the corporate acts; the original record is still admissible.<sup>86</sup>

*c. Parol Evidence.* — (1.) *Generally.* — The acts of a corporation may be proved in the same way as the acts of individuals. If there be no record evidence, they may be proved by the testimony of a witness having knowledge of the acts.<sup>87</sup> There is authority, how-

Code, § 5,236,) provides that when the contents of the books or records of a corporation located in that state are competent and material evidence in any civil action, extracts or transcripts from such books, certified to in the manner set out in the statute, may be used in evidence in lieu of the books themselves, provided the party desiring to so use them shall serve the requisite notice on his adversary; and as against the sole objection to the introduction of such transcripts, that the original books themselves are the best evidence of their contents, the transcripts are competent evidence. *Maynard v. Interstate B. & L. Ass'n*, 112 Ga. 443, 37 S. E. 741.

In *Illinois*, a statute (c. 15, §§ 15-18, pertaining to Evidence and Depositions,) provides that the papers, entries and records of any corporation may be proved by copies examined and sworn to by credible witnesses; but in *Mandel v. Swan L. & C. Co.*, 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, it was held that the original books, and the evidence provided by this statute, are original evidence, and evidence of a secondary nature is not to be resorted to where there is in the possession of a party evidence of a higher and more satisfactory character.

In *Tennessee* a statute (Shannon's Code, § 5,569; Mill's & V. Code, § 4,537,) provides that in an action between corporations and their stockholders, a copy of the proceedings of the board of directors and the subscription and other books of the corporation certified by the secretary, under the corporate seal, shall be admissible as evidence. In *Page v. Knights & Ladies of America*, (Tenn.), 61 S. W. 1,068, it was held that this statute applied to an action against a benefit society by the beneficiaries under the certificate. In this case it was also held that a printed copy of the

constitution, rules and regulations was not admissible in the absence of proof showing inability to produce the books themselves, or the copy as stated in the statute.

*86.* *Green v. Indianapolis*, 25 Ind. 490.

*87.* *California.* — *People v. Eel River R. Co.*, 98 Cal. 665, 33 Pac. 728; *Boggs v. Lakeport Agric. Pk. Ass'n*, 111 Cal. 354, 43 Pac. 1,106.

*Illinois.* — *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334.

*Indiana.* — *Langsdale v. Bouton*, 12 Ind. 467.

*Iowa.* — *Zalesky v. Iowa State Ins. Co.*, 102 Iowa 512, 70 N. W. 187; *Foley v. Tipton Hotel Ass'n*, 102 Iowa 272, 71 N. W. 236.

*Michigan.* — *Ten Eyck v. Pontiac O. & P. A. R. Co.*, 74 Mich. 226, 41 N. W. 905, 16 Am. St. Rep. 633; *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32.

*Missouri.* — *Southern Hotel Co. v. Newman*, 30 Mo. 118.

*New Hampshire.* — *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Winnepesaukee C. M. Ass'n v. Gordon*, 67 N. H. 98, 29 Atl. 412.

*New York.* — *Moss v. Averell*, 10 N. Y. 449.

*Texas.* — *Cameron v. First Nat. Bank*, (Tex. Civ. App.) 34 S. W. 178.

**Notice of First Meeting.** — Where it does not appear by the records, or any written evidence, that notice of the first meeting of a corporation had been given by the corporators, in pursuance of a statute for that purpose, parol evidence is admissible to show that such notice had been given. *Worcester Med. Institution v. Harding*, 11 Cush. (Mass.) 285.

"It has been determined that the neglect, incompetency, not to say dishonesty, of a corporation in making up its minutes, cannot exclude an interested third party from proving the truth by parol." *Donnelly v. St. John's Episcopal Church*, 26 La. Ann. 738.

**That the Directors of a Corpora-**

ever, that the acts of a corporation can only be shown by its records, which are presumed to be made and preserved; that hence parol evidence cannot be received.<sup>88</sup> It has been held that assent to the transfer of unpaid stock cannot be so shown.<sup>89</sup>

(3.) **Statute Requiring Record.**—And it has even been held that although a statute may require the directors of a corporation to keep

tion as **Mortgagee Authorized a Notice of Foreclosure** to be published may be shown by parol. *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32.

**The Proceedings of the Stockholders of a Railroad Corporation** relative to the change of the location of its right of way may be shown by parol evidence, where there is no record or written memorandum of the minutes kept. *Birmingham R. & Elec. Co. v. Birmingham Trac. Co.*, 128 Ala. 110, 29 So. 187.

**Where the Directors of a Corporation Have Borrowed Money** and have executed a deed to secure the same, and kept no record of their acts in relation thereto, parol evidence is admissible to prove such acts. *Murray v. Beal*, 23 Utah 548, 65 Pac. 726. The general rule is that a party is bound to produce the best evidence, and if the corporation has by its own carelessness or neglect prevented a party dealing with it from producing record evidence of its acts, it is his right to resort to such other oral evidence as can be legitimately produced to establish it.

It is competent to show by parol evidence that a written order, entered in the minutes of the board of directors of a corporation, was annulled by a subsequent verbal order of which no record was made. *Whittington v. Farmers' Bank*, 5 Har. & J. (Md.) 489.

While a witness cannot testify to the contents of a writing except upon proper foundation having been first laid, yet he may testify that a certain writing does not contain a particular fact, if at the time of testifying he has the writing in his hands; thus the secretary of a corporation, while holding in his hands the minute books of the corporation, may testify, as against the objection that the minutes of the meeting were the best evidence, that no part of a particular report made by the officers of the

corporation at a stockholders' meeting was rejected by the stockholders, so far as the books show. Such testimony does not refer to what particular action was taken on the report, but rather that no action was taken at all. "There is a difference in testifying to what appears on a minute book without its production, and testifying that a particular thing does not appear on the minutes, especially if the minute entries are in the hands of the witness when testifying." *Bessemer Land & Imp. Co. v. Jenkins*, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26. See also *Smith v. Richards*, 29 Conn. 232.

It is not error to permit a witness, who professes to know the fact, to testify that certain securities had never been delivered to a corporation, irrespective of what may appear with reference to this matter upon the minutes of the corporation. *Fouche v. Merchants' National Bank*, 110 Ga. 827, 36 S. E. 256.

In *Topping v. Bickford*, 4 Allen (Mass.) 120, an action on notes endorsed to the plaintiff by a corporation as payee, it was held that in order to prove a vote authorizing the endorsement, it was not necessary to produce the books of the corporation, especially as they were out of the state.

<sup>88.</sup> *Methodist Ch. Corp. v. Her-rick*, 25 Me. 354; *Stevens v. Eden M. H. Soc.*, 12 Vt. 688.

<sup>89.</sup> *Pittsburgh & C. R. R. Co. v. Clarke*, 29 Pa. St. 146, where the court said: "So long as the stock remains unpaid, the corporation has a right to refuse to receive new members in place of the original adventurers. Until the stock is fully paid up, and the stockholders otherwise free from debt to the company, they have no right whatever to introduce strangers into the company in their places. . . . The question here is whether one member of a corporation has been legally substituted for

full and correct entries of their transactions,<sup>90</sup> parol evidence is admissible to show the acts by such directors when no record is kept, or the proceedings have not been recorded, unless the statute in express terms provides that no other evidence than the recorded minutes is admissible,<sup>91</sup> although there is authority to the contrary.<sup>92</sup>

(3.) **Corporate Acts Collaterally in Issue.**—The rule admitting parol evidence of the contents of written instruments, where the

another. The title of the original stockholder was established by written evidence, and could have no legal existence without it. *Thames Tunnel v. Sheldon*, 6 B. & Cress. 341. The title of the substitute must be shown by evidence of the same character. It is the duty of the directors to keep minutes of their proceeding, and the proper evidence of their assent to a transfer is a *recorded* resolution adopted when the board was in session. Where the transfer is made by a director, it ought further to appear that the resolution of assent was carried without his vote. If the resolution was adopted and entered on the minutes, the loss or destruction of the entry might be supplied by parol proof. But in no other case can parol evidence be received to show that an assignee has been admitted as a member of the corporation, in the place of the assignor."

90. In Texas, a statute requires corporations to keep a record of all business transactions; another statute makes such records or properly authenticated copies thereof, competent evidence in any action or proceeding to which the corporation is a party, and in *Guadalupe & S. A. R. Stock Ass'n v. West*, 76 Tex. 461, 13 S. W. 307, it was held that proof that an assessment on stock was made by authority of the board of directors at a meeting of the board, could not be made by oral testimony, in the absence of proper foundation therefor as secondary evidence.

91. *Zalesky v. Iowa State Ins. Co.*, 102 Iowa 512, 71 N. W. 433; *affirming* 70 N. W. 187.

92. *Guadalupe & S. A. R. Stock Ass'n v. West*, 76 Tex. 461, 13 S. W. 307.

Where the statutes governing corporations require all corporate acts to be recorded in a record to be kept

by the officers of a corporation, parol evidence that the necessary steps under the statute had been taken by the corporation in the matter of the assessment and sale of certain corporate stock, is not admissible for the corporation in an action brought by the stockholders to set aside the sale of the stock for non-payment of the assessment. *Corcoran v. Sonora Min. & Mill. Co.*, (Idaho), 71 Pac. 127. "The statute requiring the corporation to keep a record of its proceedings intends that the substance of all its proceedings should appear on record. In case of the levy of an assessment by a corporation, and proceedings to sell stock on account of delinquency in paying such assessment, the proceeding is a special, summary one, by which citizens are deprived of their property; and, in order to make the sale valid, all of the requirements of the statute must be substantially complied with.

**The Declaration of a Dividend by a Corporation** cannot be proved by a stockholder by parol evidence, where the records of the corporation show no vote declaring a dividend, but on the contrary show an account of advances made. *Dennis v. Joslin Mfg. Co.*, 19 R. I. 666, 36 Atl. 129, 61 Am. St. Rep. 805, wherein the court said:

"The declaration of a dividend is one of the most important actions of a corporation. It is a disposition *pro tanto* of its property. It clearly implies corporate action to that effect. It is action of such a character that it ought to appear upon the books of the company. A corporation is not a co-partnership where parties can make an agreement between themselves informally, but it must act as a corporate body; and as corporations are now so numerous in all branches of business we deem it to be highly important to require regu-

writing is only collateral to the question in issue, applies to the minutes of a corporation.<sup>93</sup>

d. *Opinion of Witness.* — Proof of the papers, entries and records of a private corporation in the possession of that corporation cannot be shown by an opinion or conclusion of a witness. The evidence must be primary, original evidence.<sup>94</sup>

5. *Documentary Evidence.* — A. CORPORATE BOOKS AND RECORDS.  
a. *Against the Corporation and Members.* — The books and records of a corporation are competent evidence as against the corporation<sup>95</sup> and members thereof who had access to the books, to show the acts of the corporation.<sup>96</sup> So they are admissible against a corporator

larity and certainty in their proceedings so far as mutual rights of stockholders are concerned."

93. *New Jersey Z. & I. Co. v. Lehigh Z. & I. Co.*, 59 N. J. L. 189, 35 Atl. 915.

94. *Mandel v. Swan L. & C. Co.*, 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, holding that certain depositions should have been suppressed as being objectionable for this reason.

95. See *Buffington v. Tpke. R. Co.*, 3 Pen. & W. (Pa.) 71; *Banks v. Darden*, 18 Ga. 318; *Kalamazoo Nov. Wks. v. Macalister*, 40 Mich. 84.

"The entries upon the books of a corporation are *prima facie* evidence against it as admissions. The records and books of a corporation becoming conclusive evidence against it when they are the books and records of the corporation, and the entries upon them have been duly made by the recording officer. But corporations are not bound by false and simulated entries upon their records in any case, unless, knowing they are such, they have neglected to correct them, and some innocent third party, having had proper access to them or knowledge of them, has been misled thereby to his prejudice." *City Elec. St. R. Co. v. First Nat. Ex. Bank*, 62 Ark. 33, 34 S. W. 89, 54 Am. St. Rep. 282. See also *Holden v. Hoyt*, 134 Mass. 181.

96. *Hubbell v. Meigs*, 50 N. Y. 480; *Warner v. Daniels*, 1 Woodb. & M. (U. S.) 90, 29 Fed. Cas. No. 17,181; *Booth v. Dexter S. F. Eng. Co.*, 118 Ala. 369, 24 So. 405; *First Nat. Bank v. Tisdale*, 84 N. Y. 655; *Jefferson v. Stewart*, 4 Harr. (Del.) 82; *Macon & A. R. Co. v. Vason*, 57

Ga. 314; *Proprietors of Long Wharf v. Palmer*, 37 Me. 379.

Where the charter of a corporation requires the presence of two-thirds of the members to form a quorum, the books are competent evidence that that number of the corporators were present. *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628, so holding as against the objection that a by-law of the corporation had not been proved to have been enacted by such a quorum, the minutes simply reciting the presence of the members. See also *Gray v. Turnpike Co.*, 4 Rand. (Va.) 578.

Relevant portions of the minutes of a corporation may be introduced in evidence, subject, of course, to the right of the opposite party to introduce such other portions of the minutes as are pertinent to the issue. *Fouche v. Merchants' National Bank*, 110 Ga. 827, 36 S. E. 256.

In an action by a corporation on a promissory note given by a stockholder, who had also been treasurer, for the settlement of a claim against him for the loss of corporate funds, the minutes of the meeting of the corporation at which the defendant was present, and when action was taken regarding the giving of the note sued on, are admissible in evidence, for the purpose of showing what was done at that meeting in reference to the giving of the note, and its acceptance by the corporation, in settlement of the claim against the defendant. *Booth v. Dexter S. F. E. Co.*, 118 Ala. 369, 24 So. 405.

Portions of the minute book of a corporation which are not part of the minutes of a meeting of the corporation, but made when there was

present and assenting to the entries.<sup>97</sup> Nor is it necessary in such case that the entries should be proved by the clerk who made them.<sup>98</sup> But books of account have been held not competent evidence for the corporation as against a member claiming adverse to the corporation.<sup>99</sup>

**Personal Liability of Members for Corporate Debt.** — As to whether or not the books of account of a corporation are legal evidence, in an action by a corporate creditor to enforce the individual liability of a member of the corporation for a debt due such creditor, the cases are in conflict. On the one hand it is held that in such case the members are, as to such books of account, strangers, and that hence the books can not be received;<sup>1</sup> while on the other hand there is authority to the effect that the books are admissible.<sup>2</sup>

**Sworn Copies.** — So also sworn copies of the books are competent as against a member having access to the books.<sup>3</sup>

b. *Against Officers.* — And the corporate books are competent evidence against directors and officers<sup>4</sup> who have had access to<sup>5</sup> and have examined the books.<sup>6</sup>

c. *Against Strangers.* — The books of a corporation are not competent evidence as against strangers,<sup>7</sup> unless made so by statute,<sup>8</sup> or

no meeting, are not admissible against the corporation. Davidson v. West Oxford L. Co., 126 N. C. 704, 36 S. E. 162.

97. Graff v. Pittsburgh & S. R. Co., 31 Pa. St. 489.

98. First Nat. Bank v. Tisdale, 84 N. Y. 655.

**A Ledger Found After the Failure of a Corporation** with its other papers in the office of a director who had left the state, and which he had produced in other proceedings as the corporation ledger, is sufficiently proved for admission in evidence as such, and entries therein showing the nature and amount of corporate indebtedness to creditors are competent evidence of that fact. McHose v. Wheeler, 45 Pa. St. 32.

99. Wheeler v. Walker, 45 N. H. 355.

1. Hager v. Cleveland, 36 Md. 476; Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1,046, 22 Am. St. Rep. 816.

2. Zang v. Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145; Schalucky v. Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; Dows v. Naper, 91 Ill. 44; McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149.

3. Hubbell v. Meigs, 50 N. Y. 480.

4. Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544; Blake v. Gris-

wold, 103 N. Y. 429, 9 N. E. 434.

5. Bird v. Magowan, (N. J. Eq.), 43 Atl. 278.

In an action by a receiver of a corporation to set aside a mortgage on the corporate property made by the directors who were creditors to themselves as individuals to secure their debt, the corporate books, reports and accounts, including the bank book, are competent evidence against the directors on the issue of insolvency *vel non* of the corporation when the mortgage was made. Taylor v. Mitchell, 80 Minn. 492, 83 N. W. 418.

**The By-Laws of a Corporation** are competent evidence against its officers, although such officers are not in fact members of the corporation. Bank of Wilmington & Brandywine v. Wollaston, 3 Harr. (Del.) 90.

6. First Nat. Bank v. Tisdale, 84 N. Y. 655; Southern Mut. Ins. Co. v. Pike, 32 La. Ann. 483.

7. Chase v. Sycamore & C. R. Co., 38 Ill. 215; Pittsburgh C. & S. L. R. Co. v. Noel, 77 Ind. 110; Wetherbee v. Baker, 35 N. J. Eq. 501; Jones v. Florence Wesleyan Univ., 46 Ala. 626; Brown v. State, 64 Md. 199, 1 Atl. 54; Fleming v. Wallace, 2 Yeates (Pa.) 120.

8. Dolan v. Wilkerson, 57 Kan. 758, 48 Pac. 23.



unless they are brought home to the knowledge of, and are assented to by, such strangers;<sup>9</sup> and even when this is done, the entries must have been so made as to be part of the *res gestae*.<sup>10</sup>

**6. Opinion Evidence.** — What the constitution and by-laws of a corporation are cannot be proved by the opinion of a witness, where it appears they are matters of record on the corporate books.<sup>11</sup>

**7. Parol Evidence.** — The rule forbidding parol evidence to vary or contradict a writing applies to the records of a corporation.<sup>12</sup> But there is authority to the effect that as the records consist merely of the written entries of the acts of the directors made by a clerk appointed for that purpose, for the convenience only of themselves or the corporation for which they act, they are not of so high or solemn a character as to be conclusive, and that they may therefore be contradicted by any person whose interests are to be affected by them.<sup>13</sup>

**Resolution.** — And it has been held that a resolution belongs to those mixed transactions where part is in writing and part not, to which consequently the rule referred to does not apply so as to exclude oral evidence of the unwritten portion.<sup>14</sup>

**Mistake.** — It may be shown by parol that a resolution as written

9. *Smith v. North Carolina R. Co.*, 68 N. C. 107 (by-laws). And see *New England Mfg. Co. v. Van Dyke*, 9 N. J. Eq. 498; *Hamilton Buggy Co. v. Iowa Buggy Co.*, 88 Iowa 364, 55 N. W. 496.

In *Eigenman v. Rockport Bldg. & L. Ass'n*, 79 Ind. 41, an action by a corporation as the holder of a first mortgage against the defendant, on his contract assuming to pay such mortgage, it was held proper to permit the corporation to put in evidence its constitution and by-laws, fixing the payments due on the mortgages, and an order of its board of directors authorizing the assignment to the defendant of the mortgage on his performing his part of the contract.

10. The books of a stock exchange are not admissible as evidence against a pledgor of corporate stock whose stock was sold on the ground that his power of attorney had made the corporation his agent to sell, unless it is shown that the entries were made contemporaneously with the sale, or so near as to come within the principle of *res gestae*. *Terry v. Birmingham Nat. Bank*, 93 Ala. 609, 9 So. 299.

11. *Supreme Lodge K. of P. v. Robbins*, 70 Ark. 364, 67 S. W. 758.

12. *Williams v. Ingell*, 21 Pick. (Mass.) 288; *Davis Mill. Co. v. Bennett*, 39 Mo. App. 460; *Britton v. Lawrence*, 1 D. Chip. (Vt.) 103.

**A Record Vote of the Directors** of a corporation, being a written instrument, must be construed by its terms alone, with reference to the subject matter to which it applies, and accordingly parol evidence is not admissible to show the sense in which it was understood by one of the directors. *Gould v. Norfolk Lead. Co.*, 9 Cush. (Mass.) 338.

In the absence of an issue for that purpose a corporation will not be permitted to show that its records, upon the faith of which others have contracted with it, and which it has itself taken no steps to correct, are false. *Barrell v. Lake View L. Co.*, 122 Cal. 129, 54 Pac. 594.

A recorded vote of the directors of a corporation which contains no imperfection or ambiguity in its language, cannot be controlled by evidence of how the directors understood it. *Peterborough R. Co. v. Wood*, 61 N. H. 418.

13. *Goodwin v. U. S. A. & L. Ins. Co.*, 24 Conn. 591.

14. *Kalamazoo Nov. Mfg. Wks. v. Macalister*, 40 Mich. 84.

was not the resolution passed by the board of directors.<sup>15</sup>

**The Interpretation of a Contract Entered Into by the President of a Corporation** in its behalf, which is susceptible of different constructions, may be aided by evidence of conversations between the president of the corporations and the other parties to the contract, showing how the contract was understood between them.<sup>16</sup>

## VI. DISSOLUTION OF CORPORATION.

**1. Burden of Proof and Presumptions.** — **A. IN GENERAL.** — The burden of proving the dissolution of a corporation is upon the party seeking to take advantage of that fact.<sup>17</sup>

**B. INSOLVENCY.** — The fact of insolvency will not raise a presumption of dissolution of a corporation.<sup>18</sup>

**C. NON-USER.** — The presumption that a corporation has been dissolved which arises from non-user of its corporate franchises for a long time<sup>19</sup> may be rebutted by evidence of a statute recognizing the corporation's existence.<sup>20</sup>

15. *Gilson Quartz Min. Co. v. Gilson*, 51 Cal. 341.

16. *Balfour v. Fresno Can. & Irrg. Co.*, 123 Cal. 395, 55 Pac. 1,062.

17. *U. S. Elec. L. Co. v. Leiter*, 19 D. C. 575; *Regents of University v. Williams*, 9 Gill & J. (Md.) 232.

18. *Butchers' & Drovers' Bank v. Pulitzer*, 11 Mo. App. 594.

19. *Farmers' Bank v. Gallagher*, 43 Mo. App. 482; *Cambes v. Keyes Co.*, 89 Wis. 297, 62 N. W. 89, 46 Am. St. Rep. 825.

20. *State v. Vincennes University*, 5 Ind. 77.

# CORPUS DELICTI.

BY PETER A. BREEN.

## **I. DEFINITIONS, 660**

1. *What Is*, 660
2. *Elements of*, 660
3. *Agency of Accused Not an Element*, 660

## **II. MUST BE PROVED, 660**

## **III. ORDER OF PROOF, 662**

1. *Admissions of Evidence*, 662
  - A. *In General*, 662
  - B. *Admissible When Inseparable*, 662
2. *Rule As To Admission of Confessions*, 662
  - A. *In General*, 662
3. *Order of Proof Discretionary*, 663
4. *Error Cured*, 663

## **IV. BURDEN OF PROOF, 663**

## **V. EVIDENCE, 664**

1. *Direct Evidence Unnecessary*, 664
2. *Confessions as Evidence of Corpus Delicti*, 665
  - A. *Confessions Insufficient*, 665
  - B. *Confessions Considered in Establishing*, 666
  - C. *Facts Ascertained from Confessions*, 666.
  - D. *Judicial Confessions*, 666

## **CROSS-REFERENCES.**

Confessions ; Circumstantial Evidence ;  
Homicide.

## I. DEFINITIONS.

1. **What Is.** — By the term *corpus delicti* is meant the body of the crime or the fact that a crime has actually been committed.<sup>1</sup>

2. **Elements Of.** — The *corpus delicti* of every criminal offense is made up of two elements, which are, first, the fact that a certain result has been produced, and second, the criminal agency of some person in producing that result.<sup>2</sup>

3. **Agency of Accused Not an Element.** — Though there are some cases which seem to treat the criminal agency of the accused as a third element of the *corpus delicti* of the offense for which he is on trial,<sup>3</sup> it is well settled that such agency is not an element of the *corpus delicti*.<sup>4</sup>

## II. MUST BE PROVED.

The *corpus delicti* has been held to be the foundation of<sup>5</sup> and the primary issue in every criminal prosecution,<sup>6</sup> and it has also been held that no matter how strong the circumstances tending to indicate the guilt of the accused may be,<sup>7</sup> unless the *corpus delicti*

1. "The Expression Means, primarily, the 'body of the offense.' But, in applying it, courts and text writers have not at all times agreed as to what is meant by the 'body of the offense.' In our opinion, the term means, when applied to any particular offense, that the particular crime charged has actually been committed by some one." *State v. Millmeier*, 102 Iowa 692, 72 N. W. 275.

This Expression, *Corpus Delicti*, figures largely in criminal trials from an early day, and yet its precise scope, force and application have not been and cannot be embodied in a proposition or rule applicable to all cases. The idea indicated by it is not obscure. Upon a charge of murder the idea and the rule is that a conviction should not occur unless it was proved that the subject of the alleged murder had lost his life. To put it short, that a person should not be convicted of having killed a person until it was proved that that person was in fact dead. When that is established, the *corpus delicti* is made out — that is, the subject matter of the alleged crime, namely, a person dead. *State v. Potter*, 52 Vt. 33.

2. The *Corpus Delicti* Is Made Up

of two things: 1. Certain facts forming its basis; 2. The existence of criminal agency as the cause of them. *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *Pitts v. State*, 43 Miss. 472; *State v. Gates*, 28 Wash. 680, 69 Pac. 385.

**Elements.** — "It (the *corpus delicti*) is made up of two elements: First, that a certain result has been produced, as that a man has died, or a building has been burned, or a piece of property is not in the owner's possession; second, that some one is criminally responsible for the result." *State v. Millmeier*, 102 Iowa 692, 72 N. W. 275.

3. "This *Corpus Delicti* Consists of Two Things: First, a criminal act; and second, the defendant's agency in the commission of such act." *Lovelady v. State*, 14 Tex. App. 546.

4. See cases cited in note 2 *supra*.

5. "The Foundation of every criminal accusation, the primary fact, is the *corpus delicti*." *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698.

6. "The Material Fact in every criminal prosecution is the *corpus delicti*." *Smith's Case*, 21 Gratt. (Va.) 809.

7. **Suspicious Facts and Circumstances Insufficient.** — Though the

is established he cannot be called upon to answer to or defend himself against any criminal accusation.<sup>8</sup> The true rule is that until the *corpus delicti* of the offense for which the accused is on trial is made out by the evidence no conviction of any grade of crime can be had.<sup>9</sup>

facts and circumstances in evidence in a trial for theft produce a strong suspicion of the guilt of the accused, unless the *corpus delicti* is first established, they are not of themselves sufficient to justify the conviction of the defendant of a felony. *Younkins v. State*, 2 Cold. (Tenn.) 219; *Tyner v. State*, 5 Humph. (Tenn.) 383.

**Incriminating Circumstances Insufficient.**—"The coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, amounts to nothing unless the *corpus delicti*, the fact that the crime has been actually perpetrated, be established by full proof—for so long as the least reasonable doubt exists as to the act, there can be no certainty as to the agent." *State v. Flanagan*, 26 W. Va. 116.

8. "It Is a Fundamental and Inflexible Rule of legal procedure of unusual obligation, that no person shall be required to answer, or be involved in the consequences of guilt, without satisfactory proof of the *corpus delicti*, either by direct evidence or by cogent and irresistible grounds of presumption, for where there is no sufficient legal proof of crime, there can be no legal criminality." *State v. Flanagan*, 26 W. Va. 116.

9. *Colorado*.—*McBride v. People*, 5 Colo. App. 91, 37 Pac. 953.

*Delaware*.—*State v. Miller*, 9 Houst. 564, 32 Atl. 137.

*Kentucky*.—*Morris v. Com.*, 20 Ky. L. Rep. 402, 46 S. W. 491.

*Massachusetts*.—*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

*Mississippi*.—*Pitts v. State*, 43 Miss. 472.

*Missouri*.—*State v. Jones*, 106 Mo. 302, 17 S. W. 366; *State v. Knolle*, 90 Mo. App. 238.

*Nebraska*.—*Dreessen v. State*, 38 Neb. 375, 56 N. W. 1,024.

*New York*.—*People v. Palmer*, 109 N. Y. 110, 16 N. E. 529, 4 Am. St. Rep. 423.

*Texas*.—*Lovelady v. State*, 14 Tex. App. 546; *Puryear v. State*, 28 Tex. App. 73, 11 S. W. 929; *Harris v. State*, 30 Tex. App. 549, 17 S. W. 1,110; *Josef v. State*, 34 Tex. Crim. App. 446, 30 S. W. 1,067; *Brown v. State*, 1 Tex. App. 154; *Hunter v. State*, 34 Tex. Crim. App. 599, 31 S. W. 674; *Conde v. State*, 35 Tex. Crim. App. 98, 34 S. W. 286, 60 Am. St. Rep. 22; *Kugadt v. State*, 38 Tex. Crim. App. 681, 44 S. W. 989; *Gay v. State*, 40 Tex. Crim. App. 242, 49 S. W. 612.

*Virginia*.—*Brown v. Com.*, 89 Va. 379, 16 S. E. 250.

**Must Be Proved.**—In all trials for crime the prosecution must prove to the satisfaction of the jury that a crime has been committed before the jury can proceed to inquire as to who is the principal. *U. S. v. Searcey*, 26 Fed. 435.

**No Conviction Possible Unless Proved.**—In a prosecution for taking a letter from a letter-box and extracting money therefrom the court say: "Before a conviction is justified, the government should be required to establish the *corpus delicti* by some degree of circumstantial or other evidence independent of the defendant's extrajudicial confessions." *U. S. v. Mayfield*, 59 Fed. 118.

**Conviction Unsustainable Unless Proved.**—"It would be folly to argue that a conviction for murder could be sustained when the *corpus delicti* is not proven. It was a question which it was the duty of the jury to pass upon, and if not proven, it was their duty to acquit and it was the duty of the court to so charge them." *Territory v. Monroe*, (Ariz.), 6 Pac. 478.

**Evidence Must Show Corpus Delicti.**—"Before a verdict of guilty can be sustained, the evidence must be sufficient to establish the *corpus delicti*—the body of the offense—and the intent with which it was

## III. ORDER OF PROOF.

**1. Admission of Evidence.** — A. IN GENERAL. — As to the order in which evidence shall be admitted in criminal cases, the general rule is that until the *corpus delicti* of the offense charged is established, no evidence tending to show the defendant's guilt can be introduced.<sup>10</sup>

B. ADMISSIBLE WHEN INSEPARABLE. — There are, however, many cases in which it is impossible to separate the evidence going to establish the *corpus delicti* from that going to establish the defendant's guilt of the offense charged, or in which the evidence establishing the *corpus delicti* is the same as that establishing the defendant's guilt, and it is now well established that such cases form an exception to the general rule as to the order of proof, and that in such cases, incriminating evidence may be admitted along with and at the same time as evidence of the *corpus delicti*.<sup>11</sup>

**2. Rule as to Admission of Confessions.** — A. IN GENERAL. — In accordance with the general rule as to the order of proof in

committed beyond a reasonable doubt." State v. Alcorn, (Idaho), 64 Pac. 1,014.

"The Rule Should Be Adhered to with the utmost and strictest tenacity, that the facts forming the basis of the offense, or *corpus delicti*, must be proved, either by direct testimony or by presumptive evidence of the most cogent or irresistible kind. In one of these methods the essential fact or facts must be established beyond a reasonable doubt." State v. Keeler, 28 Iowa 551.

**10. Corpus Delicti Must First Be Shown.** — The general rule is that the *corpus delicti* must first be shown before other evidence can be introduced against the accused. People v. Ward, 134 Cal. 301, 66 Pac. 372.

In Regular Order, evidence tending to implicate the party on trial ought not to be introduced until the principal fact, known in legal parlance as the *corpus delicti*, has been established. Traylor v. State, 101 Ind. 65; People v. Hall, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477; People v. Millard, 53 Mich. 63, 18 N. W. 562.

11. In a prosecution for abortion, evidence as to the manner of producing the miscarriage properly precedes proof of the *corpus delicti*, because such evidence tends to establish it. Hauk v. State, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

**Evidence Inseparable.** — Evidence tending to show the *corpus delicti* and the defendant's guilty connection with the offense charged are properly admitted together where they cannot well be separated. State v. Davis, 48 Kan. 1, 28 Pac. 1,092.

**History of Case Admissible.** Though the *corpus delicti* had not been fully established in a prosecution for manslaughter produced by an abortion, there was no error in permitting the woman who had attended the deceased up to the time of her death to testify regarding the deceased's sickness and as to what the defendant said and did while attending her, for such testimony tends to prove the *corpus delicti*. People v. Aiken, 66 Mich. 460, 33 N. W. 821, 11 Am. St. Rep. 512.

**Evidence Tending to Show Corpus Delicti and Guilt Admissible Together.** — "There are some cases where the *corpus delicti*—generally in homicide—is clearly separated and distinct from the question as to who committed the offense, if any is found to have been committed. In such cases the evidence to establish the *corpus delicti* must first be given before acts or admissions of the accused can be put in evidence. But the present case is one where the body of the offense—the uttering of a forged instrument, knowing it to

criminal cases, the rule is well established that the confessions of the defendant are inadmissible in evidence against him prior to the proof of the *corpus delicti*.<sup>12</sup>

**3. Order of Proof Discretionary.**—However, notwithstanding the general rule, it has been held that the order of proof in criminal cases is generally within the discretion of the trial court.<sup>13</sup>

**4. Error Cured.**—And that the error in admitting evidence before the *corpus delicti* is established is cured by the subsequent introduction of evidence sufficiently establishing the *corpus delicti* to justify the admission.<sup>14</sup>

#### IV. BURDEN OF PROOF.

The burden of proving the *corpus delicti* is always on the prosecution,<sup>15</sup> and the general rule is that it must be proved beyond a reasonable doubt.<sup>16</sup>

be false—is so intimately connected with the question whether or not the respondent is guilty of the crime that there can be no such separation. The *corpus delicti* in this case depends entirely for its existence upon the acts and intent of the respondent, so that her acts and admissions, if admissible at all, were admissible at any stage of the proceedings upon the trial." *People v. Swetland*, 77 Mich. 53, 43 N. W. 779.

**Admissible When Showing Both Corpus Delicti and Guilt.**—"Often the evidence that tends to show the *corpus delicti* . . . tends also to show that it was effected by criminal means, and by the party charged. Such evidence would be admissible, notwithstanding, of itself, it would not be sufficient to establish the *corpus delicti*." *State v. Potter*, 52 Vt. 33.

**12. Confessions Inadmissible Unless Corpus Delicti Proven.**—The *corpus delicti* must be established before the extrajudicial statements and admissions of a defendant are admissible in a criminal prosecution. *People v. Simonson*, 107 Cal. 345, 40 Pac. 440; *Winslow v. State*, 76 Ala. 42; *Pitts v. State*, 43 Miss. 472. See article "CONFESSIONS."

**13.** *People v. Shainwald*, 51 Cal. 468; *People v. Jones*, 123 Cal. 65, 55 Pac. 698.

**Order of Proof Discretionary.**—"Except in those cases where it is sought to put in evidence the con-

fession or admission of the defendant, the order of proof is in the discretion of the court." *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *State v. Laliyer*, 4 Minn. 368.

**14. Error Cured.**—"If the court erred in admitting evidence of confessions before evidence of the *corpus delicti*, such error was cured by the subsequent introduction of such evidence." *Carl v. State*, 125 Ala. 89, 28 So. 505; *Holland v. State*, 39 Fla. 178, 22 So. 298.

**15. United States.**—U. S. v. Searcey, 26 Fed. 435.

*California.*—*People v. Whiteman*, 114 Cal. 338, 46 Pac. 99.

*Delaware.*—*State v. Taylor*, 1 Houst. Crim. Cas. 436; *State v. Miller*, 9 Houst. 564, 32 Atl. 137.

*Mississippi.*—*Haynes v. State*, (Miss.), 27 So. 601.

*New York.*—*People v. Schryver*, 42 N. Y. 1, 1 Am. Rep. 480.

*Pennsylvania.*—*Ettinger v. Com.*, 98 Pa. St. 338.

*Texas.*—*Lovelady v. State*, 14 Tex. App. 546; *Lovelady v. State*, 17 Tex. App. 286.

**The Burden of Proof** is on the government in a trial for murder by throwing a child overboard from a ship, to prove that the child was not dead before it was thrown overboard. *U. S. v. Hewson*, 26 Fed. Cas. No. 15,360.

**16. California.**—*People v. Morino*, 53 Cal. 67.

*Florida.*—*Lambright v. State*, 34

## V. EVIDENCE.

**1. Direct Evidence Unnecessary.**—It has been said that the *corpus delicti* must be proved by direct evidence,<sup>17</sup> but the rule is now well established that circumstantial evidence suffices.<sup>18</sup> Such evidence, however, in order that it be sufficient, must be such as

Fla. 564, 16 So. 582; *Joe v. State*, 6 Fla. 591, 65 Am. Dec. 579.

*Georgia*.—*Lee v. State*, 76 Ga. 498.

*Illinois*.—*Williams v. People*, 101 Ill. 382.

*Indiana*.—*Traylor v. State*, 101 Ind. 65.

*Iowa*.—*State v. Keeler*, 28 Iowa 551.

*Maryland*.—*Norwood v. State*, 45 Md. 68.

*Massachusetts*.—*Com. v. York*, 9 Metc. 93, 43 Am. Dec. 373.

*Minnesota*.—*State v. Laliyer*, 4 Minn. 368.

*Mississippi*.—*Pitts v. State*, 43 Miss. 472.

*Nebraska*.—*Chezem v. State*, 56 Neb. 496, 76 N. W. 1,056.

*New York*.—*People v. Schryver*, 42 N. Y. 1, 1 Am. Rep. 480.

*Pennsylvania*.—*Zell v. Com.*, 94 Pa. St. 258; *Gray v. Com.*, 101 Pa. St. 380, 47 Am. Rep. 733.

*South Carolina*.—*State v. Motley*, 7 Rich. L. 327.

*Texas*.—*Anderson v. State*, 34 Tex. Crim. App. 546, 31 S. W. 673, 53 Am. St. Rep. 722.

*Vermont*.—*State v. Roe*, 12 Vt. 93.

*West Virginia*.—*State v. Parsons*, 39 W. Va. 464, 19 S. E. 876.

*Wisconsin*.—*Buel v. State*, 104 Wis. 132, 80 N. W. 78.

17. 2 Hale's P. C. 290; *Campbell v. People*, 159 Ill. 9, 42 N. E. 123; *Ruloff v. People*, 18 N. Y. 179; *State v. Williams*, 7 Jones L. (N. C.), 446, 78 Am. Dec. 248.

**18. Direct and Positive Evidence** is not required for the proof of the *corpus delicti*.

*United States*.—*St. Clair v. U. S.*, 154 U. S. 134; *U. S. v. Williams*, 28 Fed. Cas. No. 16,707; *U. S. v. Brown*, 24 Fed. Cas. No. 14,656a; *U. S. v. Matthews*, 26 Fed. Cas. No. 15,742.

*Alabama*.—*Winslow v. State*, 76 Ala. 42; *Martin v. State*, 125 Ala. 64, 28 So. 92.

*Arkansas*.—*Cavaniss v. State*, 43 Ark. 331.

*California*.—*People v. Alviso*, 55 Cal. 230.

*Florida*.—*Anderson v. State*, 24 Fla. 139, 3 So. 884; *Holland v. State*, 39 Fla. 178, 22 So. 298.

*Georgia*.—*Mitchum v. State*, 11 Ga. 615; *Glover v. State*, 114 Ga. 828, 40 S. E. 998.

*Idaho*.—*State v. Alcorn*, (Idaho), 64 Pac. 1,014.

*Illinois*.—*Gannon v. People*, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; *Campbell v. People*, 159 Ill. 9, 42 N. E. 123.

*Indiana*.—*Stocking v. State*, 7 Ind. 326; *McCulloch v. State*, 48 Ind. 109.

*Iowa*.—*State v. Keeler*, 28 Iowa 551; *State v. Millmeier*, 102 Iowa 692, 72 N. W. 275; *State v. Minor*, 106 Iowa 642, 77 N. W. 330.

*Kansas*.—*State v. Winner*, 17 Kan. 298; *State v. Hunter*, 50 Kan. 302.

*Kentucky*.—*Johnson v. Com.*, 81 Ky. 325; *Laughlin v. Com.*, 18 Ky. L. Rep. 640, 37 S. W. 590.

*Massachusetts*.—*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

*Michigan*.—*People v. Hawksley*, 82 Mich. 71, 45 N. W. 1,123.

*Mississippi*.—*Pitts v. State*, 43 Miss. 472.

*Missouri*.—*State v. Dickson*, 78 Mo. 438; *State v. Patterson*, 73 Mo. 695; *State v. Crabtree*, 170 Mo. 642, 71 S. W. 127; *State v. Jones*, 106 Mo. 302, 17 S. W. 366.

*Nevada*.—*State v. Cardelli*, 19 Nev. 319, 10 Pac. 433; *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530.

*New York*.—*Bloomer v. People*, 1 Abb. Dec. 146; *People v. Ruloff*, 3 Park. Crim. 401; *People v. Badgley*, 16 Wend. 53; *People v. Beckwith*, 45 Hun 422; *People v. Palmer*, 46 Hun 479; *People v. Davis*, 64 Hun 636, 19 N. Y. Supp. 781; *Ruloff v.*



to satisfy the jury beyond a reasonable doubt.<sup>19</sup>

**2. Confessions as Evidence of Corpus Delicti.** — A. CONFESSIONS INSUFFICIENT. — In no criminal prosecution can the *corpus delicti* be proved by the uncorroborated extra judicial confessions of the defendant alone.<sup>20</sup>

B. CONFESSIONS CONSIDERED IN ESTABLISHING. — It is now well

People, 18 N. Y. 179; *People v. Bennett*, 49 N. Y. 137; *People v. Beckwith*, 108 N. Y. 67, 15 N. E. 53.

*North Carolina*. — *State v. Williams*, 7 Jones L. 446, 78 Am. Dec. 248.

*Pennsylvania*. — *Com. v. Johnson*, 162 Pa. St. 63, 29 Atl. 280.

*South Carolina*. — *State v. Martin*, 47 S. C. 67.

*Tennessee*. — *State v. Carey*, 7 Humph. 499.

*Texas*. — *Brown v. State*, 1 Tex. App. 154; *Lovelady v. State*, 14 Tex. App. 546; *Kugadt v. State*, 38 Tex. Crim. App. 681, 44 S. W. 989.

*Vermont*. — *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 712; *State v. Brink*, 68 Vt. 659, 35 Atl. 492.

*Washington*. — *State v. Smith*, 9 Wash. 341, 37 Pac. 491; *State v. Gates*, 28 Wash. 689, 69 Pac. 385.

*Wisconsin*. — *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778.

**Coroner's Inquest.** — The verdict of a coroner's jury has been held admissible to prove *corpus delicti*. *State v. Parker*, 7 La. Ann. 83; *State v. Baptiste*, 108 La. 234, 32 So. 371; *State v. Tate*, 50 La. Ann. 1,183, 24 So. 592. See also *State v. Garth*, 164 Mo. 553, 65 S. W. 275.

**19. When the Corpus Delicti Is Attempted to Be Shown** by circumstantial evidence, it must be so established as to positively exclude all uncertainty or doubt from the minds of the jury, but it is not necessary that each particular circumstance should be of this conclusive character, but that all combined should produce the same degree of certainty as positive proof. *State v. Davidson*, 30 Vt. 377, 73 Am. Dec. 312; *Timmerman v. Territory*, 3 Wash. Ter. 445, 17 Pac. 624; *Buel v. State*, 104 Wis. 132, 80 N. W. 78.

See also article "CIRCUMSTANTIAL EVIDENCE."

**20. Confessions Alone Insufficient.** The *corpus delicti* cannot be sufficiently established by the extra judi-

cial confessions of the accused alone. *United States*. — *U. S. v. Mayfield*, 59 Fed. 118.

*California*. — *People v. Jones*, 31 Cal. 566; *People v. Thrall*, 50 Cal. 415; *People v. Tapia*, 131 Cal. 647, 63 Pac. 1,001.

*Illinois*. — *Williams v. People*, 101 Ill. 382; *Gore v. People*, 162 Ill. 259, 44 N. E. 500.

*Iowa*. — *State v. Dubois*, 54 Iowa 363, 6 N. W. 578.

*Michigan*. — *People v. Lane*, 49 Mich. 340, 13 N. W. 622.

*Minnesota*. — *State v. Laliyer*, 4 Minn. 368.

*Mississippi*. — *Jenkins v. State*, 41 Miss. 582; *Sam v. State*, 33 Miss. 347.

*Nebraska*. — *Priest v. State*, 10 Neb. 393, 6 N. W. 468.

*New York*. — *People v. Badgley*, 16 Wend. 53; *People v. Hennessy*, 15 Wend. 147.

*Ohio*. — *Blackburn v. State*, 23 Ohio St. 146.

*Tennessee*. — *Tyner v. State*, 5 Humph. 383.

*Texas*. — *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247; *Kugadt v. State*, 38 Tex. Crim. App. 681, 44 S. W. 989; *Anderson v. State*, 34 Tex. Crim. App. 546, 31 S. W. 673, 53 Am. St. Rep. 722.

**The Rule Requiring Proof of the Corpus Delicti** other than the uncorroborated confessions of the defendant in order to justify a conviction is not founded upon the idea that confessions are inadmissible to prove this material fact, but upon the theory, justified by judicial experience, that confessions alone are insufficient evidence upon which to base a conviction. *Holland v. State*, 39 Fla. 178, 22 So. 298.

**Slighter Proof Necessary Where Defendant Has Confessed.** — "Where there has been a confession by the accused, much slighter proof is required to establish the *corpus delicti* than would be necessary where the

established that the uncorroborated extra judicial confessions of the defendant may be considered as evidence of the *corpus delicti* in connection with other facts and circumstances tending to show the defendant's guilty connection with the offense charged.<sup>21</sup>

C. FACTS ASCERTAINED FROM CONFESSIONS. — And that the facts and circumstances ascertained by reason of such confessions are competent evidence of the *corpus delicti*.<sup>22</sup>

D. JUDICIAL CONFESSIONS. — Judicial confessions alone have been held, however, to be sufficient proof of the *corpus delicti*,<sup>23</sup> and sufficient also, without other proof of the *corpus delicti*, to sustain a conviction on any criminal charge.<sup>24</sup>

state must make out the entire case unaided by a confession. Any corroborative proof in such a case will be held sufficient which satisfies the mind that it is a real and not an imaginary crime which the accused has confessed, and the fact that he was the guilty party may be found by the jury, on proof much slighter than that ordinarily essential." *Heard v. State*, 59 Miss. 545.

21. **Confession Considered With Circumstances.** — In a prosecution for running a policy shop, testimony of the arresting officer showing that the materials for the game were found in the defendant's possession is sufficient, in addition to the defendant's confession, to prove the *corpus delicti*. *People v. Hess*, 85 Mich. 128, 48 N. W. 181.

**Confession Admissible to Prove.** When it is shown in a trial for murder that the body of the deceased has not been seen, but there is other evidence tending to show the *corpus delicti*, the confession of the accused may be admitted to aid in establishing it. *State v. Brown*, 1 Mo. App. 86.

**Confession Sufficient.** — Though the confessions of a defendant will not alone establish the *corpus delicti*, where in addition to such confessions flight and other circumstances tending to show the commission of the crime and connecting the accused with the crime are proved, the *corpus delicti* is sufficiently proved. *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247; *Tidwell v. State*, 40 Tex. Crim. App. 38, 47 S. W. 466, 48 S. W. 184.

22. **Facts Ascertained by Reason of a Prisoner's Confession** may be taken into consideration in establishing the *corpus delicti*. *Pitts v. State*, 43 Miss. 472; *People v. Jaehne*, 103 N. Y. 182, 8 N. E. 374; *State v. Hall*, 31 W. Va. 505, 7 S. E. 422.

23. *State v. Leuth*, 5 Ohio Cr. Ct. 105.

24. "Judicial Confessions uncorroborated by any other proof of the *corpus delicti*, are sufficient to found a conviction, even if it be followed by a sentence of death." *State v. Lamb*, 28 Mo. 218. See article "CONFESSIONS."

# CORROBORATION.

BY CHARLES SUMNER LOBINGIER, PH. D., LL.M.

## I. INTRODUCTORY, 671

1. *Quantum of Proof*, 671
  - A. *In Other Legal Systems*, 671
  - B. *By the Common Law*, 672

## II. NATURE AND REQUISITES, 673

1. *In General*, 673
  - A. *Definition*, 673
  - B. *Terminology*, 674
  - C. *Classes*, 675
2. *Essentials*, 675
  - A. *Must Be Independent of Witness to Be Corroborated*, 675
  - B. *Must Be Material*, 676
  - C. *Must Tend to Connect an Accused With the Offense Charged*, 677
3. *Extent*, 677
4. *Character of Evidence Received*, 678
  - A. *In General*, 678
  - B. *Corroborative Evidence May Be Circumstantial*, 679
  - C. *Confessions and Admissions*, 680

## III. NECESSITY AND SUFFICIENCY, 680

1. *In Criminal Prosecutions*, 680
  - A. *Generally*, 680
    - a. *Confessions*, 680

- (1.) *Judicial*, 680
  - (2.) *Extra-judicial*, 681
    - (A.) *General Rule*, 681
    - (B.) *Sufficiency of Corroboration*, 684
      - (a.) *Generally*, 684
      - (b.) *Abortion*, 685
      - (c.) *Adultery*, 685
      - (d.) *Arson*, 686
      - (e.) *Burglary*, 686
      - (f.) *Embezzlement, Larceny, etc.*, 686
      - (g.) *Escape*, 687
      - (h.) *Murder*, 687
      - (i.) *Poisoning Cattle*, 688
      - (j.) *Rape*, 688
  - b. *Testimony of Particular Persons*, 688
    - (1.) *Accomplices*, 688
    - (2.) *Children*, 688
    - (3.) *Prostitutes*, 688
- B. For Particular Offenses, 688**
- a. *Abduction*, 688
  - b. *Abortion*, 689
  - c. *Bastardy*, 691
  - d. *Bribery*, 693
  - e. *Forgery*, 693
  - f. *Homicide*, 693
  - g. *Incest*, 694
  - h. *Perjury*, 696
    - (1.) *General Rule*, 696
    - (2.) *Scope of the Rule*, 698
    - (3.) *Sufficiency of Corroboration*, 700
      - (A.) *In General*, 700
    - (4.) *What Constitutes Corroboration*, 701

- i. *Rape*, 705
  - (1.) *General Rule*, 705
  - (2.) *Exceptions*, 707
  - (3.) *Minority Rule*, 707
  - (4.) *Sufficiency of Corroboration*, 708
- j. *Seduction*, 711
  - (1.) *In Absence of Statute*, 711
  - (2.) *Statutory Rule*, 711
    - (A.) *In General*, 711
    - (B.) *Degree of Corroboration*, 712
    - (C.) *Elements to Be Corroborated*, 713
    - (D.) *Sufficiency of Corroboration*, 714.
- k. *Treason*, 716
- 2. *In Civil Actions at Law*, 718
  - A. *Breach of Promise*, 718
  - B. *Actions on Contracts*, 719
    - a. *Necessity*, 719
    - b. *Sufficiency of Corroboration*, 721
  - C. *Actions for Slander—Justifying Charge of Perjury*, 721.
  - D. *Proof of Usage*, 722
- 3. *In Divorce Proceedings*, 722
  - A. *In English Courts*, 722
  - B. *In the United States*, 723
    - a. *Testimony of Parties*, 723
    - b. *Other Witnesses Than Parties*, 726
  - C. *Sufficiency of Corroboration*, 726
    - a. *Abandonment and Desertion*, 726
    - b. *Adultery*, 727
    - c. *Cruelty*, 727
    - d. *Drunkenness*, 727

e. *Impotence*, 7274. *In Probate Proceedings*, 727A. *Former Rule*, 727B. *Lost Wills*, 728C. *Transactions With Decedents*, 7295. *In Equity Cases*, 729A. *Overcoming Answers*, 729B. *Establishments of Trusts*, 729**IV. ADMISSIBILITY, 730**1. *In General*, 7302. *When Corroboration Is Required by Law*, 7313. *When Credibility of Witness Is Assailed*, 731A. *In General*, 731B. *Mode of Corroboration*, 736a. *Proof of Prior Declarations*, 736b. *Self Corroboration*, 741**V. PRODUCTION, 742**1. *Order of Proof*, 7422. *Province of Court and Jury*, 743**CROSS-REFERENCES.**

Credibility; Contradiction of Witnesses;

Impeachment;

Perjury;

Rape;

Seduction;

Treason.

## I. INTRODUCTORY.

**1. Quantum of Proof.** — A. IN OTHER LEGAL SYSTEMS. — In no respect is the common law system of evidence more unlike that of other legal systems than as regards the *quantum* of proof.

In the **Babylonian Code** of Hammurabi, which is the oldest extant collection of laws, provisions are found requiring "witnesses," in addition to the claimant, in order to establish the ownership of property alleged to have been stolen.<sup>1</sup>

Under the **Hebrew Law** the testimony of at least two witnesses has always been required in order to obtain a conviction,<sup>2</sup> or establish a fact,<sup>3</sup> and the same rule was retained by the early Christians.<sup>4</sup>

The **Mohammedan Law** has likewise never been satisfied by the testimony of a single witness.<sup>5</sup>

**The Old Aryan Law.** — The laws of the older Aryan nations generally required two witnesses. This was true of the ancient Hindu law,<sup>6</sup> of the Slavic, Bohemian and Polish,<sup>7</sup> and Montenegrin,<sup>8</sup> and Scandinavian, Norwegian and old Icelandic<sup>9</sup> legal systems.

**The Roman Law.** — "*Testis unus testis nullus*" was a maxim of

**1. Code of Hammurabi,** §§ 9, 13. See this code reprinted in *Records of the Past* (Washington, 1903), Pt. III, p. 70. (The code was discovered in 1901 and is about 4,000 years old.)

**2. Mosaic Code.** — "At the mouth of two or three witnesses shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death." Deuteronomy, 17:6. Compare Hebrews 10:28.

**Talmud.** — "To convict a person of a crime Talmudic jurisprudence requires convincing proof of his guilt, which must be furnished by at least two competent witnesses." Mendelsohn, *Crim. Juris. of the Ancient Hebrews* (Baltimore, 1891), § 75n. Compare *The Babylonian Talmud* (Rodkinson's ed., New York, 1900), Vol. II, Pt. X, p. 166.

**3.** "One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses or at the mouth of three witnesses shall the matter be established." Deuteronomy, 19:15.

**4. Early Christian Law.** — "In the mouth of two or three witnesses shall every word be established." II Cor., 13:1.

"Against an elder receive not an

accusation, but before two or three witnesses." I Tim., 5:19.

**5. Law of Islam.** — "Call to witness two witnesses (to contracts) of your neighboring men; but if there be not two men let there be a man and two women of those whom ye shall choose for witnesses." Koran, Ch. II (Sale's 6th ed.), p. 34.

"The evidence required in a case of whoredom is that of four men, as has been ordained in the Koran.

The evidence required in other criminal cases is that of two men, according to the text of the Koran.

In all other cases the evidence required is that of two men or of one man and two women, whether the case relate to property, or to other rights, such as marriage, divorce, agency, executorship, or the like." Hedaya (Guide), *A Commentary on the Mussulman Laws* (Hamilton's Trans., 2nd ed., 1870), pp. 353-4; Kohler, *Islamitisches Recht*, 155.

**6.** Kohler, *Altindisches Prozessrecht*, 32; Post, *Ethnologische Jurisprudenz*, 548.

**7.** Maciejowski, *Slavische Rechtsgeschichte*, Vol. II, p. 100; Post, *Ethnologische Jurisprudenz*, 548.

**8.** Popovich, *Recht und Gericht in Montenegro*, § 124; Post, *Ethnologische Jurisprudenz*, 548.

**9.** Dareste, *Etude d'Historie du*

the Roman law,<sup>10</sup> and both the modern civil law<sup>11</sup> and the canon law<sup>12</sup> have so far retained this feature of the parent system that two witnesses are normally required in order to make what is termed "full proof."

B. BY THE COMMON LAW, on the other hand, no such requirement exists. The sufficiency of the proof is a question for the triers of fact, and if they are satisfied the proof will not fail merely because it is made by one witness only.<sup>13</sup> In some jurisdictions this rule has been enacted into statute.<sup>14</sup> It follows, too, from this that the exclusion of testimony to a fact which has already been proved

Droit, 338, 345; Post, *Ethnologische Jurisprudenz*, 548.

10. **Roman Law.**—Thayer *Cas. on Ev.* (Cambridge, 1900), p. 1,067; *Cavelier v. Collins*, 3 Mart. (O. S.) (La.) 188.

"In general two witnesses were sufficient to prove a fact; but in some exceptional cases a larger number was required." Lord Mackenzie, *Studies in Roman Law* (Edinburgh, 1886), p. 369.

11. **Modern Civil Law.**—"It is clear that neither by the civil nor by the canon law (the principles of which are one and the same) is the evidence of one witness, standing entirely alone, sufficient." Sir Herbert Fust in *Evans v. Evans*, 1 Rob. Eccle. Rep. 165.

"A fundamental principle of the Roman law, which may be considered as the basis of the Spanish, as it relates to testimony, is *testis unus est testis nullus*; and by the laws of Spain it will be found that in no case does one witness make full proof of any fact or contract, except in the case of the king or prince acknowledging no superior, as stated in the *Curia Philippica*, p. 62, tit. Pruebas, § 23, referring to a law of the *Partidas*." *Cavelier v. Collins*, 3 Mart. (O. S.) (La.) 188. This maxim, however, is no longer applied in Louisiana except (by statute) in actions on contracts involving more than \$500.00. *Armor v. Huie*, 14 La. (O. S.) 346.

12. **Canon Law.**—"Now that is called full proof which gives so great an assurance to the judge that he seems to himself to be fully instructed on the merits of the cause; and this kind of proof is made by two or three witnesses at the least.

For there are some matters which, according to the canon law, do require five, seven or more witnesses to make full proof; yet full proof cannot be said to be made by one witness alone. . . . Full proof may be made by the testimony of one witness, and a well grounded fame concurrent thereunto." Ayliffe, *Parergon, Juris Canonici Anglicani* (2nd Ed., London, 1734,) 444.

"By the canon law now, and then, in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses." *Stafford's Case*, T. Raym. 408.

See also *Institutes Juris Canonici, De Probationibus* I, 3, 6; *Hutchins v. Denziloe*, 1 Cons. Rep. 460; *Crompton v. Butler*, 1 Cons. Rep. 181; *Evans v. Evans*, 1 Rob. Eccle. Rep. 171; *Simmons v. Simmons*, 1 Rob. Eccle. Rep. 569.

13. **Common Law Rule.**—See Thayer, *Cas. on Ev.*, p. 1,067.

In *State v. McGlothlen*, 56 Iowa 544, 9 N. W. 893, which was a bastardy proceeding, the defendant urged that the prosecutrix must be corroborated as in prosecutions for rape, seduction, etc., and as in the case of an accomplice's testimony, in all of which corroboration was expressly required by the Iowa statute. But the court said: "As it is provided by statute that corroboration is required in other cases and none in this, therefore, because of the statute, we hold a defendant may be convicted in a proceeding of this character upon the uncorroborated evidence of the prosecutrix."

14. **Rule Codified.**—*California.* The direct evidence of one witness, who is entitled to full credit, is suffi-



by another witness is not prejudicial.<sup>15</sup>

**Origin and Modification of the Rule.** — It seems, however, that such has not always been the rule of the common law. "There are various indications in our older law," observes Prof. Thayer,<sup>16</sup> "that the principle of the Roman system, *testis unus testis nullus*, was formerly recognized in England.<sup>17</sup> . . . But it is an indirect result of trial by jury that, as a rule, no particular number of witnesses is required in our law; for many centuries, indeed, as we have noticed, none at all were needed."

This peculiarity of the common law, then, is an outgrowth of the jury system,<sup>18</sup> and just as the functions of the jury have been from time to time restricted, so this rule as to the *quantum* of proof has been modified so as to approach more nearly that of the civil law. From a very early period<sup>19</sup> the legislature began to prescribe cases in which the testimony of a single witness would not suffice, and at the present day, in a considerable portion of our law, evidence additional to that of one witness is imperatively required.

## II. NATURE AND REQUISITES.

**1. In General.** — A. DEFINITION. — This additional evidence required by rules which have come into our law mainly by statute is

cient for proof of any fact except perjury and treason." Code Civ. Proc., § 1,844.

*Montana.* — Code, § 616, applied in *State v. Tipton*, 15 Mont. 74, 38 Pac. 222.

*Oregon.* — Hill's Code (1888), § 681.

15. *People v. Westlake*, 62 Cal. 303; *People v. Reed*, 48 Cal. 553.

16. *Thayer Cas. on Ev.*, p. 1,067.

17. *Best Ev.*, § § 612, 614.

There seem to have been no court witnesses in the Anglo-Saxon law, but its codes abound in provisions fixing a definite number of witnesses for various transactions. "Transaction witnesses were brought to corroborate business transactions of sale, gift, exchange, etc. These witnesses existed in Anglo-Saxon law, as in all the folk laws. Laughlin, *The Anglo-Saxon Legal Procedure, Essays in Anglo-Saxon Law* (Boston, 1876), p. 187.

In *Wambaugh v. Schenck*, 2 N. J. L. 214, the court made special mention of the fact that "absence out of the state has been proved by two witnesses."

18. In *State v. Tipton*, 15 Mont.

74, 38 Pac. 222, which was a bastardy proceeding, the trial court instructed the jury as follows: "Before the defendant in this case can be convicted of the charge against him, the testimony of the complaining witness must be sustained by facts and circumstances corroborating it." This was treated as a ground of reversal by the supreme court, which said: "If the jury believed the testimony of the plaintiff as a witness it was for them to find in accordance with such belief. But this instruction invaded this province of the jury. It told the jury that it could not find for the plaintiff unless her testimony was corroborated. It was not corroborated. The court, therefore, told the jury to find for the defendant. It thus deprived the jury of their right and duty to pass upon the credibility of these two witnesses, and find their verdict in accordance with whether they believed one or the other."

19. In 1547 a statute was passed by the English parliament requiring two witnesses to convict in prosecutions for treason. See 5 Eng. Stats. at Large, p. 259.

termed corroborative, i.e., strengthening,<sup>20</sup> and means evidence which tends to support and render more probable some other evidence — generally that already produced — to the same point and like in character.<sup>21</sup>

**Should Be Defined for the Jury.** — When the term is used in an instruction it should be defined and made intelligible to the jurors.<sup>22</sup>

**B. TERMINOLOGY.** — In the terminology of the canon law, corroborative evidence is termed "adminicular."<sup>23</sup> It is also known as "confirmatory,"<sup>24</sup> and is sometimes used interchangeably with "cumulative."<sup>25</sup>

20. From the Latin *robur*, strength.

21. "It becomes material to a correct understanding of the subject to settle what is meant by the qualification 'corroborating,' annexed to the term 'circumstances.' The phrase clearly does not mean facts which, independent of the confession, will warrant a conviction, for then the verdict would stand, not on the confession, but upon those independent circumstances. To corroborate is to strengthen, to confirm by additional security, to add strength. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witness, or to comport with some facts otherwise known or established. Corroborating circumstances, then, used in reference to a confession, are such as serve to strengthen it, to render it more probable; such, in short, as may serve to impress a jury with a belief of its truth." Ewing, C. J., in *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404.

"Corroborating evidence is such evidence as tends, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. And such evidence will not be material unless the evidence sought to be corroborated itself sup-

ports the allegation or point in issue." *Gildersleeve v. Atkinson*, 6 N. M. 250, 27 Pac. 477.

**But It Need Only Tend to Strengthen.** — "The rule given in the instructions is that, to justify a conviction, the prosecutrix (being the person injured) must be 'corroborated by other evidence tending to connect the defendant with the commission of the crime.' In one instruction it is said: 'The corroborating evidence required to warrant a conviction must be evidence tending to strengthen and corroborate the said Mattie Harkness.' The criticism is as to the word 'tending.' It is said that the testimony 'must strengthen' the other evidence. The difficulty with the argument is the statute, which provides that, before a person shall be convicted of rape on the testimony of the person injured, she must be 'corroborated by other evidence tending to connect the defendant with the commission of the offense.' Code, § 4,560. The court used both the words 'strengthen and corroborate,' of which defendant could not well complain." *State v. French*, 96 Iowa 255, 65 N. W. 156.

22. *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349.

23. From the Latin *adminiculum*, "a prop."

24. "The word 'corroborating' is the word apt and fitting, and generally adopted by judges and law writers to indicate the confirmatory evidence required in this and like cases." *Mills v. Com.*, 93 Va. 815, 22 S. E. 863.

25. *Wade v. Thayer*, 40 Cal. 578; *Parker v. Hardy*, 24 Pick. (Mass.) 246; *People v. Superior Court*, 10 Wend. (N. Y.) 284; *Pike v. Evans*,

**C. CLASSES.** — There are said to be two classes of corroborative evidence, viz.: (a) *Permissive*, which is not essential in order to make a case, but is received so that the case as made may be stronger; and, (b) *Required*, without which no valid judgment can be rendered.<sup>26</sup> The former class may be excluded without prejudice where the testimony sought to be corroborated is uncontradicted.<sup>27</sup> There is one exception to the statutory origin of the rule, and that is the requirement in actions for slander, in charging perjury where justification must be established by two witnesses or corroborative circumstances in addition to one witness. The exception, however, is more apparent than real, since the rule is based on the analogy of the requirement in prosecutions for perjury, which is wholly of statutory origin.

**2. Essentials.** — **A. MUST BE INDEPENDENT OF WITNESS TO BE CORROBORATED.** — Where the law requires the corroboration of a witness it must be accomplished by other evidence than that of the witness himself; his own acts or statements do not constitute corroborative evidence.<sup>28</sup> Indeed, it is held that a fact testified to by the

15 Johns. (N. Y.) 210; *Smith v. Brush*, 8 Johns. 84.

See article "CUMULATIVE EVIDENCE."

**26.** "The term 'corroborating evidence,' as found in the books, is used in two distinct senses—the one general; the other special or technical. In the general sense, it is used when we say that in any case, and as to any evidence, it was or was not corroborated. In this sense the evidence has no further function than to aid other evidence of a like or different character in giving it additional weight. Such other evidence, so aided, may or may not be sufficient of itself; that is a question solely for the jury. General corroborating evidence may corroborate any material evidence already in, whether that evidence goes directly to the issue or necessary legal elements in the case, or to giving solidity to a link merely in the chain of proof. In the special or technical sense of corroborating evidence, upon the other hand, we are dealing with a substantive quantum of evidence without which the case of the party who is compelled to produce it must inevitably fail. Its materiality goes to the very core of the case. The character of this species of evidence, too, is generally the creation of statute." Gil-

dersleeve v. Atkinson, 6 N. M. 250, 27 Pac. 477.

**27.** *People v. Westlake*, 62 Cal. 313; *People v. Reed*, 48 Cal. 553.

On the other hand the admission of a single item of incompetent evidence is not reversible error if immediately followed by competent evidence on the same point corroborating the other. "It is like admitting parol evidence as to the contents of a written instrument, and then immediately afterward introducing the instrument itself, and showing that it conforms to the testimony given." *Lobinger, C.*, in *Jones v. Wattles*, (Neb.), 92 N. W. 765.

**28. Evidence Must Be by Other Witness.** — *Alabama.* — "There must be corroboration by some other witness as to some act or fact which is an element of the offense charged." *Cooper v. State*, 90 Ala. 641, 8 So. 821.

*Iowa.* — *State v. Kingsley*, 39 Iowa 439; *State v. Lenihan*, 88 Iowa 670, 56 N. W. 292; *State v. McGinn*, 109 Iowa 641, 80 N. W. 1,068; *State v. Kissock*, 111 Iowa 690, 83 N. W. 724; *State v. Wells*, 48 Iowa 671; *State v. Tulley*, 18 Iowa 88.

*Louisiana.* — *Cormier v. Le Blanc*, 8 Mart. (N. S.) 457; *Robbins v. Lambeth*, 2 Rob. 304.

witness alone is not admissible for corroborative purposes.<sup>29</sup> And acts on the part of such witness consistent with his testimony cannot be proved by way of corroboration.<sup>30</sup>

B. MUST BE MATERIAL. — Evidence in order to meet the requirement of corroboration must be material to the issues.<sup>31</sup> And this

*Maine.* — *Pulsifer v. Crowell*, 63 Me. 22.

*Massachusetts.* — *Loomis v. New York, N. & N. H. R. Co.*, 159 Mass. 39, 34 N. E. 82.

*Missouri.* — "There must be some evidence independent of the principal witness." *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511.

*North Dakota.* — "No conviction can be had upon the testimony of the accomplice alone; and it matters not how inherently probable that testimony may be. It may be so connected with and related to known facts and conditions as to render fabrication impossible, and produce absolute moral conviction of its truthfulness. Still, standing alone, it cannot, under the statute, warrant conviction. It must be corroborated by some evidence tending to connect the accused with the commission of the offense, and this evidence must come from an entirely independent source." *State v. Kent*, 5 N. D. 576, 67 N. W. 1,052.

*South Carolina.* — *State v. Gilliam*, 66 S. C. 419, 45 S. E. 6.

*Texas.* — "It must be borne in mind that the statute in terms requires other corroborative evidence. What are we to understand by this? It can only mean that this other evidence must come from some other source than from the witness who is to be corroborated. It was certainly never intended that a witness could corroborate his own testimony by his own acts and declarations. Such a conclusion would be absurd." *Gabrielsky v. State*, 13 Tex. App. 428.

<sup>29</sup>. *State v. Kingsley*, 39 Iowa 439; *Gabrielsky v. State*, 13 Tex. App. 428.

<sup>30</sup>. "It appears to us that if the prosecuting witness was allowed to testify to preparations for marriage, in such case, it would not corroborate her testimony. It is merely

her statement in corroboration of herself. It is not claimed that the defendant had any knowledge of the purchase of the wedding dress." *State v. Lenihan*, 88 Iowa 670, 56 N. W. 292. See also *State v. Buxton*, 89 Iowa 573, 57 N. W. 417.

In *Cormier v. Le Blanc*, 8 Mart. (N. S.) (La.) 457, the corroborating circumstance relied on was the indorsement of payment on a note which was claimed to have been made by the witness himself. The court said: "The code requires for proof of a contract for the payment of a greater sum than 500 dollars, the testimony of one credible witness, and other corroborating circumstances. Now the circumstance relied on is found in the testimony of the single witness. This we think does not suffice; the corroborating circumstances the code requires are not those stated by the single witness in his testimony, but those that appear *aliunde*."

<sup>31</sup>. *Cooper v. State*, 90 Ala. 641, 8 So. 821; *Munkers v. State*, 87 Ala. 94, 6 So. 357; *Cunningham v. State*, 73 Ala. 51; *Cunningham v. Com.*, 9 Bush (Ky.) 149; *Gildersleeve v. Atkinson*, 6 N. M. 258, 27 Pac. 477.

"The testimony of Dr. Peden was relied upon as thus corroborating the witness. And the judge charged that it was corroborative as to the defendant's intent and connection with the alleged offense. Now it only corroborated her as to the single fact of the birth of the child, which was not disputed, and which did not at all tend to prove the offense. She did not testify that she was attended by Dr. Peden, or that the accused employed him; and if she had, the case would not have been varied. They were comparatively unimportant facts, not in the least implicating the accused in a criminal offense. The claim is that the fact of the employment of Dr. Peden by the defendant to attend upon the girl at

means the main issue; it is not sufficient or even permissible to introduce evidence as to a purely collateral issue.<sup>32</sup>

C. MUST TEND TO CONNECT AN ACCUSED WITH THE OFFENSE CHARGED. — Following from the rule last stated it is also required, where corroboration is necessary in order to convict of a crime, that the evidence offered for that purpose must tend to connect the accused with the offense charged.<sup>33</sup> Hence evidence of acts or occurrences for which some third party as well as the accused might have been responsible cannot be received in order to corroborate a witness against him.<sup>34</sup>

3. **Extent.** — The corroboration which is necessary in order to convict of a crime need not, as a rule, extend to every element and incident thereof.<sup>35</sup> Where it is a witness who is to be corroborated it

her confinement is some evidence of his paternity of the child, and this latter fact being proved, a motive existed for the commission of the offense, and that this motive thus inferred corroborates the evidence of the girl as to the actual guilt of the party. This is quite too far fetched and fanciful." *Frazer v. People*, 54 Barb. (N. Y.) 306.

32. *Atlanta, K. & N. R. Co. v. Strickland*, 116 Ga. 439, 42 S. E. 864; *Stewart v. Anderson*, 111 Iowa 329, 82 N. W. 770.

33. *Alabama*. — *Cooper v. State*, 90 Ala. 641, 8 So. 821; *Munkers v. State*, 87 Ala. 94, 6 So. 357; *Cunningham v. State*, 73 Ala. 51.

*Arkansas*. — *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17.

*Iowa*. — *State v. Crawford*, 34 Iowa 40; *State v. McLaughlin*, 44 Iowa 82; *State v. Bell*, 79 Iowa 117, 44 N. W. 244; *State v. Smith*, 84 Iowa 522, 51 N. W. 24; *State v. Bollerman*, 92 Iowa 460, 61 N. W. 183; *State v. Lauderbeck*, 96 Iowa 258, 65 N. W. 158; *State v. McGinn*, 109 Iowa 641, 80 N. W. 1,068; *State v. Kisko*, 111 Iowa 690, 83 N. W. 724; *State v. Coffman*, 112 Iowa 8, 83 N. W. 721.

*Kentucky*. — *Cunningham v. Com.*, 9 Bush 149.

*North Dakota*. — *State v. Kent*, 5 N. D. 516, 67 N. W. 1,052.

*Oklahoma*. — *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837.

*Texas*. — *Creighton v. State*, (Tex. Crim. App.), 61 S. W. 492.

34. *State v. McGinn*, 109 Iowa 641, 80 N. W. 1,068; *State v. Dan-*

*forth*, 48 Iowa 43, 30 Am. Rep. 387.

35. *United States*. — *State v. Hall*, 44 Fed. 864, 10 L. R. A. 324.

*Alabama*. — *Suther v. State*, 118 Ala. 88, 24 So. 43; *Munkers v. State*, 87 Ala. 94, 6 So. 357; *Cooper v. State*, 90 Ala. 641, 8 So. 821; *Cunningham v. State*, 73 Ala. 51; *Wilson v. State*, 73 Ala. 527.

*California*. — *People v. Rodley*, 131 Cal. 240, 63 Pac. 351.

*Iowa*. — *State v. Fountain*, 110 Iowa 15, 81 N. W. 162; *State v. Lauderbeck*, 96 Iowa 258, 65 N. W. 158; *State v. Bollerman*, 92 Iowa 450, 61 N. W. 183; *State v. Smith*, 84 Iowa 522, 51 N. W. 24; *State v. McLaughlin*, 44 Iowa 82.

*Louisiana*. — *State v. Jean*, 42 La. Ann. 946, 8 So. 480.

*Massachusetts*. — *Com. v. Pollard*, 12 Metc. 225.

*Mississippi*. — *Ferguson v. State*, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 92.

*Nebraska*. — *Dunn v. State*, 58 Neb. 807, 79 N. W. 719; *Hammond v. State*, 39 Neb. 252, 58 N. W. 92; *Fager v. State*, 22 Neb. 332, 35 N. W. 195.

*New York*. — *People v. Terwilliger*, 74 Hun 310, 26 N. Y. Supp. 674; *People v. Adams*, 72 App. Div. 166, 76 N. Y. Supp. 361; *Armstrong v. People*, 70 N. Y. 38; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *People v. Lomax*, 6 Abb. Pr. 139; *People v. Kearney*, 110 N. Y. 188, 17 N. E. 736, reversing 47 Hun 119.

*Oklahoma*. — *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837.

is generally sufficient if the independent evidence tends to connect the accused with the crime.<sup>36</sup> The actual commission of the offense may usually be established by the testimony of the witness alone.<sup>37</sup> This is true, even where the crime charged consists of a single act, but its criminal character depends on the circumstances of the particular case.<sup>38</sup> On the other hand, where it is a confession which must be corroborated the application of the rule is reversed; the *corpus delicti*, or commission of the crime, must be established by evidence *aliunde*, while the criminal agency may rest on the confession alone.<sup>39</sup>

**4. Character of Evidence Received.** — A. IN GENERAL. — As a rule, evidence in order to be corroborative need not be of a higher degree than ordinary evidence; it is not necessary that the fact concerning which corroboration is required be established by direct and positive proof,<sup>40</sup> nor that the corroborating evidence be such as would, if standing alone, support a conviction.<sup>41</sup> These are matters which pertain to the weight of the evidence, concerning which the

*South Dakota.* — *State v. King*, 9 S. D. 628, 70 N. W. 1,046.

*Virginia.* — *Mills v. Com.*, 93 Va. 815, 22 S. E. 863.

36. See *supra* this title, note 33.

**37. Evidence Aliunde Not Required as to Commission of Crime.**

"In all criminal trials there are two ultimate facts to be established, namely, the commission of the alleged crime, including all facts constituting it, and the defendant's connection with its commission. The orderly method of considering evidence is to inquire, first, whether the alleged crime has been committed — that is, whether the facts constituting it have been proven; and then whether the accused was concerned in its commission. Under the statute in this state, corroboration is required only as to the second inquiry. In other words, the defendant can be convicted upon the testimony of the person injured if she is corroborated by other evidence tending to connect him with the commission of the offense." *State v. King*, 9 S. Dak. 628, 70 N. W. 1,046.

"That the crime charged was in fact committed may be shown by the testimony of the prosecutrix alone." *State v. Lauderbeck*, 96 Iowa 258, 65 N. W. 158. See also *State v. Bollerman*, 92 Iowa 460, 61 N. W. 183; *State v. Fountain*, 110 Iowa 15, 81 N. W. 162.

38. In *Com. v. Pollard*, 12 Metc. (Mass.) 225, the court said: "Admitting the truth of the position that the crime of perjury is a single act, yet there is a great distinction as to the facts to which a man testifies and the willful falsehood of the testimony respecting them. The speaking of the words, and the motive with which they are uttered, are independent facts; and the proof of the first has no necessary tendency to prove the last." . . . Serjeant Hawkins states it as the law that it seems to be agreed that two witnesses are required in proof of the crime of perjury, but the taking of the oath, and the facts deposed, may be proved by one witness only; and he is supported by modern works of authority. 2 Hawk. C. 46, § 10; Roscoe Crim. Ev. (2nd ed.) 770; 1 McNally on Ev. 37.

39. See *infra* this title, Extra Judicial Confessions.

40. *Winslow v. State*, 76 Ala. 42; *Ryan v. State*, 100 Ala. 94, 14 So. 868; *State v. Keeler*, 28 Iowa 551; *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *State v. Eisenhower*, 132 Mo. 140, 33 S. W. 785; *State v. Patterson*, 73 Mo. 695; *Boyce v. People*, 55 N. Y. 644.

41. *State v. Heed*, 57 Mo. 252; *State v. Eisenhower*, 132 Mo. 140, 33 S. W. 785; *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642.

jurors are the sole judges.<sup>42</sup> In some instances, however, a higher standard is fixed by the statute itself, and the evidence is required to be of a character to justify conviction for a certain crime, such as perjury, in which case it will not suffice to offer slight evidence, or that which merely balances the evidence of the adverse party.<sup>43</sup>

**B. CORROBORATIVE EVIDENCE MAY BE CIRCUMSTANTIAL.** — The evidence which the law makes necessary in order to corroborate a witness or a confession need not, as we have seen, be direct; it may consist of proof of circumstances.<sup>44</sup> Thus the conduct of the accused when arrested,<sup>45</sup> or his demeanor while testifying,<sup>46</sup> may afford the necessary corroboration. Even the failure to deny the charge when opportunity is given has been accepted as a sufficient corroborating circumstance.<sup>47</sup> And where corroboration is required in civil cases, the failure of the defendant to appear and contest the claim is treated as sufficient to supply the corroboration, otherwise lacking, of the plaintiff's testimony.<sup>48</sup>

42. "While proof should be clear and distinct, it is not necessary that it should be direct and positive. For while that which is direct might be more satisfactory — less liable to deceive and mislead — this goes to its weight or effect, and by no means establishes that in no other way can the essential facts be shown with the requisite distinctness and clearness." *State v. Keeler*, 28 Iowa 551.

43. *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798; *State v. Primm*, 98 Mo. 368, 11 S. W. 732; *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610.

44. *Iowa*. — "The law is well settled that the required corroboration may be furnished by facts and circumstances, as well as by direct and positive testimony." *State v. Clough*, 111 Iowa 714, 83 N. W. 727; *State v. Raymond*, 20 Iowa 582. Compare *State v. McLaughlin*, 44 Iowa 82.

*Kentucky*. — *Osborn v. Com.*, 14 Ky. L. Rep. 246, 20 S. W. 223.

*Louisiana*. — *State v. Jean*, 42 La. Ann. 946, 8 So. 480.

*Mississippi*. — *Heard v. State*, 59 Miss. 545.

*Missouri*. — *State v. Marshall*, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63; *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *State v. Brassfield*, 81 Mo. 151, 51 Am. Rep. 234.

*New York*. — *People v. Grauer*, 12 App. Div. 464, 42 N. Y. Supp. 721,

the court saying: "The evidence under this section to support that of the female need not be direct; it may be circumstantial. It need not be in and of itself convincing or conclusive, but it must be corroborative of the female's evidence."

See also *Boyce v. People*, 55 N. Y. 644; *Armstrong v. People*, 70 N. Y. 38; *People v. Doody*, 172 N. Y. 165, 64 N. E. 807.

*North Carolina*. — *State v. Hawkins*, 115 N. C. 712, 20 S. E. 623. Compare *State v. Gates*, 107 N. C. 832, 12 S. E. 319.

*Oregon*. — *State v. Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296.

*Pennsylvania*. — *Com. v. McCarty*, 2 Pa. L. J. 351, 4 Pa. L. J. 136.

*Texas*. — *Creighton v. State*, (Tex. Crim. App.), 61 S. W. 492; *Snodgrass v. State*, 36 Tex. Crim. App. 207, 31 S. W. 366.

In *Beach v. State*, 32 Tex. Crim. App. 240, 22 S. W. 976, the contention of counsel was that there could be no conviction for perjury on circumstantial evidence, but the court held otherwise.

*West Virginia*. — *State v. Miller*, 24 W. Va. 802.

45. *Heard v. State*, 59 Miss. 545.

46. *State v. Miller*, 24 W. Va. 802.

47. *Bessela v. Stern*, 46 L. J. C. P. 467, 2 C. P. D. 265; *Heard v. State*, 59 Miss. 545.

48. **Non-appearance.** — *Lopez v. Bergel*, 7 (O. S.) La. 178; *Leeds v.*

**Qualifications of the Rule.**—But it is not every circumstance that will afford the corroboration which the law requires. "Circumstantial evidence . . . should be such as to establish the fact . . . not only as a fair inference, but as a necessary conclusion."<sup>49</sup>

**Proof of Opportunity.**—Thus it will not usually suffice to show by way of corroboration that a party had the opportunity to commit an offense with which he stands charged.<sup>50</sup> But proof of opportunity, coupled with slight circumstances tending to connect the accused with the commission of the crime, has been held sufficient.<sup>51</sup>

**C. CONFESSIONS AND ADMISSIONS.**—The corroboration of a witness may appear in the form of confessions or admissions, or other disserving statements on the part of the one against whom the testimony of the witness is offered.<sup>52</sup>

### III. NECESSITY AND SUFFICIENCY.

#### 1. In Criminal Prosecutions. — A. GENERALLY. — a. *Confessions.*

(1.) **Judicial Confessions**, or those made by an accused in open court or before an examining magistrate, need no corroboration, but are suf-

Debuys, 4 Rob. (La.) 257; Harrison v. McCawley, 10 La. Ann. 270; Webster v. Burke, 24 La. Ann. 137; Goepfer v. Lusse, 30 La. Ann. 392.

"It has been long settled that a judgment by default is a sufficient corroborative circumstance with the testimony of one witness to establish a claim amounting to more than five hundred dollars." Webster v. Burke, 24 La. Ann. 137.

49. Phillips v. Phillips, 24 Misc. 334, 52 N. Y. Supp. 489.

50. "Mere Opportunity Is Not Enough."—State v. Wheeler, 116 Iowa 212, 89 N. W. 978; State v. Kisson, 111 Iowa 690, 83 N. W. 724; State v. Burns, 110 Iowa 745, 82 N. W. 325; State v. Chapman, 88 Iowa 254, 55 N. W. 489; State v. Araah, 55 Iowa 258; State v. Smith, 54 Iowa 743, 7 N. W. 402, 30 Am. Rep. 387; State v. Painter, 50 Iowa 317; State v. Danforth, 48 Iowa 43; Murray v. State, 43 Ga. 256.

51. Com. v. Tarr, 4 Allen (Mass.) 315; Crowder v. People, 56 Ga. 44; People v. McKeon, 64 Hun 504, 19 N. Y. Supp. 486; People v. Rangod, 112 Cal. 669, 44 Pac. 1,071.

"The opportunities of the defendant were favorable and frequent; and that he had been alone with her on occasions he admitted; and that he rode home with her several times

very late at night was testified to by other witnesses. This evidence and these circumstances strongly corroborate the testimony of the complainant, and we cannot say that the jury were not warranted in finding the defendant guilty beyond a reasonable doubt." McClellan v. State, 66 Wis. 335, 28 N. W. 347.

52. *England.*—Reg. v. Hook, 8 Cox C. C. 5; Rex v. Mayhew, 6 Car. & P. 315, 25 Eng. C. L. 415; Rex v. Knill, 5 B. & Ald. 929 (note).

*Iowa.*—State v. Swafford, 98 Iowa 362, 67 N. W. 284.

*Massachusetts.*—Com. v. Parker, 2 Cush. 212.

*Mississippi.*—Hemphill v. State, 71 Miss. 877, 16 So. 261.

*Missouri.*—State v. Blize, 111 Mo. 464, 20 S. W. 210.

*New Jersey.*—Dodge v. State, 24 N. J. L. 671.

*North Carolina.*—State v. Molier, 12 N. C. 263.

In Oregon, however, the unsworn statement of a party made out of court will not afford a sufficient corroboration to convict him of perjury in testifying differently. State v. Buckley, 18 Or. 228, 22 Pac. 838, the court saying: "No doubt the prisoner committed perjury by swearing to an untrue statement as a witness, or he told a falsehood



ficient, standing alone, to support a conviction.<sup>53</sup> The confession need not be a formal one, or intended for that purpose. It may be in the form of an admission by the accused while testifying in another case,<sup>54</sup> or of an agreed statement of facts approved by counsel for the accused.<sup>55</sup>

But a confession at a coroner's inquest is not a judicial confession within the provisions of the rule, and some corroborative evidence is required.<sup>56</sup> So an admission deduced argumentatively by the magistrate from the prisoner's examination is not sufficient; there must be "a plea of guilty, or what is tantamount to it."<sup>57</sup>

(2.) **Extra Judicial Confessions.** — (A.) **GENERAL RULE.** — Extra judicial confessions are, by the law of most civilized countries, insufficient, unless corroborated, to support a conviction. Such was the rule under the Roman law.<sup>58</sup> In England there are some early *nisi prius* cases which are supposed to state a different rule, and permit

when he narrated his experience to the police officers; but in such case, because of the solemnity of an oath, credit is to be given to the statement made under oath, rather than to the one not under oath."

53. *Alabama.* — *White v. State*, 49 Ala. 244.

*Arkansas.* — *Buckingham v. State*, 32 Ark. 218.

*Indiana.* — *Dantz v. State*, 87 Ind. 398, the court saying: "The record shows a confession of guilt in open court, and in the presence of a jury, and this was sufficient to sustain a conviction. *Eastman v. State*, 54 Ind. 441; *Griffith v. State*, 36 Ind. 406; *Behler v. State*, 22 Ind. 345."

*Kentucky.* — *Roberts v. Com.*, 97 Ky. L. Rep. 888, 7 S. W. 401.

*Missouri.* — *State v. Lamb*, 28 Mo. 218; *State v. Brooks*, 99 Mo. 137, 12 S. W. 633.

*New York.* — "By the examination of the prisoner it appears he has confessed the larceny of all the articles mentioned in the indictment. The law upon the subject of examinations is that a prisoner may be convicted upon that species of proof alone. It is, however, at all times advisable to have other testimony if it can be produced." *People v. McFall*, 1 *Wheeler's C. C. (N. Y.)* 107.

*North Carolina.* — *State v. Cowan*, 29 N. C. 239.

*Texas.* — *Cross v. State*, 11 Tex. App. 84.

*Compare Simco v. State*, 9 Tex. App. 338.

See article "CONFESSIONS."

54. *Anderson v. State*, 26 Ind. 89.

*Compare State v. Brooks*, 99 Mo. 137, 12 S. W. 633.

55. *Marmont v. State*, 48 Ind. 21; *Cross v. State*, 11 Tex. App. 84; *Simco v. State*, 9 Tex. App. 338.

*Contra.* — *State v. Cross*, 34 Me. 594, construing a peculiar constitutional provision.

56. *State v. Leuth*, 5 Ohio C. C. 94.

57. *Bennac v. People*, 4 Barb. (N. Y.) 164.

58. "In the Roman Law, such naked confessions amounted only to a *semplena probatio*, upon which alone no judgment could be founded; and at most the party could only in proper cases be put to the torture. But if voluntarily made, in the presence of the injured party, or if reiterated at different times in his presence, and persisted in, they were received as plenary proof." Greenl. on Ev., 14th ed., Vol. I, § 217. *Citing* N. Everhard. Concil. xix, 8; lxxii, 5; cxxxi, 1; clxv, 1, 2, 3; clxxxvi, 2, 3, 11; Mascard. De Probat. Vol. I, Concil. 347, 349; Van Leeuwen's Comm. b. 5, c. 21, §§ 4, 5; B. Carpov. Practic. Rerum Criminal. Pars II, Quaest. n. 8.

See also *Territory v. McClin*, 1 Mont. 397.

See article "CONFESSIONS."

a conviction upon such confessions independently.<sup>59</sup> But the one most often cited is well characterized by Greenleaf as "too briefly reported to be relied on,"<sup>60</sup> while in the two latest cases<sup>61</sup> there was other corroborative evidence. In the United States, while the doctrine has been held inapplicable to misdemeanors like the unlawful sale of liquor,<sup>62</sup> it has now become universally adopted as the rule that an extra judicial confession will not support a conviction unless corroborated by independent evidence at least of the *corpus delicti*.<sup>63</sup> But independent evidence in corroboration as to the *cor-*

#### 59. Early English Doctrine.

"It is stated by Mr. East, in his Crown Law, 1 East's P. C. 133, that in the case of Francis Francia, in 1716, it was agreed, at a conference of the judges, preparatory to his trial, among other things, that in all cases the confession of a criminal may be given in evidence against him; and that in causes of treason, if such confession be proved by two witnesses, it is proper evidence to be left to the jury. Mr. Justice Foster thought this decision wrong, though he admitted it might be too late to controvert the authority of it. He insists that the rule should never be carried further than to a confession made during the solemnity of an examination before a magistrate. For, he observes, hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. . . . It will be found, I think, that however broadly judges and elementary writers have laid down the rule, yet most, if not all, the reported cases show that very few convictions have taken place without some evidence that a crime has been committed, independent of the confession of the accused. The case of John Bernish, Foster's Cr. L. 10, is an instance of a conviction on the confession of the prisoner. There was, however, one witness who proved him to have been in arms with the rebels; and two witnesses who swore to his confession, who also saw him among the officers of the rebels, who were confined apart from the common men, and he there gave in his name as a lieutenant. See Lambe's Case, 2 Leach 625; Thomas' Case, *id.* 728; Wheeling's Case, 1 Leach 349."

Savage, Ch. J., in *People v. Hennessey*, 15 Wend. (N. Y.) 148.

"In the case of John Wheeling, tried before Lord Kenyon at the summer assizes at Salisbury, 1789, it was determined that a prisoner may be convicted on his own confession, when proved by legal testimony, although it is totally uncorroborated by any evidence." 1 Leach's C. C. 311, note. See also *Rex v. Eldridge*, R. & R. C. C. 440; *Rex v. Falkner & Bond*, R. & R. C. C. 481.

60. Wheeling's case, 1 Leach C. C. 311, the full report of which is quoted in the foregoing note.

In *State v. Laliyer*, 4 Minn. 277, it is said of this case: "The statement of what the court decided is in terms so general that it is not necessarily inconsistent with there having been corroborating circumstances as to the *corpus delicti*, if not as to the criminal agency of the defendant."

61. *Rex v. Eldridge*, R. & R. C. C. 440; *Rex v. Falkner*, R. & R. C. C. 481.

62. *State v. Gilbert*, 36 Vt. 145.

63. *United States.—Modern American Rule.*—The doctrine has recently been stated in a charge to the jury as follows: "All that is required on this branch of the case, as I have said before, is for you to find that outside of the confessions there is substantial and material corroboration of the confessions as to the question that some one embezzled the funds of the bank. If you find that there is such corroboration outside of the confessions, then you will consider the confessions, together with all the other evidence in the case; and if, upon

the consideration of the whole evidence, which would then include the confessions, you are satisfied beyond a reasonable doubt that the defendant is guilty, you are then bound to so find; while, on the contrary, if a reasonable doubt of his guilt then arises in your minds, you should then acquit him." *Flower v. United States*, 116 Fed. 241.

In the same opinion the court, after reviewing the authorities, says: "It is insisted by the counsel for plaintiff in error that these decisions have been qualified by the language of Mr. Justice Brown in the opinion in the case of *Isaacs v. U. S.*, 159 U. S. 487, 16 Sup. Ct. 51, 40 L. ed. 229; but a careful examination of these cases does not sustain this contention of the counsel."

See also *United States v. Williams*, 1 Cliff. (U. S.) 5, 28 Fed. Cas. No. 16,707; *United States v. Boese*, 46 Fed. 917; *United States v. Mulvaney*, 4 Park. Crim. Rep. 164.

*Alabama*.—*Harden v. State*, 109 Ala. 50, 19 So. 494; *Ryan v. State*, 100 Ala. 94, 14 So. 868; *Winslow v. State*, 76 Ala. 42; *Young v. State*, 68 Ala. 569; *Johnson v. State*, 59 Ala. 37; *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698.

*Compare Rice v. State*, 47 Ala. 38.

*California*.—*People v. Simonsen*, 107 Cal. 345, 40 Pac. 440; *People v. Elliot*, 90 Cal. 586, 27 Pac. 433; *People v. Thrall*, 50 Cal. 415; *People v. Ah How*, 34 Cal. 218; *People v. Jones*, 31 Cal. 566.

*Colorado*.—*Roberts v. People*, 11 Colo. 213, 17 Pac. 637.

*Florida*.—*Brown v. State*, 44 Fla. 32 So. 107; *Mitchell v. State*, (Fla.), 33 So. 100. *Compare Anthony v. State*, (Fla.), 32 So. 818.

*Georgia*.—Revised Code, § 3,739. *Allen v. State*, 91 Ga. 189, 16 S. E. 980; *Murray v. State*, 43 Ga. 256; *Johnson v. State*, 86 Ga. 90, 13 S. E. 282; *Smith v. State*, 64 Ga. 605.

*Idaho*.—*State v. Keller*, (Idaho), 70 Pac. 1,051.

*Illinois*.—*Williams v. People*, 101 Ill. 382; *South v. People*, 98 Ill. 261; *May v. People*, 92 Ill. 343; *Brown v. People*, 91 Ill. 506; *Burgen v. People*, 17 Ill. 425, 65 Am. Dec. 672.

*Iowa*.—*State v. Carroll*, 85 Iowa

1, 51 N. W. 1,159; *State v. Dubois*, 54 Iowa 363, 6 N. W. 578.

*Kentucky*.—Criminal Code, § 238. *Mullins v. Com.*, 14 Ky. 569, 20 S. W. 1,035; *Cunningham v. Com.*, 9 Bush 149; *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387.

*Michigan*.—*People v. Lane*, 49 Mich. 340, 13 N. W. 622; *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49. *Compare People v. Hess*, 85 Mich. 128, 48 N. W. 181.

*Minnesota*.—*State v. Grear*, 29 Minn. 221, 13 N. W. 140; *State v. Laliyer*, 4 Minn. 277.

*Mississippi*.—*Pitts v. State*, 43 Miss. 472; *Jenkins v. State*, 41 Miss. 582; *Brown v. State*, 32 Miss. 433; *Stringfellow v. State*, 26 Miss. 157, 59 Am. Dec. 247.

*Missouri*.—*State v. Brooks*, 92 Mo. 542, 5 S. W. 257; *State v. Patterson*, 73 Mo. 695; *State v. German*, 54 Mo. 526, 14 Am. Rep. 481; *State v. Scott*, 39 Mo. 424; *Robinson v. State*, 12 Mo. 592.

*Montana*.—*United States v. Weikel*, 8 Mont. 124, 19 Pac. 396; *Territory v. Farrell*, 6 Mont. 12, 9 Pac. 336; *Territory v. McClintock*, 1 Mont. 397.

*Nebraska*.—*Smith v. State*, 17 Neb. 358, 22 N. W. 780; *Priest v. State*, 10 Neb. 393, 6 N. W. 468.

*New Jersey*.—*State v. Aaron*, 4 N. J. L. 263, 7 Am. Dec. 592.

*New York*.—*People v. Hennessey*, 15 Wend. 148; *People v. Badgley*, 16 Wend. 53; *People v. Ruloff*, 3 Park. Crim. Rep. 401, 18 N. Y. 179; *People v. Porter*, 2 Park. Crim. Rep. 14; *People v. Humphrey*, 7 Johns. 314; *People v. Burton*, 77 Hun 498, 28 N. Y. Supp. 1,081; *Lyon v. Lyon*, 62 Barb. 164; *Bennett v. People*, 4 Barb. 164; *In re Hope*, 1 City Hall Rec. 5; *In re Hope*, 1 City Hall Rec. 150.

*North Carolina*.—*State v. Long*, 2 N. C. 458.

*Ohio*.—*Blackburn v. State*, 23 Ohio St. 146; *Hotelling v. State*, 2 Ohio C. D. 366.

*Pennsylvania*.—*Gray v. Com.*, 101 Pa. St. 380, 47 Am. Rep. 733; *Com. v. Hanlen*, 8 Phil. 401, 3 Brewster 461. *Compare Ettinger v. Com.*, 98 Pa. St. 338.

*Tennessee*.—*Tyner v. State*, 5 Humph. 383.

*pus delicti* alone is sufficient,<sup>64</sup> and if this is proved *aliunde*, it is not usually necessary to offer evidence of the prisoner's criminal agency independent of the confession.<sup>65</sup>

(B.) SUFFICIENCY OF CORROBORATION.—(a.) *Generally*.— Proof of the *corpus delicti* need not, in order to corroborate a confession, be made beyond a reasonable doubt.<sup>66</sup> Slight corroborating evidence may be sufficient.<sup>67</sup> Under a statute requiring other proof of the commission of the offense besides the confession, there must be additional evi-

*Texas*.—Cox v. State, (Tex. Crim. App.), 69 S. W. 145; Jackson v. State, 29 Tex. App. 458, 16 S. W. 247; Harris v. State, 28 Tex. App. 308, 12 S. W. 1,102, 19 Am. St. Rep. 837; Willard v. State, 27 Tex. App. 386, 11 S. W. 453, 11 Am. St. Rep. 197; Hill v. State, 11 Tex. App. 132.

*Vermont*.—State v. Jenkins, 2 Tyler 377.

*Virginia*.—Early v. Com., 86 Va. 921, 11 S. E. 795; Wolf v. Com., 30 Gratt. 833; Smith v. Com., 21 Gratt. 809.

*West Virginia*.—State v. Hall, 31 W. Va. 505, 7 S. E. 422.

See article "CONFESSIONS."

**64. Corroboration as to Corpus Delicti Sufficient.**—United States v. Williams, 1 Cliff. 5, 28 Fed. Cas. No. 16,707.

*Alabama*.—Marton v. State, 90 Ala. 602, 8 So. 858, 24 Am. St. Rep. 844; Mose v. State, 36 Ala. 211.

*Delaware*.—State v. Miller, 9 Houst. 564, 32 Atl. 137.

*Georgia*.—Williams v. State, 69 Ga. 11; Daniel v. State, 63 Ga. 339; Williams v. State, 57 Ga. 478; Crowder v. State, 56 Ga. 44; Holsenbake v. State, 45 Ga. 43.

*Illinois*.—Bartley v. People, 156 Ill. 234, 40 N. E. 831.

*Kentucky*.—Mullins v. Com., 14 Ky. L. Rep. 569, 20 S. W. 1,035; Brown v. Com., 7 Ky. L. Rep. 217.

*Massachusetts*.—Com. v. Tarr, 4 Allen 315; Com. v. McCann, 97 Mass. 580.

*Missouri*.—State v. Patterson, 73 Mo. 695.

*New Jersey*.—State v. Guild, 10 N. J. L. 163, 18 Am. Dec. 404.

*New York*.—People v. Badgley, 16 Wend. 53.

*Pennsylvania*.—Gray v. Com., 101 Pa. St. 380, 47 Am. Rep. 733.

*Texas*.—Attaway v. State, 35 Tex. Crim. App. 403, 34 S. W. 112; Jackson v. State, 29 Tex. App. 458, 16 S. W. 247.

**65. United States**.—United States v. Williams, 1 Cliff. 5, 28 Fed. Cas. No. 16,707; United States v. Jones, 10 Fed. 469.

*Arkansas*.—Melton v. State, 43 Ark. 307.

*Georgia*.—Cochran v. State, 113 Ga. 726, 39 S. E. 332, the court saying: "One ground alleges that the court, in charging upon the subject of confessions and the necessity for a confession to be corroborated before it would justify a conviction, erred in not charging that the corroborating testimony must be such as to connect the accused with the crime charged. This is the rule in reference to the corroboration of the testimony of an accomplice, but it is not the rule in reference to the corroboration of a confession."

*Illinois*.—Gore v. People, 162 Ill. 259, 44 N. E. 500; Andrews v. People, 117 Ill. 195, 7 N. E. 265.

*Iowa*.—State v. Knowles, 48 Iowa 598.

*Mississippi*.—Sam v. State, 33 Miss. 347.

*Missouri*.—State v. Lamb, 28 Mo. 218.

*New Jersey*.—State v. Guild, 10 N. J. L. 163, 18 Am. Dec. 404.

*Tennessee*.—Williams v. State, 12 Lea 211.

*Texas*.—Attaway v. State, 35 Tex. Crim. App. 403, 34 S. W. 112.

**66.** Gray v. Com., 101 Pa. St. 380, 47 Am. Rep. 733; State v. Hall, 31 W. Va. 505, 7 S. E. 422.

**67.** People v. Badgley, 16 Wend. 53; Heard v. State, 59 Miss. 545.

dence tending to connect the accused therewith, and not simply other evidence having no tendency to establish the *corpus delicti*.<sup>68</sup> But the additional proof need only suggest the commission of the crime, and need not be incapable of innocent construction.<sup>69</sup>

**Testimony of an Accomplice** is sufficient to corroborate a confession of the accused.<sup>70</sup>

(b.) *Abortion*. — Where there is other evidence of pregnancy and of inquiries by the accused for drugs to produce miscarriage, his confession that he administered such drugs is sufficient to establish his guilt.<sup>71</sup>

(c.) *Adultery*. — Evidence to corroborate a confession of adultery is sufficient where it shows an opportunity to commit the crime and conduct on the part of the accused tending to acknowledge it.<sup>72</sup>

A wife's confession of adultery is not established by the unsupported testimony of the husband,<sup>73</sup> but the testimony of one who was

68. "The manifest meaning of the provision is that besides the proof of any confession a defendant may have made of his guilt, unless made in open court, there must, to warrant a conviction, be other evidence conducing to prove him guilty of the offense alleged to have been committed by him; or, in other words, to show that such an offense had been committed, and not inconsistent with his guilt, and not merely some 'other testimony' than that adduced to prove the confession, which might have no tendency whatever to establish the charge." *Cunningham v. Com.*, 9 Bush (Ky.) 149.

69. **Need Not Be Incapable of Innocent Construction.** — *People v. Jaehne*, 103 N. Y. 182, 8 N. E. 374, the court per Andrews, J., saying: "We are of opinion that when, in addition to the confession, there is proof of circumstances which, although they have an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key, the case cannot be taken from the jury for a non-compliance with the requirement of the statute. The words of the statute, 'additional proof that the crime charged has been committed,' seem to imply that the confession is to be treated as evidence of the *corpus delicti*; that is, not only of the subjective criminal act, but also

the criminal agency of the defendant."

70. *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387.

So, on the other hand, where the accomplice's testimony must be corroborated, the confession of the accused is sufficient for that purpose. *Snoddy v. State*, 75 Ala. 23; *People v. Cleveland*, 49 Cal. 577.

71. *Dougherty v. People*, 1 Colo. 514.

72. **Opportunity and Acknowledgment.** — "The fact in proof—that the defendant resided in the same house with the woman; that he had ready means of access to her; that she was delivered of a child who was apparently a bastard; that he applied to a physician some weeks prior to the birth of the child to attend her in her confinement, and then called her his wife—were all circumstances corroborative of his confession as testified to by the witness Marshall, and properly submitted to the jury, in connection with his admissions as evidence of his guilt." *Com. v. Tarr*, 4 Allen (Mass.) 315.

73. *Perkins v. Perkins*, 59 N. J. Eq. 515, 46 Atl. 173.

**Under the French Law**, the confession of one charged with adultery must be corroborated by strong presumptions and some determinate facts. *Fournal, Traite l'Adultere*, p. 160.

forced to have sexual intercourse with the accused is sufficient to convict him, she being in no sense an accomplice.<sup>74</sup>

(d.) *Arson*. — Generally the corroborating evidence which will, besides the confession, support a conviction of arson must tend to show not only the burning of the house, but that it was done feloniously.<sup>75</sup> But it has been held in *Mississippi* that if the burning was established by other evidence, the confession is competent to show its felonious character.<sup>76</sup>

Evidence of hostility on the part of the accused toward the occupant has been held sufficient to corroborate a confession of arson.<sup>77</sup> But where the only evidence besides the confession was the fact that the building was consumed by fire in the night and that the prisoner lived about a mile therefrom, it was held insufficient.<sup>78</sup>

(e.) *Burglary*. — Where the commission of the crime of burglary is proved *aliunde*, the confession of the accused that he and others went to the house in furtherance of another's plan, and took certain articles therefrom, is sufficient.<sup>79</sup>

(f.) *Embezzlement, Larceny, etc.* — In a prosecution for embezzlement, evidence *aliunde* of defendant's receipt of money and his failure to turn it over or account for it is sufficient to corroborate a confession.<sup>80</sup> Suspicious conduct at the time of arrest, and the finding of the lost articles where the confession states that accused had thrown them, may be sufficient proof of the *corpus delicti* in grand larceny.<sup>81</sup> So where one accused of larceny of a hog was

74. *State v. Henderson*, 84 Iowa 161, 50 N. W. 758.

75. *Williams v. State*, 76 Ala. 42; *Stallings v. State*, 47 Ga. 572; *Westbrook v. State*, 91 Ga. 11, 16 S. E. 100; *Murray v. State*, 43 Ga. 256. Compare *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440.

76. *Mississippi Rule*. — *Sam v. State*, 33 Miss. 347, the court saying: "The rule with regard to proof of the *corpus delicti*, apart from the mere confession of the accused, proceeds upon the reason that the general fact, without which there could be no guilt, either in the accused or any one else, must be established before any one could be convicted of the perpetration of the alleged criminal act which caused it; as in cases of homicide, the death must be shown; in larceny, it must be proved that the goods were lost by the owner; and in arson, that the house had been burned. . . . But when the general fact is proved, the foundation is laid, and it is competent

to show by any legal and sufficient evidence how and by whom the act was committed, and that it was done criminally."

77. *Com. v. McCann*, 97 Mass. 580.

78. *Murray v. State*, 43 Ga. 256.

79. *Attaway v. State*, 35 Tex. Crim. App. 403, 34 S. W. 112.

80. *State v. New*, 22 Minn. 76.

81. *Corroboration of Confession of Grand Larceny*. — "It is shown here that Nash was seeking a lost pocketbook, that suspicion pointed to the accused; he was arrested, and just as the arrest took place he was observed to throw away a pocketbook which was immediately identified in his presence by Nash as his lost property, and Nash's assertion to that effect was not denied by the accused. Some papers which had been in the pocketbook were found in the place where the accused said he had thrown them. These facts, established by testimony *de hors* the confession, were sufficient proof of the

shown to have sold one, in size and color similar to that which the prosecuting witness had lost, and different from any owned by the accused himself, it was held sufficient to authorize the confession to be introduced in evidence.<sup>82</sup> But in a charge of obtaining property under false pretenses the fact that the accused owned no land, as represented, cannot be shown by his admission, as it is an essential element of the *corpus delicti*.<sup>83</sup>

(g.) *Escape*. — In a prosecution for assisting prisoners, one of whom was the accused's husband, to escape from jail, evidence that she had access to certain augers used in effecting the escape, and that she frequently visited the jail, was held sufficient to corroborate her confession.<sup>84</sup>

(h.) *Murder*. — Proof of the unlawful killing is sufficient to corroborate a confession of murder.<sup>85</sup>

**Finding the Body** of the murdered victim with marks of the crime thereon is also sufficient,<sup>86</sup> but is not essential to corroboration.<sup>87</sup> Nor need the body be positively or directly identified.<sup>88</sup>

**Finding the Weapons** with which the crime was committed in the place described in the confession is also a strong corroborating circumstance.<sup>89</sup>

**Possession** by the accused of money, and a key to its hiding place, both belonging to the victim, may be shown as tending to corroborate a confession of murder.<sup>90</sup>

**Abortion**. — The confession of an abortionist is corroborated by evidence of his inquiries for drugs to cause abortion, and of the victim's pregnancy.<sup>91</sup>

*corpus delicti* to warrant conviction on the full and explicit confession subsequently made before the magistrate after the accused had by the magistrate been advised to say nothing." Heard *v. State*, 59 Miss. 545.

82. Ryan *v. State*, 100 Ala. 94, 14 So. 868.

83. **False Pretenses**. — "Laying aside the evidence of defendant's admissions, there is nothing whatever in record even pointing toward the commission of a crime, and this condition furnishes a sure and conclusive test that the falsity of the representations is a necessary element of the *corpus delicti*. Indeed, the falsity of these representations as to the ownership of the land forms the core of the charge and makes the defendant's conduct and acts a crime, when otherwise they would be entirely innocent and lawful. For these reasons we conclude the evidence offered at the trial failed to establish

*prima facie* the *corpus delicti*, and that the defendant's admissions cannot be relied upon to supply the defect in the proof." People *v. Simonson*, 107 Cal. 345, 40 Pac. 440.

84. Crowder *v. State*, 56 Ga. 44.

85. Holsenbake *v. State*, 45 Ga. 43; Daniel *v. State*, 63 Ga. 339.

86. Hunt *v. State*, 135 Ala. 1, 33 So. 329, where deceased was last seen alive in the company of the accused; Anderson *v. State*, 72 Ga. 98; Williams *v. State*, 57 Ga. 478; People *v. Deacons*, 109 N. Y. 374, 16 N. E. 676.

87. State *v. Lamb*, 28 Mo. 218.

88. State *v. Patterson*, 73 Mo. 695.

89. State *v. McGloin*, 91 N. Y. 241; State *v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404.

90. State *v. Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296.

91. Dougherty *v. People*, 1 Colo. 514.

**Dying Declarations** of the murdered victim may corroborate the accused's confession.<sup>92</sup>

(i.) *Poisoning Cattle*. — A confession by one accused of poisoning cattle is sufficiently corroborated by evidence that he afterward purchased more of the poison and placed it within reach of cattle belonging to the same owner.<sup>93</sup>

(j.) *Rape*. — A confession of criminal intercourse without force and with the consent of the prosecutrix will not corroborate her testimony that it was forcible and against her will.<sup>94</sup>

b. *Testimony of Particular Persons*. — (1.) *Accomplices*. — At common law the testimony of an accomplice is not required to be corroborated, although conviction on such evidence alone is not encouraged, and in some jurisdictions corroboration is expressly required by statute.<sup>95</sup>

(2.) *Children*. — In England the tendency is to require that the testimony of a child of tender years be corroborated in order to support a conviction,<sup>96</sup> but no such rule obtains in the United States.<sup>97</sup>

(3.) *Prostitutes*. — It is error, in a prosecution for rape, for the court in its instructions to cast discredit on the testimony of a witness because she is a prostitute,<sup>98</sup> though in divorce cases corroboration is required of such testimony,<sup>99</sup> and sometimes in homicide.<sup>1</sup>

B. FOR PARTICULAR OFFENSES. — a. *Abduction*. — Where not expressly required by statute, a party may be convicted of abduction

92. *Lowry v. State*, 100 Ga. 574, 28 S. E. 419.

93. *Osborn v. Com.*, 14 Ky. L. Rep. 246, 20 S. W. 223.

94. *Confession of Permitted Intercourse*. — *Tway v. State*, 7 Wyo. 74, 50 Pac. 188, the court saying: "It is urged that the fact that illicit intercourse is admitted by the defendant is corroboration of the testimony of the prosecuting witness. We do not think so. Whether it was forcibly and without her consent is the precise issue, and the only issue, in the case. A confession of intercourse without force, and with her consent, is not corroboration of the charge that it was forcibly, and without her consent."

95. This subject has already been treated in this work. See article "ACCOMPLICES," Vol. I, pp. 99-110.

96. *English Rule*. — "Where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent tes-

timony of time, place and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion." IV Bl. Comm. 214.

By the English Criminal Law Amendment Act, in prosecutions for defilement of a girl under age, evidence of a child of tender years, though not under oath, may be received, but there can be no conviction unless such witness is "corroborated by some other material evidence in support thereof implicating the accused." L. R. Eng. Stats. (1885), Ch. 69.

97. *State v. Todd*, 110 Iowa 631, 82 N. W. 322.

98. *State v. Tuttle*, 67 Ohio St. 440, 66 N. E. 524, 93 Am. St. Rep. 689.

99. See *infra* this title, "DIVORCE CASES."

1. *Bailus v. State*, 8 Ohio C. P. 226, 16 Ohio C. C. 226.



upon the uncorroborated testimony of the victim.<sup>2</sup> And even where corroboration is required by statute, the testimony of another victim, abducted at the same time, is sufficient.<sup>3</sup>

**Sufficiency of Corroboration.** — But the victim's testimony is not sufficiently corroborated by that of another victim who saw the accused in the hallway of a disorderly house with others, including the victim, there being no corroborative evidence that the accused brought her there.<sup>4</sup>

Where the age of the victim is an essential element of the crime, and hers is the only testimony that she was under eighteen, it is error for the court to refuse a charge that in determining her age the jury might consider the manner of her attire, and the failure to produce a birth certificate which she testified was in existence.<sup>5</sup> The corroborative evidence is, of course, insufficient unless it tends to connect the accused with the crime.<sup>6</sup>

b. *Abortion.* — In prosecutions for abortion the victim is not, at common law, considered an accomplice within the rule which requires corroboration of the testimony of such a witness.<sup>7</sup> In several of the

2. This subject has already been treated. See Vol. I, pp. 45 to 47.

3. *People v. Panyko*, 71 App. Div. (N. Y.) 324, 75 N. Y. Supp. 945; *affirmed* 171 N. Y. 669, 64 N. E. 1,124.

4. **Insufficient Corroboration.** "Her testimony simply amounts to a statement that she saw this girl and the defendant in the hall together, and that she recognized them. That is not sufficient corroboration of the fact that he took her there. The whole story of this girl may have been fabricated. What the law requires is confirmation of her story on the material facts, or on so much of the material facts as would lead to the conclusion, beyond a reasonable doubt, that the defendant was guilty of the crime with which he was charged." *People v. Miller*, 70 App. Div. 592, 75 N. Y. Supp. 655.

5. **Instructions. — Defects in State's Case.** — *People v. Ragone*, 54 App. Div. 498, 67 N. Y. Supp. 23. On pp. 499-500 the court says: "While the jury was bound to consider her appearance on the stand upon the question of age, and might refer to it for the purpose of supporting her testimony, yet in doing so they were also bound to take into consideration the fact, which was apparent to them, that as to her hair

and clothing her appearance was not usual, but some change had been made in it. So they might give some weight to the fact that the certificate of birth, in which the precise time of her birth was stated, might have been presented to them by the district attorney, and that he had not done so. Where the matter of the age was so important, and evidence bearing upon it might have been presented to the jury, the defendant was entitled to have all the testimony — not only that against him, but that in his favor — presented to the jury and considered by them, before he was convicted. Because of this failure to permit the jury to take this matter into consideration, we are obliged to reverse this judgment and order a new trial."

6. *People v. Swasey*, 77 App. Div. 185, 78 N. Y. Supp. 1,103.

7. **Victim of Abortion Need Not Be Corroborated.** — *Com. v. Drake*, 124 Mass. 21; *Com. v. Boynton*, 116 Mass. 343; *Com. v. Wood*, 11 Gray 85, the court saying: "The prayers for instructions as to the credibility of the principal witness, Sarah Chaffee, from her supposed relation to the offense as an accomplice, and the credit to be reposed in or withheld from her if she was found to have sworn falsely upon any material

states, however, statutes have been passed requiring such corroboration, and under these the accused cannot be convicted by the unsupported testimony of the victim.<sup>8</sup> When corroboration is thus required it must, of course, in order to be availing, relate to some fact material to the issue.<sup>9</sup> Thus, where there was no corroboration of testimony of the alleged use of the instrument by the accused, a judgment of conviction under such a statute was reversed.<sup>10</sup> Nor is evidence that instruments like those claimed to have been used in the performance of the criminal act were found in defendant's office suf-

point, was rightly refused. We think the court rightly instructed the jury that the woman was not under the statute technically an accomplice; for she could not have been indicted with him for the offense."

*State v. Owens*, 22 Minn. 238; *State v. Hyer*, 39 N. J. L. 598; *Dunn v. People*, 29 N. Y. 523, 86 Am. Dec. 319, where it is observed: "The position that an acquittal should have been directed on the ground that the female was an accomplice and was not corroborated in her testimony, was not urged in the argument, though taken on the trial. It could not, however, have been sustained. She did not stand legally in the situation of an accomplice; for although she no doubt participated in the moral offense, the law regards her rather as the victim than the perpetrator of the crime. (*Rex v. Hargrave*, 5 Car. & P. 170; *Rex v. Boyes*, 1 Best & Smith 311." See also *Frazer v. People*, 54 Barb. (N. Y.) 306; *People v. Meyers*, 5 N. Y. Crim. Rep. 120; *People v. Vedder*, 34 Hun (N. Y.) 280.

*Watson v. State*, 9 Tex. App. 237. The court says: "It is claimed and insisted by the defendant that, the drug having been administered with the consent of Mattie Shook, her consent made her also an accomplice, and that the court should have instructed the jury with reference to and in conformity with that view of the case. There has been some contrariety of opinion and decision in the courts upon this subject. The rule that she does not stand legally in the situation of an accomplice, but should rather be regarded as the victim than the perpetrator of the crime, is one which commends itself to our sense of justice and right,

and there is certainly nothing in our law of accomplices which should be held to contravene it." See also *Willingham v. State*, 33 Tex. Crim. App. 98, 25 S. W. 424; *Miller v. State*, 37 Tex. Crim. App. 575, 40 S. W. 313. *Contra*.—*Wandell v. State*, (Tex. 1894,) 25 S. W. 27.

8. *People v. Josselyn*, 39 Cal. 393; *State v. McCoy*, 52 Ohio St. 157, 39 N. E. 316; *Com v. Keene*, 7 Pa. Super. Ct. 293.

9. *Frazer v. People*, 54 Barb. (N. Y.) 306; *Com v. Keene*, 7 Pa. Super. Ct. 293.

10. **Alleged Use of Instrument Not Corroborated.**—*People v. Josselyn*, 39 Cal. 393. The court says: "On this vital point in the case there is no corroboration whatever of the witness Locke. It is proved that she was pregnant and had a miscarriage; but, aside from her testimony, there is no proof whatever that any attempt was made by any one to produce abortion, or that the miscarriage was the result of any such effort. It is not enough that the witness was corroborated in some particulars which involve no criminality in the defendant. She must also have been corroborated by circumstances, or otherwise, in at least some portion of her testimony which imputes to the defendant the commission of the crime alleged, to-wit: the use of an instrument with intent to produce abortion. In this particular there was not the slightest corroboration of her testimony. In view of the confidential relations which exist between physicians and surgeons and their patients, and the secrecy which necessarily exists in the treatment of certain diseases to which females are subject, and foreseeing that physicians and surgeons might

ficient to corroborate the victim's testimony concerning their use.<sup>11</sup> The fact that the defendant, a reputable physician, had been employed by the complaining witness to attend her in no way corroborates her testimony that he had been previously instrumental in attempting to procure an abortion.<sup>12</sup> But the testimony of another accomplice of the accused to the effect that he accompanied the victim to a place in front of defendant's house, where the alleged criminal act was committed, corroborates her testimony on a material point.<sup>13</sup>

The Confession of one accused of the crime of abortion will support a conviction where there is extraneous evidence of inquiries by the prisoner concerning drugs to produce that result, and also other evidence as to the victim's condition.<sup>14</sup>

c. *Bastardy*. — A prosecution for bastardy is not, strictly speaking, a criminal proceeding, and in the absence of a statutory requirement the accused may be found guilty upon the unsupported testimony of the prosecutrix.<sup>15</sup> This rule obtains even under a statute requiring corroboration of the testimony of an accomplice, or of

be exposed to great peril if criminal practices imputed to them could be sustained on the uncorroborated statement of the patient alone, the legislature has wisely provided that they shall not be 'arrested, indicted, put on trial or convicted' of an attempt to produce abortion 'by the testimony of such woman alone.'

11. *People v. Vedder*, 34 Hun (N. Y.) 280.

12. *Frazer v. People*, 54 Barb. (N. Y.) 306, the court saying: "The testimony of Dr. Peden was relied on as thus corroborating the witness. And the judge charged that it was corroborative as to the defendant's intent and connection with the alleged offense. Now it only corroborated her as to the single fact of the birth of the child, which was not disputed, and which did not at all tend to prove the offense. She did not testify that she was attended by Dr. Peden, or that the accused employed him, and if she had, the case would not have been varied. They were comparatively unimportant facts, not in the least implicating the accused in a criminal offense. The claim is that the fact of the employment of Dr. Peden by the defendant to attend upon the girl at her confinement is some evidence of his paternity of the child, and this latter fact being proved, a motive

existed for the commission of the offense, and that this motive thus inferred corroborates the evidence of the girl as to the actual guilt of the party. This is quite too far fetched and fanciful."

13. *Com. v. Drake*, 124 Mass. 21.

14. *Dougherty v. People*, 1 Colo. 514.

15. *Testimony of Prosecutrix Sufficient*. — *Iowa*. — *State v. McGlothlen*, 56 Iowa 544, 9 N. W. 893.

*Minnesota*. — *State v. Nichols*, 29 Minn. 357, 13 N. W. 153, where it is observed: "It is claimed that the complaining witness was not corroborated, and that a verdict against the defendant cannot stand upon her testimony alone. The law does not require in such cases that the testimony of the complaining witness be corroborated by other evidence. The rule invoked by the defendant is one which has reference only to criminal prosecutions, except where by statute it is given a broader application, as has been the case in England with respect to bastardy proceedings. Our statute relating to convictions upon the testimony of accomplices (Gen. St. 1878, c. 73, § 104,) applies only to prosecutions for crime. This is not a criminal proceeding, in the proper sense of the term."

*Montana*. — *State v. Tipton*, 15 Mont. 74, 38 Pac. 222.

the prosecutrix in proceedings for abduction, seduction and similar offenses,<sup>16</sup> and of course is peculiarly applicable under a statute making the evidence of a credible witness sufficient in all ordinary cases.<sup>17</sup>

In England, by statute, the evidence of a complainant must be "corroborated in some material particular by other testimony."<sup>18</sup> This does not require that the complainant's testimony that defendant paid for the child's maintenance within twelve months after its birth should be corroborated, although that fact was stated in the information and summons as required by the statute.<sup>19</sup> Moreover, the complainant may be corroborated by evidence of intimacy between herself and the accused long prior to the act complained of.<sup>20</sup>

In Illinois the appellate courts, while not establishing the rule that the complainant's testimony must have corroboration, have assumed to reverse judgments founded upon the unsupported evidence of the complainant which, in the opinion of the court, was insufficient.<sup>21</sup> A

*Nebraska.*—Robb v. Hewitt, 39 Neb. 217, 58 N. W. 88; Olson v. Peterson, 33 Neb. 358, 50 N. W. 155; Altschuler v. Algaza, 16 Neb. 631, 21 N. W. 401.

*New York.*—People v. Lyon, 83 Hun 303, 31 N. Y. Supp. 942; *distinguishing* Burke v. Burpo, 75 Hun 568, 27 N. Y. Supp. 684.

*South Carolina.*—State v. Meares, 60 S. C. 527, 39 S. E. 245.

*Wisconsin.*—McClellan v. State, 66 Wis. 335, 28 N. W. 347.

16. State v. McGlothlen, 56 Iowa 544, 9 N. W. 893.

17. State v. Tipton, 15 Mont. 74, 38 Pac. 222.

18. 35 & 36 Vict. Ch. 65, § 45.

The order of maintenance under this statute must recite that the corroboration was "in some material particular." Queen v. Read, 9 Ad. & E. 619.

19. Hodges v. Bennett, 5 H. & N. 625, 29 L. J. M. C. 224.

20. "The magistrate says that the acts of familiarity deposed to by the appellant's parents would have a great effect upon his judgment, if he had considered himself at liberty to take them into consideration as corroborative evidence. I know of no rule of law which prevented him from so doing. Suppose that in the summer of 1874 the appellant and the respondent had been seen walking together in a lonely spot, such as might be convenient

for the commission of immoral acts, certainly that would be a material corroboration of the appellant's evidence as to the paternity of her illegitimate child; and I do not think that the testimony rejected by the magistrate is distinguishable in principle. I am clearly of the opinion that the evidence given by the appellant's parents did corroborate her statement in a material particular." Cole v. Manning, 2 Q. B. 611, 46 L. J. M. C. 175.

21. **Sufficiency Determined by Reviewing Court.**—"The question whether the evidence is sufficient to support the verdict is open to determination in this court; and while we must give due weight to the superior facilities possessed by the jury for determining the truth by seeing the manner of the witnesses upon the stand, yet that consideration is not conclusive upon us that their verdict is just. We find no competent evidence in this record casting any doubt on the defendant as a witness. On the other hand, not only were there several features of Mrs. Ford's testimony which were very improbable, but her evidence is placed under serious cloud by the fact, which appeared upon her cross-examination, that she was indicted with her husband and others for the murder of Edward Moore at Allen's Park, Ottawa, in 1890; that she pleaded guilty and was sentenced to impris-

similar rule has been applied in New York.<sup>22</sup>

d. *Bribery*. — In a prosecution for bribery, where the parties charged to have been bribed by the defendant testified that after an interview with him they had entered another room and there received the bribe from another person, it was held that they were not accomplices within the rule requiring corroboration of their testimony.<sup>23</sup>

e. *Forgery*. — A statute of Ontario requires corroborative evidence in order to convict of the crime of forgery.<sup>24</sup> Under this statute the evidence of one witness that certain documents were forged by the accused is not sufficiently corroborated by further testimony by the same witness that names in the same handwriting, inscribed in another book, are the work of the accused.<sup>25</sup> So where the only witnesses examined were one whose name was forged, and the addressee in the forged order in question, there was held to be an absence of corroborative evidence.<sup>26</sup>

f. *Homicide*. — In some states there may be a conviction even of homicide upon the uncorroborated evidence of an accomplice,<sup>27</sup> though this is to be received with extreme caution.<sup>28</sup> Where corroboration is required, it is sufficient if it tends to connect the defendant with the commission of the crime.<sup>29</sup>

**Spectators at a Prize Fight** which results fatally to one of the com-

onment in the penitentiary for a term of fourteen years, and served five years and seven months of that sentence, and was then pardoned. Finding that the prosecuting witness has been a married woman, and is an ex-convict, and that her evidence is uncorroborated upon the main fact, and is in several respects improbable, and that she had the burden of proof, while against her is the positive denial of the defendant, who stands unimpeached, we are of the opinion that this case ought to be submitted to another jury." *Gehm v. People*, 87 Ill. App. 158. Compare *Corcoran v. People*, 27 Ill. App. 638.

22. "The testimony of the girl, while contradictory and unreasonable, cannot be said to be corroborated in any particular by a disinterested witness." *Burke v. Burpo*, 75 Hun (N. Y.) 568, 27 N. Y. Supp. 684.

23. **Necessity of Corroborating Accomplice**. — *Queen v. Boyes*, 1 B. & S. 311, Hill, J., says: "In the application of the rule respecting accomplices much depends on the nature of the crime and the extent of the complicity of the witnesses in it.

If the crime is a very deep one, and the witness so far involved in it as to render him apparently unworthy of credit, he ought to be corroborated. On the other hand, if the offense be a light one, as in *Rex v. Hargrave*, 5 C. & P. 170 (E. C. L. R., Vol. 24,) which has been referred to, where the nature of the offense and the extent of the complicity would not much shake his credit, it is otherwise."

24. Statute, 10 & 11 Vict., Ch. IX, § 21.

25. *Regina v. McBride*, 26 Ont. Rep. 639.

26. *Regina v. Giles*, 6 U. C. C. P. 84.

27. "It is in my opinion a fearful discrepancy that a man might be executed on evidence which would not be sufficient in law to prove in these courts (i. e., the ecclesiastical) a fact of adultery, even by way of defense." Dr. Lushington, in *Simmons v. Simmons*, 1 Rob. (Eccle.) 569.

28. *Campbell v. People*, 159 Ill. 9.

29. *People v. Mayhew*, 150 N. Y. 346, 44 N. E. 971.

batants are guilty of manslaughter under the English law, but are not accomplices within the rule requiring corroboration.<sup>30</sup>

**Discredited Witness.**—A conviction of homicide is not sustained by the uncorroborated testimony of a prostitute who is shown to be taking part in the prosecution for the purposes of revenge.<sup>31</sup>

**g. Incest.**—In some jurisdictions a conviction for the crime of incest may be based upon the uncorroborated testimony of the female.<sup>32</sup> Such, indeed, appears to be the rule in all states in cases where the crime is committed forcibly and without the consent of the female, for she is not then regarded as an accomplice.<sup>33</sup> Even where the crime is committed under circumstances which would constitute rape, and corroboration of the victim's evidence is required by statute in order to convict of the latter crime, there may, nevertheless, be a conviction of incest upon the testimony of the female alone.<sup>34</sup>

Where, however, the crime is committed with the consent or permission of the female, she is regarded as an accomplice, and in those jurisdictions where an accomplice's testimony must be corroborated, this general rule applies.<sup>35</sup> The question whether the witness is or

30. *Rex v. Hargrave*, 5 Car. & P. (Eng.) 170.

31. *Bailus v. State*, 8 Ohio, C. D. 226, 16 Ohio C. C. 226.

32. *Brown v. State*, (Fla.), 27 So. 869; *State v. Dana*, 59 Vt. 614, 10 Atl. 727, the court saying: "There is no rule of common law, nor of the statute law of this state, that a person shall not be convicted on the testimony of an accomplice unless corroborated by other evidence. In some states such a rule may exist either from a code or statute law."

33. **Female Need Not Be Corroborated Where Crime Is Forced.** *Alabama.*—*Smith v. State*, 108 Ala. 1, 19 So. 306, 54 Am. St. Rep. 140; *State v. Kouhns*, 103 Iowa 720, 73 N. W. 353; *State v. Hurd*, 101 Iowa 391, 70 N. W. 613; *State v. Chambers*, 87 Iowa 1, 53 N. W. 1,090, 43 Am. St. Rep. 349; *Whitaker v. Com.*, 95 Ky. 632, 27 S. W. 83, for it is observed: "The crime was committed against the daughter. She was not the accomplice, but the victim of her father. If another had aided the father in the accomplishment of his purpose, he would have been an accomplice, but not so with the daughter. She might have committed a crime also; indeed, did commit one, unless she is guilty of

perjury, but it was not the same crime that the father committed." *Compare Mathis v. Com.*, 11 Ky. L. Rep. 882, 13 S. W. 360; *Schwartz v. State*, (Neb.), 91 N. W. 190; *Clark v. State*, 39 Tex. Crim. App. 179, 45 S. W. 576, 73 Am. St. Rep. 918; *Mullunix v. State*, (Tex.), 26 S. W. 504; *Porath v. State*, 90 Wis. 527, 63 N. W. 1,061.

34. *State v. Kouhns*, 103 Iowa 720, 73 N. W. 353; *State v. Hurd*, 101 Iowa 391, 70 N. W. 613.

35. *Georgia.*—*Solomon v. State*, 113 Ga. 192, 38 S. E. 332. *Compare Taylor v. State*, 110 Ga. 150, 35 S. E. 161; *Raiford v. State*, 68 Ga. 672.

*Massachusetts.*—*Com. v. Lynes*, 142 Mass. 577, 8 N. E. 408, 56 Am. Rep. 709.

*Nevada.*—*State v. Streeter*, 20 Nev. 403, 22 Pac. 758.

*North Dakota.*—*State v. Kellar*, 8 N. Dak. 563, 80 N. W. 476, the court saying (p. 564): "That the female participant in incestuous intercourse, whose action in the matter is voluntary, and uninfluenced by any element of coercion, either by force, fear or fraud, or undue influence, is an accomplice in the commission of the crime of incest, is, we think, firmly settled in the law."

*Oregon.*—*State v. Jarvis*, 20 Or. 437, 26 Pac. 302, 23 Am. St. Rep.

is not an accomplice becomes, therefore, a question of fact to be determined from all the evidence.<sup>36</sup> Her own testimony that she did not consent is, of course, not necessarily conclusive.<sup>37</sup>

**Sufficiency of Corroboration.** — Where the evidence discloses that the female consented, or at least failed to resist to the extent required by law, the corroborating evidence required is often slight. Thus, the fact that the accused was the only one who had the opportunity to commit the crime, coupled with the pregnancy of the female, has been held sufficient corroboration.<sup>38</sup> So an admission of defendant that he might have committed the crime while asleep, while strongly improbable, will be treated as sufficient for the purposes of corroboration,<sup>39</sup> and in general nothing more is required than proof *aliunde* of circumstances consistent with the story related by the female.<sup>40</sup>

141; *State v. Jarvis*, 18 Or. 360, 23 Pac. 251.

*Tennessee.* — *Shelly v. State*, 95 Tenn. 152, 31 S. W. 492, 49 Am. St. Rep. 926, the court saying (p. 156): "There is no evidence in this record of any force, threats, fraud or undue influence practiced by the defendant in accomplishing the incestuous act. On the contrary, the evidence of the female was that the sexual intercourse was commenced in the spring or summer of 1893, and kept up until the following Christmas, which would imply that she consented to it. The court holds that her uncorroborated testimony is insufficient to support the conviction, and, for this reason, the judgment is reversed and the cause remanded."

*Texas.* — *Ratliff v. State*, (Tex. Crim. App.), 60 S. W. 666; *Sauls v. State*, 30 Tex. App. 496, 17 S. W. 1,066; *Dodson v. State*, 24 Tex. App. 514, 6 S. W. 548; *Mercer v. State*, 17 Tex. App. 452; *Freeman v. State*, 11 Tex. App. 92, 40 Am. St. Rep. 787.

36. "It would seem that, in order to determine whether the witness in the present case was an accomplice or not, in the sense of requiring corroboration, the proper inquiry would be, did she knowingly, voluntarily, and with the same intent which actuated the defendant, unite with him in the commission of the crime charged against him? If she did, she was an accomplice, and her uncorroborated testimony would not support a conviction." *Freeman v.*

*State*, 11 Tex. App. 92, 40 Am. Rep. 787.

37. *Mercer v. State*, 17 Tex. App. 452.

38. *Lomax v. State*, (Tex. Crim. App.), 40 S. W. 999.

39. *Bales v. State*, (Tex. Crim. App.), 44 S. W. 517.

40. **General Corroboration.** — "In addition, the state proved by Joe Woods that defendant and the prosecuting witness were chopping cotton in the field, by themselves, near the peach brake in question; that he had occasion to examine some foot tracks leading from this field into the peach brake; that he traced the tracks of two persons, one a bare foot and the other a shoe track, from where they were chopping cotton to a point in said 'brake' where he saw an impression on the ground, and thence back into the field. This, in our opinion, was testimony corroborative of the prosecuting witness, and tending to connect defendant with the offense; and whether or not the jury regarded the prosecuting witness as an accomplice is not material." *Cesar v. State*, (Tex.), 29 S. W. 785. "Upon an examination of the transcript, it appears therefrom that there was some evidence tending to corroborate the accomplice. Defendant was in the habit of taking the prosecuting witness with him to the River ranch, and there remaining over night, and on one occasion they occupied the same bed, in the presence of the witnesses, Neely and Dakin. He admits these facts. He

**Confessions** of one accused of the crime of incest must of course be corroborated in order to afford a basis for conviction.<sup>41</sup> But a confession of incest is sufficient when corroborated,<sup>42</sup> and a confession or admission is sufficient to corroborate the testimony of the prosecuting witness, although she is shown to have been an accomplice.<sup>43</sup>

**h. Perjury.** — (1.) **General Rule.** — In prosecutions for perjury the testimony of a single witness for the state is not sufficient to convict.<sup>44</sup> It was formerly the rule that at least one additional witness was required,<sup>45</sup> and it is even yet announced in some jurisdictions that the corroboration must be equal to that of an additional witness.<sup>46</sup> But the ancient rule has gradually been expanded,<sup>47</sup>

also admits the fact that his attention was called to the condition of his daughter, and that he took her to San Francisco, and placed her in St. Mary's Hospital, where she gave birth to a child, after which he sent her to Iowa by the southern route. She was brought from Iowa by the sheriff of Elko county. While she was at the hospital awaiting confinement she wrote to her sister, in this state, charging that their father was the one who had committed the crime. Publicity appears to have been given to the accusation, and, several months before the finding of the indictment, persons acting in behalf of the defendant persuaded her to make an affidavit, fully denying the charge, and also to copy and sign a letter to the same effect, drawn in the interest of defendant, and addressed to this same sister, who was present at the time of writing and signing the letter. It may be said of this circumstance, as well as of each of the others, that it does not of itself necessarily tend to establish guilt, and it is true that an innocent father might have done any of these things; but, taken as a whole, these circumstances form a combination tending to connect defendant with the commission of the offense." *State v. Streeter*, 20 Nev. 403, 22 Pac. 758. *Compare* *Smith v. Com.*, 22 Ky. L. Rep. 1,349, 60 S. W. 531.

<sup>41.</sup> *Bergen v. People*, 17 Ill. 425, 65 Am. Dec. 672.

<sup>42.</sup> *Mathis v. Com.*, 11 Ky. L. Rep. 882, 13 S. W. 360.

<sup>43.</sup> *Bales v. State*, (Tex. Crim. App.), 44 S. W. 517.

<sup>44.</sup> **Single Witness Insufficient.** *California.* — *People v. Davis*, 61 Cal. 536.

*Indiana.* — *Galloway v. State*, 29 Ind. 442.

*Mississippi.* — *Whittle v. State*, 79 Miss. 327, 30 So. 722.

*Missouri.* — *State v. Heed*, 57 Mo. 252.

*New Mexico.* — *Territory v. Williams*, 9 N. M. 400.

*New York.* — *People v. Stone*, 32 Hun 41.

*Pennsylvania.* — *Peoples v. Com.*, 91 Pa. St. 493.

*South Carolina.* — *State v. Hayward*, 1 N. & Mc. 546.

*Texas.* — *Waters v. State*, 30 Tex. App. 284, 17 S. W. 411; *Taylor v. State*, (Tex. Crim. App.), 22 S. W. 974; *Brooks v. State*, 29 Tex. App. 582, 16 S. W. 542; *Kemp v. State*, 28 Tex. App. 519, 13 S. W. 869; *Lee v. State*, (Tex. Crim. App.), 70 S. W. 425.

*England.* — *Rex v. Broughton*, 2 Strange 1,229; *Reg. v. Braithwaite*, 8 Cox C. C. 254, 1 F. & F. 638; *Reg. v. Yates*, C. & M. 132, 41 Eng. C. L. 77; *Reg. v. Muscot*, 10 Mod. 192.

<sup>45.</sup> "Lord Tenterden, C. J., was of opinion that two witnesses were necessary to a conviction." *Champney's Case*, 2 Lewin C. C. 258.

<sup>46.</sup> *McClerkin v. State*, 20 Fla. 879; *Gandy v. State*, 23 Neb. 436, 36 N. W. 817; 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; *Silver v. State*, 17 Ohio 365.

*England.* — *Reg. v. Parker*, C. & M. 639, 41 Eng. C. L. 346.

<sup>47.</sup> **Expansion of Rule.** — Mr. Justice Wayne in *U. S. v. Wood*, 14 Pet. (U. S.) 430, gives the following



until at the present day it is generally held that, though there must be corroboration of a single prosecuting witness, this need not be other testimony, but may consist of circumstances or other competent evidence tending to support that of the witness,<sup>48</sup> and need not even

sketch of the development of the rule: "At first two witnesses were required to convict in a case of perjury, both swearing directly adversely from the defendant's oath. Contemporaneously with this requisition, the larger number of witnesses on one side or the other prevailed. Then, a single witness corroborated by other witnesses, swearing to circumstances bearing directly upon the imputed *corpus delicti* of a defendant, was deemed sufficient. Next, as in the case of *Rex v. Knill*, 5 B. & A. 929, note, with a long interval between it and the preceding, a witness who gave proof only of the contradictory oaths of the defendant on two occasions, one being an examination before the House of Lords, and the other an examination before the House of Commons, was held to be sufficient. Though this principle has been acted on as early as 1764, by Justice Yates, as may be seen in the note to the case of the *King v. Harris*, 5 B. & A. 937, and was acquiesced in by Lord Mansfield and Justices Wilmot and Aston. We are aware that in a note to *Rex v. Mayhew*, 6 Car. & Payne 315, a doubt is implied concerning the case decided by Justice Yates; but it has the stamp of authenticity, from its having been referred to in a case happening ten years afterwards, before Justice Chambre, as will appear by the note in 6 B. & A. 937. Afterwards, a single witness, with the defendant's bill of costs (not sworn to) in lieu of a second witness, delivered by the defendant to the prosecutor, was held sufficient to contradict his oath; and in that case Lord Denman says: 'A letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness.' 6 Car. & Payne 315. All of the foregoing modifications of the rule will be found in 2 Russell 544, and that respecting written documents is stated in Archbold 157, in

anticipation of the case in 6 Car. & Payne 315.

We thus see that this rule, in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered equivalent to the end intended to be accomplished by the rule."

**48. Corroborating Evidence Need Not Be Testimony.**—*United States*. U. S. v. Wood, 14 Pet. 430.

*Florida*.—*McClerkin v. State*, 20 Fla. 879.

*Georgia*.—*Haines v. State*, 109 Ga. 526, 35 S. E. 141.

*Iowa*.—*State v. Raymond*, 20 Iowa 582; *State v. Waddle*, 100 Iowa 57, 69 N. W. 279; *State v. Clough*, 111 Iowa 714, 83 N. W. 727.

*Kentucky*.—*Wadlington v. Com.*, 22 Ky. L. Rep. 1,108, 59 S. W. 851; *Wells v. Com.*, 9 Ky. L. Rep. 658, 6 S. W. 150.

*Massachusetts*.—*Com. v. Bultand*, 119 Mass. 317; *Com. v. Pollard*, 12 Metc. 225; *Com. v. Parker*, 2 Cush. 212.

*Mississippi*.—*Whittle v. State*, 79 Miss. 327, 30 So. 722; *Hemphill v. State*, 71 Miss. 877, 16 So. 261; *Brown v. State*, 57 Miss. 424; *Vance v. State*, 62 Miss. 137.

*Missouri*.—*State v. Miller*, 44 Mo. App. 159; *State v. Blize*, 111 Mo. 464, 20 S. W. 210.

*Montana*.—*State v. Gibbs*, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749.

*Nebraska*.—*Gandy v. State*, 23 Neb. 436, 36 N. W. 817; 27 Neb. 707, 43 N. W. 747, 44 N. W. 108.

*New Jersey*.—*State v. Dayton*, 23 N. J. L. 49, 53 Am. Dec. 270.

*New Mexico*.—*Territory v. Remuzon*, 3 N. M. 648, 9 Pac. 598.

*New York*.—*Eighmy v. People*, 79 N. Y. 546.

*North Carolina*.—*State v. Peters*, 107 N. C. 876, 12 S. E. 74; *State v. Swain*, 97 N. C. 462, 2 S. E. 68; *State v. Hawkins*, 115 N. C. 712, 20 S. E. 623.

equal that of another.<sup>49</sup>

The Reason for the Rule requiring corroboration of a single witness lies in the principle that one man's oath, in law, is *prima facie* as good as another.<sup>50</sup> It is not therefore a mere arbitrary rule, but a just and logical one,<sup>51</sup> and it should be embodied in the court's instructions to the jury.<sup>52</sup>

(2.) Scope of the Rule — Crimes Included. — The requirement of corroboration above stated applies to prosecutions, not alone for technical perjury, but also for the statutory offense of false swearing,<sup>53</sup>

*Ohio*. — *Crusen v. State*, 10 Ohio 258; *In re Commissioners*, 70 N. E. 450, 50 S. & C. P. Dec. 691.

*Texas*. — *Carter v. State*, (Tex. Crim. App.), 43 S. W. 996; *Montgomery v. State*, (Tex. Crim. App.), 40 S. W. 805; *Butler v. State*, (Tex. Crim. App.), 38 S. W. 46; *Whittaker v. State*, 37 Tex. Crim. App. 479, 36 S. W. 253; *Rogers v. State*, 35 Tex. Crim. App. 221, 32 S. W. 1,044; *Plummer v. State*, 35 Tex. Crim. App. 202, 33 S. W. 228; *Beach v. State*, 32 Tex. Crim. App. 240, 22 S. W. 976; *Grandison v. State*, 29 Tex. App. 186, 15 S. W. 174; *Kitchen v. State*, 29 Tex. App. 45, 14 S. W. 392, 9 S. W. 51; *Washington v. State*, 22 Tex. App. 26, 3 S. W. 228; *Smith v. State*, 22 Tex. App. 196, 2 S. W. 542; *Maines v. State*, 26 Tex. App. 14, 9 S. W. 51; *Anderson v. State*, 24 Tex. App. 705, 7 S. W. 40; *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295; *Gartman v. State*, 16 Tex. App. 215; *Gabrielsky v. State*, 13 Tex. App. 428; *State v. Buie*, 43 Tex. 532.

*Virginia*. — *Schwartz v. Com.*, 27 Gratt. 1,025, 21 Am. Rep. 365.

**49. Corroboration Need Not Equal Other Testimony.** — *Indiana*. — *Galloway v. State*, 29 Ind. 442, where the following instruction was approved:

"It is frequently stated that such corroborating circumstances must be equivalent to the positive or direct testimony of a witness. *But such is not the rule of law.* If it were the rule, it would be a rule without sense, furnishing no guidance to the jury; for the weight which attaches to the direct testimony of a witness can scarcely be said to be exactly equal in any two individual cases; and consequently there could be no

rule for arriving at the weight of the direct testimony of one witness."

*Kentucky*. — *Com. v. Davis*, 92 Ky. 460, 18 S. W. 10.

*Louisiana*. — *State v. Jean*, 42 La. Ann. 946, 8 So. 480.

*Missouri*. — *State v. Heed*, 57 Mo. 252; *State v. Miller*, 44 Mo. App. 159.

*North Carolina*. — *State v. Peters*, 107 N. C. 876, 12 S. E. 74.

*Ohio*. — *Crusen v. State*, 10 Ohio St. 258.

*Texas*. — *Whittaker v. State*, 37 Tex. Crim. App. 479, 36 S. W. 253.

50. "The reason of the rule in cases of perjury is that the same effect is to be given to the testimony of the party accused as to that of the accusing witness, so that if there be no other proof, the scale of evidence is poised; there being witness against witness, oath against oath." *Com. v. Douglass*, 5 Metc. (Mass.) 241.

*Compare State v. Waddle*, 100 Iowa 57, 69 N. W. 279; *Galloway v. State*, 29 Ind. 442.

51. Coleridge, J.: "The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule, but a rule founded on substantial justice." *Reg. v. Yates*, C. & M. 139, 41 E. C. L. 77.

52. *Grandison v. State*, 29 Tex. App. 186, 15 S. W. 174; *Wilson v. State*, 27 Tex. App. 47, 10 S. W. 749, 11 Am. St. Rep. 180; *Brooklin v. State*, 27 Tex. App. 701, 11 S. W. 645; *Miller v. State*, 27 Tex. App. 497, 11 S. W. 485; *Washington v. State*, 22 Tex. App. 26, 3 S. W. 228; *Gartman v. State*, 16 Tex. App. 215; *Aguierre v. State*, 31 Tex. Crim. App. 519, 21 S. W. 256.

53. **False Swearing.** — "The rule applicable to perjury applies to the

and to actions for slander in charging the plaintiff with perjury.<sup>54</sup>

**Subornation of Perjury Not Included.** — But the rule does not extend to the crime of suborning perjury, and it may be proved by a single witness.<sup>55</sup>

**Circumstantial Evidence.** — So where the proof of the crime is necessarily circumstantial the rule is inapplicable.<sup>56</sup>

**Elements Requiring Corroboration.** — The rule which requires corroboration of a single witness to the crime of perjury does not apply to every element of the crime, but only to the fact that the oath of the accused was false, and that he did not believe it to be true.<sup>57</sup>

**Several Assignments.** — Where several assignments of perjury are included in one indictment, each assignment is treated as a distinct offense, as regards corroboration, and a conviction cannot be obtained by producing a single witness for each assignment.<sup>58</sup>

statutory offense of false swearing. If the evidence be corroborative of the fact that the accused swore falsely it is sufficient." *Com. v. Davis*, 92 Ky. 460, 18 S. W. 10. See also *State v. Miller*, 44 Mo. App. 159.

54. *Woodbeck v. Keller*, 6 Cow. (N. Y.) 118, holding that proof of justification must be equal to that required for conviction.

55. *State v. Waddle*, 100 Iowa 57, 69 N. W. 279, where it is observed: "The reason for the rule fails, when applied to a case like this, where the crime is complete, 'though no perjury be committed.' It seems to us clear, upon reason and principle, that in cases like this the state may sufficiently establish the falsity of the matter charged to be false, by the testimony of one witness. Of course, as in all cases, the credit and weight to be given to the witness must be left with the jury. Of the authorities cited, some relate to familiar and undisputed principles of the law, and others to other offenses, and are not applicable to this."

*Com. v. Douglass*, 5 Metc. (Mass.) 241; *State v. Renswick*, 85 Minn. 19, 88 N. W. 22, the court saying: "The suborned is neither a principal nor an accomplice, for legally he cannot be guilty of persuading himself to commit perjury. An indictment of a party for inducing himself to commit a crime would be a legal absurdity. *State v. Pearce*, 56 Minn. 231, 57 N. W. 652, 1,065; *State v. Sargent*, 71 Minn. 31, 73 N. W. 626;

*State v. Durnam*, 73 Minn. 150, 75 N. W. 1,127. The conclusion logically follows that if, in the prosecution of a party for subornation of perjury, it is sought to establish the fact that perjury was committed by the testimony of a person committing it, his testimony must be corroborated as to such fact, because as to the perjury he is an accomplice. But the alleged fact that he was induced to commit the crime by the accused may be established by his uncorroborated testimony if it satisfies the jury beyond a reasonable doubt."

56. *People v. Doody*, 172 N. Y. 165, 64 N. E. 867 (*affirming* 72 App. 372).

57. *U. S. v. Hall*, 44 Fed. 864, 10 L. R. A. 324; *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *State v. Wood*, 17 Iowa 18; *State v. Jean*, 42 La. Ann. 946, 8 So. 480; *Com. v. Pollard*, 12 Metc. (Mass.) 225.

58. **Full Corroboration Required for Each Assignment.** — *Lea v. State*, 64 Miss. 278, 1 So. 235, where the accused was indicted for falsely testifying relative to several unlawful sales of liquors, the trial court's instructions permitted the jury to treat the several sales testified to by different witnesses as corroborating each other. The supreme court said: "Proof of either assignment of perjury contained in the indictment, by two witnesses, or by one witness and corroborating circumstances, would have supported conviction; but the better opinion in such case is, that proof of one assignment is

(3.) **Sufficiency of Corroboration.** — (A.) **IN GENERAL.** — The evidence which will corroborate a single witness to the crime of perjury must be both strong and positive.<sup>59</sup> It may, however, be circum-

not corroborated by proof of another, even when all the perjuries assigned are committed at the same time and place." *Williams v. Com.*, 91 Pa. St. 493; *Reg. v. Parker*, (Eng.), C. & M. 639, 41 Eng. C. L. 346; *Reg. v. Hare*, (Eng.), 13 Cox C. C. 174.

But in a prosecution of one charged with falsely swearing on a previous trial for larceny, that he received the goods in question by mail at two different postoffices, the testimony of each postmaster, at each office, that no such goods were received at his office corroborates the other. *Barton v. Com.*, 17 Ky. L. Rep. 580, 32 S. W. 396.

So where the accused testified that he had not been on a certain day at the house of either of two persons, each of whom swore in the prosecution for false swearing that he was at her house on that day, the evidence is sufficient to support a conviction. *Com. v. Davis*, 92 Ky. 460, 18 S. W. 10.

"In this case the jury were told, 'the accused must be acquitted unless it is proven that he swore falsely by two witnesses, or by one witness and strong corroborating circumstances.' The defense asked an instruction which substantially told the jury, or which was calculated to lead them to believe, that if, upon the trial of one charged with giving false testimony, one witness testifies to what the accused swore, but another witness is only able to detail a part of it; or, in other words, one testifies to one portion of it, and the other to another, that then there can be no conviction, in the absence of strong corroborating circumstances. This, it seems to us, would have been a misapplication of the law. If not, then the conviction of a perjurer or false swearer would be rare, and often impossible. Two witnesses and more testified to what the accused substantially swore. They of course differed some as to the language used by him, and one recollected more of his testimony than another;

but, when considered together, there can be no doubt of the correctness of the verdict. The instruction as given was a correct statement of the law, and fully as favorable to the accused, upon the circumstances of the case, as he had a right to expect, if not more so." *Wells v. Com.*, 9 Ky. L. Rep. 658, 6 S. W. 150.

59. *State v. Heed*, 57 Mo. 252, *State v. Miller*, 44 Mo. App. 159; *Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; *Crusen v. State*, 10 Ohio St. 259; *Code Crim. Proc. Tex.* § 746, construed in *State v. Buie*, 43 Tex. 532; *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295, where it is observed: "Our statute in using the words, '*strongly corroborated*,' means that the corroborating evidence must relate to a material matter, that is, tend to show the falsity of defendant's oath, and, taken all together, it must be, in the opinion of both the court and the jury, *strong*, that is, cogent, powerful, forcible, calculated to make a deep or effectual impression upon the mind. But this character of corroborating evidence may be produced by the proof of independent facts and circumstances which, when considered separately, would not be sufficient, but when considered in the concrete would be *strong*. In other words, the corroboration may be by circumstantial evidence, consisting of proof of independent facts which together tend to establish the main fact, that is, the falsity of the oath, and which together strongly corroborate the truth of the testimony of the single witness who has testified to such falsity."

*Reg. v. Yates*, (Eng.), C. & M. 132, 41 Eng. C. L. 77; *Parker, C. J.*, in *Reg. v. Muscot*, (Eng.), 10 Mod. 194: "To convict a man of perjury, a probable, a credible witness is not enough, but it must be a strong and clear evidence and more numerous than the evidence given for the defendant, for else there is only oath against oath."

stantial,<sup>60</sup> though by the Texas statute the circumstantial proof must include the testimony of at least one credible witness.<sup>61</sup>

**The Witness.** — The one whose testimony is corroborated in a prosecution for perjury may be an accomplice in the commission of the crime.<sup>62</sup> But the prosecuting witness cannot be corroborated by his own evidence in another case.<sup>63</sup> Moreover, there must be at least one witness to be corroborated, and where this is wanting there can be no conviction of perjury, though strong circumstantial evidence has been produced.<sup>64</sup>

(4.) **What Constitutes Corroboration.** — The manner of the accused

**60. Circumstantial Evidence May Suffice.** — *Galloway v. State*, 29 Ind. 442; *State v. Raymond*, 20 Iowa 582; *State v. Jean*, 42 La. Ann. 946, 8 So. 480.

**61. Plummer v. State**, 35 Tex. Crim. App. 202, 33 S. W. 228, where it is observed: "The statute requires (Code Crim. Proc., Art. 746,) that the falsity of the statement be established by the testimony of two credible witnesses, or by one credible witness strongly corroborated. We hold that the falsity of the statement can be established by circumstantial evidence, but this must be done by the testimony of at least two credible witnesses, or by one credible witness strongly corroborated, as the law requires. In all criminal cases the guilt of the accused can be established by circumstantial evidence. Why cannot the falsity of a statement in a perjury case be established by the same character of evidence? The difference between other cases and perjury cases is this: While one witness may be sufficient to establish the guilt of the accused in other cases, the law requires two credible witnesses, or one credible witness strongly corroborated, in perjury cases. It is not the character of the proof that is contemplated by the statute, but the number and character of the witnesses."

See also *Rogers v. State*, 55 Tex. Crim. App. 221, 32 S. W. 1,044; *Beach v. State*, 32 Tex. 240, 22 S. W. 976; *Franklin v. State*, 38 Tex. Crim. App. 346, 43 S. W. 85.

In *Maines v. State*, 26 Tex. App. 14, 9 S. W. 51, and *Kemp v. State*, 28 Tex. App. 519, 13 S. W. 869, a somewhat different rule is stated, but

these may be regarded as qualified by the foregoing cases.

**62. Accomplice May Corroborate.** "It is not a rule of law that an accomplice is never to be believed, nor is it the rule that he can never be the one witness giving the direct and positive evidence required by § 1,968 of the Code of Civil Procedure in cases of perjury. His credit and the weight of his testimony is a question for the jury (*People v. Gibson*, 53 Cal. 601,) in such cases as in others, except that there is a positive rule of law that the direct evidence of one witness must always be corroborated in perjury cases to warrant conviction." *People v. Rodley*, 131 Cal. 240, 63 Pac. 351. Compare *Beach v. State*, 32 Tex. Crim. App. 240, 22 S. W. 976.

**63. Witness Cannot Corroborate Himself.** — "In the case before us, the defendant says under oath that the notes sued upon were executed by him without consideration, as accommodation paper. Wilkins, the state's witness, testifies to the falsity of this statement, and to corroborate his testimony the state proves that Wilkins brought suit upon the notes, that Wilkins made affidavit in that suit, and gave bond for an attachment, and that Wilkins had never in fact used the notes as accommodation paper. It is Wilkins all the time corroborating Wilkins. It is not other corroborating evidence, but it is nothing more than the evidence of the same witness, viz., his acts and declarations in regard to the subject about which he testified." *Gabrielsky v. State*, 13 Tex. App. 428.

**64. No Corroboration Without a Witness.** — *People v. Wells*, 103 Cal. 631, 37 Pac. 529. In this case the

in giving his evidence may be sufficient corroboration of the evidence of the prosecuting witness.<sup>65</sup>

**Circumstantial Evidence.**<sup>66</sup> — Where the accused swore in an affidavit for continuance that a certain witness was absent, and that the application was not made for delay, he was held to have been

accused was charged with false swearing in a prosecution for the larceny of a cow that he met going toward the house of the defendant in that case, who stated that the cow was not his. The court observes: "To support the charge of perjury as to the alleged false statement of defendant that he met the cow at the time stated upon this particular public highway, it was necessary to produce the positive testimony of one witness at least that such meeting did not take place, as that the defendant was not at that time at that place, or that the cow was not there; and the same rule is equally applicable to the remaining portions of the alleged false testimony. The corroborating circumstances disclosed by the record are sufficiently established, but the one witness to furnish the positive testimony of the commission of the perjury was not produced at the trial. The record discloses no witness who testifies that the aforesaid meeting between the defendant and the cow did not take place. The falsity of defendant's statements as to the alleged meeting may well be termed the *corpus delicti*, and in cases like the present the *corpus delicti* must be proven by the positive evidence of at least one witness. The defendant's testimony given in the grand larceny case, and as set out in the information, is only proven to be false by incidents and circumstances occurring at other times and places. And while such evidence in a case of the present character is proper, as furnishing the corroborating circumstances required, by the section of the code we have quoted, it in no sense takes the place of the positive and direct evidence of one witness as to the *corpus delicti* demanded by the statute." See also *Maines v. State*, 26 Tex. App. 14, 9 S. W. 51; *Waters v. State*, 30 Tex. App. 284, 17 S. W. 411.

65. *State v. Miller*, 24 W. Va. 802.

66. **Instances of Sufficient Corroboration.** — In the following cases the circumstances were held sufficient to corroborate the testimony of the prosecuting witness: *Flemister v. State*, 81 Ga. 768, 7 S. E. 642. "The defendant was convicted of falsely swearing, in an affidavit for a bond for costs, that A. West & Son were acting as a corporation, doing business at Des Moines, Iowa. The defendant contends that there is not sufficient corroborative evidence that they were not so acting to sustain the verdict. We think otherwise. The testimony of A. West on this point was sustained by another witness, who had made inquiries as to the matter, and by facts and circumstances before the jury which tend to show that they were not a corporation. The law is well settled that the required corroboration may be furnished by facts and circumstances, as well as by direct and positive testimony." *State v. Clough*, 111 Iowa 714, 83 N. W. 727; *People v. Hayes*, 70 Hun (N. Y.) 111, 24 N. Y. Supp. 194. Here the defendant was charged with falsely swearing that he had never executed or seen a certain note which purported to have been given to the prosecuting witness. The court said:

"She was corroborated, not only by the documents generally, but by a special feature of the note itself. The body of this note was concededly in the handwriting of Mrs. Hayes, but she omitted to write the word 'date' in the appropriate place. Miss Keating testified that this word was written by the defendant himself on the occasion when the note was delivered to her. In this she was corroborated by the testimony of two experts in handwriting, who testified that in their opinion, based upon considerations which were detailed, the word 'date' was written by the same

rightly convicted of perjury upon evidence that he had just been talking with the witness.<sup>67</sup> Testimony that the accused swore falsely in a prosecution for assault, that he did not have an ax, was sufficiently corroborated by the physician, who swore that the wound was made with a sharp-edged instrument.<sup>68</sup>

**Confessions.** — In Texas, by statute, the accused may be convicted upon his own confession.<sup>69</sup> This, however, means a confession in a cause pending against the prisoner, and not a confession in another court as a witness there.<sup>70</sup> In the absence of such a statute the prisoner's confession is not sufficient to support a conviction.<sup>71</sup>

**Contradictions.** — The fact that the prisoner swore differently on another occasion than that for which he was being prosecuted has been held insufficient, of itself, to convict him of perjury, since, it is argued, the contradiction may have been innocent, and there was

person who wrote the signature to the instrument; and the signature 'W. B. Hayes' was admittedly in the handwriting of the defendant. Three other witnesses also corroborated Miss Keating as to the defendant's presence in the city of New York at or about the time when she says he gave her the note. One, a physician who attended him for an injury to his foot; another, a person who resided in the same house with him, and who identified him both personally and with regard to the injured foot; the third, a servant in defendant's family. This testimony not only corroborated Miss Keating upon the affirmative case, but negated the weak and unsatisfactory testimony with which the defendant attempted to establish an alibi." *State v. Swaim*, 97 N. C. 462, 2 S. E. 68; *Anderson v. State*, 24 Tex. App. 705, 7 S. W. 40; *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295.

67. *Beach v. State*, 32 Tex. Crim. App. 240, 22 S. W. 976, the court saying: "Counsel insist that one cannot be convicted of perjury upon circumstantial evidence in Texas, because the code declares that 'in trials of perjury no person shall be convicted except upon the testimony of two credible witnesses, or upon the testimony of one credible witness corroborated strongly by other evidence as to the falsity of defendant's statement made under oath, or upon his own confession in open

court.' Code Crim. Proc., Art. 746. It was decided by this court that, in order to convict of perjury, it is not required in every case that the two witnesses must swear directly adversely to the fact or facts sworn to by the defendant, but it is sufficient when the facts sworn to by said witnesses, if true, conclusively demonstrate defendant's guilt. Thus, if the facts so sworn to, if true, show that defendant must have been ignorant of the matter about which he swore, it is sufficient to sustain a conviction (*Maine's Case*, 26 Tex. Crim. App. 22), or when the facts testified to by said witnesses conclusively show, as true, that defendant swore contrary to what he necessarily knew to be the truth. *U. S. v. Wood*, 14 Pet. 430, 2 Bish. Crim. Proc., § 932. There is ordinarily no other way of proving the second and third assignments of perjury, as to "delay" and "reasonable expectation of procuring attendance of witness" except by circumstantial evidence, and, if perjury can be assigned at all (of which we have no doubt) on these statements, they must be proven by facts conclusively showing their falsity."

68. *State v. Hawkins*, 115 N. C. 712, 210 S. E. 623.

69. Texas Code Crim. Proc., § 786.

70. *Butler v. State*, 36 Tex. Crim. App. 483, 38 S. W. 787.

71. *Swartz v. State*, 27 Gratt. 1,025, 21 Am. Rep. 365.

no way to decide which statement was true.<sup>72</sup> But such contradictory evidence on the part of the accused will be sufficient to corroborate the prosecuting witness,<sup>73</sup> and it is held in New York that the contradictory evidence would be sufficient standing alone.<sup>74</sup>

**Admissions** of the accused in the form of unsworn statements, contradicting his oath, will also be sufficient to corroborate the prosecuting witness.<sup>75</sup> But such admissions will not generally support a conviction,<sup>76</sup> though in a prosecution under the federal statute it was held that one who swore on his *voir dire* as a grand juror that he believed polygamy to be wrong was held to have been properly convicted upon evidence that he subsequently stated to other parties that he knew it to be right.<sup>77</sup>

**72. England.**—Reg. v. Wheatland, 8 Car. & P. 238, 34 Eng. C. L. 369; Reg. v. Hughes, 1 C. & K. 519, 47 Eng. C. L. 519; Mary Jackson's Case, 1 Lewin C. C. 270, the court saying: "There are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and, from other circumstances at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict, where it is not possible to tell which was the true and which was the false."

**United States.**—U. S. v. Mayer, Deady (U. S.) 147.

**Alabama.**—Peterson v. State, 74 Ala. 34.

**Florida.**—Freeman v. State, 19 Fla. 552.

**Missouri.**—State v. Williams, 30 Mo. 364.

**Texas.**—Brooks v. State, 29 Tex. App. 582, 16 S. W. 542.

**Virginia.**—Rhodes v. Com., 78 Va. 692.

**73. England.**—Rex. v. Mayhew, 6 Car. & P. 315; Rex v. Knill, 5 B. & Ald. 929, note.

**Massachusetts.**—Com. v. Parker, 2 Cush. 212.

**Mississippi.**—Hemphill v. State, 71 Miss. 877, 16 So. 261.

**Missouri.**—State v. Blize, 111 Mo. 464, 20 S. W. 210, the court saying: "Of two contradictory statements one must be false. Taking them together and without other evidence,

no presumption arises that either of them was corruptly made (Schulter v. Insurance Co., 62 Mo. 239); but we think a statement of the accused under oath, directly contradicting the evidence with which he was accused of falsely giving, very strongly corroborative of the evidence of a witness who testifies to its falsity, and amply sufficient to sustain a conviction."

**New Jersey.**—Dodge v. State, 24 N. J. L. 671.

**North Carolina.**—State v. Moler, 12 N. C. 263.

**Oregon.**—State v. Buckley, 18 Or. 228, 22 Pac. 838.

**74. People v. Burden**, 9 Barb. 467. See this case criticised in Schwartz v. State, 27 Gratt. 1,025, 21 Am. Rep. 365.

**75. Reg. v. Hook**, (Eng.), 8 Cox C. C. 5; State v. Swafford, 98 Iowa 362, 67 N. W. 284.

**76. State v. Buckley**, 18 Or. 228, 22 Pac. 838.

**77. United States v. Brown**, 6 Utah 115, 21 Pac. 461, where it is observed:

"It is claimed by counsel that the testimony only shows that two inconsistent statements were made by the defendant—one under the sanction of an oath and another without it—and that the presumption is that the statement under oath is true and must prevail. We think there were strong circumstances shown to corroborate the statement made out of court, and before he was examined, and that the statements made by him afterwards were in the nature of confessions. If this claim of the de-



i. *Rape*. — (1.) *General Rule*. — In the absence of statute it is the general rule that the corroboration of the prosecutrix is not necessary in order to convict the accused of the crime of rape.<sup>78</sup> If the

fendant is correct, then it would be impossible to show that the testimony is untrue, unless he had been actually guilty of polygamy or unlawful cohabitation, and such persons are disqualified from serving on juries by other provisions of the statute than those above quoted; but the statute goes beyond this, and disqualifies persons having a certain belief, and authorizes the court to make inquiry under oath of persons presented or proposed as jurors as to that belief. If the testimony in this case does not fairly tend to show that the testimony given is false, it is hard to be shown, and the statutes would have no force whatever."

It seems difficult to reconcile this case with the rule announced in the authorities cited in the preceding note.

**78. Prosecutrix Need Not Be Corroborated.** — *Alabama*. — *Barnett v. State*, 83 Ala. 40, 3 So. 612, the court saying: "The experience of the courts in modern times has amply attested the assertion of Lord Hale, that the charge of rape is 'an accusation easy to make and hard to be proved, and harder still to be defended by the party accused, though never so innocent,' I Hale 635. But there is no rule of law which forbids a jury to convict one charged with this crime, on the uncorroborated testimony of the prosecutrix, although she is impeached for ill-fame in chastity, or otherwise; provided they be satisfied, beyond a reasonable doubt, of the truth of her testimony. *Boddie v. State*, 52 Ala. 395, 2 Bish. Crim. Proc. (3rd ed.) 968. If this were not so, one of the most detestable and atrocious of all crimes known to the law might often go unpunished, as the perpetrators of this offense almost invariably seek to carry out their purposes when their victim is alone and unprotected."

*Arizona*. — *Trimble v. Territory*, (Arizona, 1903), 71 Pac. 932; *Curby v. Territory*, 42 Pac. 953.

*Arkansas*. — *Bond v. State*, 63 Ark.

504, 39 S. W. 554, 58 Am. St. Rep. 129; *Frazier v. State*, 56 Ark. 242, 19 S. W. 838.

*California*. — *People v. Benc*, 139 Cal. 159, 62 Pac. 404; *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *People v. Gardner*, 98 Cal. 127, 32 Pac. 880; *People v. Wessel*, 98 Cal. 352, 33 Pac. 216; *People v. Stewart*, 97 Cal. 238, 32 Pac. 8; *People v. Fleming*, 94 Cal. 308, 29 Pac. 647; *People v. Mesa*, 93 Cal. 580, 29 Pac. 116; *People v. Mayes*, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126.

*Connecticut*. — *State v. Lattin*, 29 Conn. 389.

*Florida*. — *Doyle v. State*, 39 Fla. 155, 22 So. 272, 63 Am. St. Rep. 159.

*Illinois*. — *Johnson v. People*, 197 Ill. 48, 64 N. E. 286.

*Kentucky*. — *Lynn v. Com.*, 11 Ky. L. Rep. 772, 3 S. W. 74; *Pugh v. Com.*, 10 Ky. L. Rep. 64, 7 S. W. 541.

*Michigan*. — *People v. Miller*, 96 Mich. 119, 55 N. W. 675.

*Missouri*. — *State v. Marks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1,095; *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461; *State v. Wilcox*, 111 Mo. 569, 20 S. W. 314; *State v. Hert*, 89 Mo. 590, 1 S. W. 830. But see *State v. Patrick*, 107 Mo. 147, 17 S. W. 666.

*Montana*. — *State v. Peres*, 27 Mont. 358, 71 Pac. 162.

*Ohio*. — *State v. Tuttle*, 67 Ohio 440, 66 N. E. 524, 93 Am. St. Rep. 689.

*Oregon*. — *State v. Knighten*, 39 Or. 63, 64 Pac. 866, 87 Am. St. Rep. 647.

*Pennsylvania*. — *Com. v. Byers*, 5 York Legal Rec. 13; *Com. v. Wise*, 5 York Legal Rec. 11.

*Texas*. — *Hall v. State*, (Tex. Crim. App.), 22 S. W. 141; *Danley v. State*, (Tex. Crim. App.), 71 S. W. 958; *Keith v. State*, (Tex. Crim. App. 1900), 56 S. W. 628; *McIntire v. State*, (Tex. Crim. App. 1897), 43 S. W. 104; *Cox v. State*, (Tex. Crim. App. 1898), 44 S. W. 157; *Hamilton v. State*, 41 Tex. Crim. App. 599, 58 S. W. 93.

victim consents, the crime is not committed, and if her age is such as, under the statute, makes her incapable of consent, she is, nevertheless, not an accomplice within the meaning of the rule which requires corroboration of such a witness.<sup>79</sup> But regardless of the statute fixing the age of consent, the testimony of an infant prosecutrix may be sufficient to convict.<sup>80</sup>

*Utah.*—*State v. Hilberg*, 22 Utah 27, 61 Pac. 215.

*Virginia.*—*Givens v. Com.*, 29 Gratt. 830.

*Washington.*—*State v. Roller*, 30 Wash. 692, 71 Pac. 718.

*Wisconsin.*—*Lanphere v. State*, 114 Wis. 193, 89 N. W. 128.

*Wyoming.*—*Tway v. State*, 7 Wyo. 74, 50 Pac. 188.

**Sufficiency.**—*West v. State*, (Tex. Crim. App.), 21 S. W. 686; *Crew v. State*, (Tex. Crim. App.), 22 S. W. 973.

**79. Female Under Age Not an Accomplice.**—*England.*—Reg. v. Tyrrell, 10 Q. B. 810.

*Arkansas.*—*Bond v. State*, 63 Ark. 504, 39 S. W. 554, 58 Am. St. Rep. 129, where it is observed: "A girl under sixteen years is not an accomplice within the meaning of the law, in case of carnal abuse of herself. She is incapable of consenting. Obtaining carnal knowledge of a girl under sixteen years of age with or without her consent is punishable under this statute. It has been held that, in case of seduction, bastardy, adultery and abortion, the defendant cannot be convicted upon the uncorroborated testimony of the injured party alone, because she is an accomplice, these authorities will not apply in a case of carnal abuse of a female under 16 years of age because she cannot be an accomplice, but is a victim." *Whitaker v. Com.*, (Ky.), 27 S. W. 83.

*Ohio.*—*State v. Tuttle*, 67 Ohio St. 440, 66 N. E. 524, 93 Am. St. Rep. 689. In this case the trial court charged as follows: "The jury is warned that it is exceedingly unsafe to convict in any case upon the evidence of an accomplice unless the same is corroborated by other evidence which is reliable."

The supreme court said in commenting on this: "We think the

error of the trial court is so gross and flagrant that it needs no further discussion. Otherwise such accomplice might not only be discredited as a witness, but also prosecuted and punished for the complicity in the crime. The rapist in this case has been acquitted, and the climax of folly will be reached when the accomplice is convicted."

*Texas.*—*Danley v. State*, (Tex. Crim. App. 1903), 71 S. W. 958, the court saying: "No case can be found, where it required the court to treat the prosecutrix as an accomplice, and charge the law of accomplice testimony in reference to her evidence."

*Utah.*—"It appears that the witness knowingly and willingly consented to the act; but, being under the age of consent, the law will not presume that she consented. As to the defendant, she was incapable of consenting or forming a criminal intent to commit the act. The true test of her relation to the act would be, could she have been indicted for the offense charged, either as a principal or accessory? The statute under which the information was framed renders the male participant the only guilty party. That she could not be indicted for the offense charged renders her incapable of being an accomplice. It necessarily follows that although she participated in the act, this participation did not render her liable to an indictment for the offense charged, and therefore she was not an accomplice, and did not require corroboration." *State v. Hilberg*, 22 Utah 27, 61 Pac. 215.

*Wisconsin.*—*Lanphere v. State*, 114 Wis. 193, 98 N. W. 128.

**80.** *State v. Lattin*, 29 Conn. 389; *People v. Stewart*, 90 Cal. 212, 27 Pac. 200.

"If the rule were not as stated as regards a female over the age of consent, it should apply where the

(2.) **Exceptions.** — It has been held in Alabama that the general rule applies, even though the general reputation of the prosecutrix for chastity is bad.<sup>81</sup> But the rule in other jurisdictions appears to be that proof of such a reputation on her part is sufficient to require corroboration of her testimony.<sup>82</sup> Moreover, where testimony of the prosecutrix is impeached, or improbable, corroboration is usually required.<sup>83</sup>

(3.) **Minority Rule.** — In some jurisdictions the general doctrine first above stated does not prevail, and where the accused contradicts it the testimony of the prosecutrix must be corroborated before a conviction for rape can be sustained.<sup>84</sup>

victim is a child under such age. One of the chief reasons for the contrary rule is the danger of a mere act of fornication or adultery being made the basis for a prosecution for the heinous crime of rape. Courts have held, as it would seem, in reason, they must hold, that corroborating evidence of the prosecutrix, where she is under age of consent, is not essential to a conviction of such a violation of her person as is here charged. Female children are not so endangered as that by any mere weakness of the law. *Jones v. State*, 68 Ga. 760; *State v. Lattin*, 29 Conn. 389. In the last case cited there was no confirmation of the child's testimony by evidence of the condition of her person after the commission of the offense, by medical examination or otherwise, nor was there any corroborating evidence by medical testimony, and the verdict of guilty was sustained." *Lanphere v. State*, 114 Wis. 193, 89 N. W. 128. But see *Montresser v. State*, 19 Tex. App. 281.

81. *Boddie v. State*, 52 Ala. 395; *Barnett v. State*, 83 Ala. 40, 3 So. 612.

82. **Corroboration Required Because of Reputation.** — *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; *People v. Ardaga*, 51 Cal. 371; *People v. Hamilton*, 46 Cal. 540; *State v. Anderson*, 59 Pac. 180.

83. **Corroboration Required Where Testimony Is Improbable.** — *California*. — *People v. Ardaga*, 51 Cal. 371.

*Idaho*. — *State v. Anderson*, 59 Pac. 180.

*Minnesota*. — *State v. Connelly*, 57 Minn. 482, 59 N. W. 479.

*Mississippi*. — *Monroe v. State*, 71 Miss. 196, 13 So. 884.

*Texas*. — *Gazley v. State*, 17 Tex. App. 267.

*West Virginia*. — *State v. Perry*, 41 W. Va. 641, 24 S. E. 634.

The failure of the prosecutrix to complain of, or disclose the offense, until long after its alleged commission, is a strong indication of improbability and is one of the circumstances which goes to require corroboration. *Smith v. State*, 77 Ga. 705; *Topolanck v. State*, 40 Tex. 160; *People v. Adams*, 72 App. Div. 166, 76 N. Y. Supp. 36; *Mares v. Territory*, 10 N. M. 770, 65 Pac. 165; *Richards v. State*, 36 Neb. 17, 53 N. W. 1,027.

"It is a circumstance that deserves your consideration, that a very long time elapsed after the commission of the fact, before she made any disclosure, and this, unless it can be satisfactorily accounted for, must undoubtedly detract much from her credibility." *People v. Croucher*, 2 Wheel. Crim. Cases (N. Y.) 42.

Failure or delay in this regard may, however, be explained. *People v. Terwilliger*, 74 Hun (N. Y.) 310, 26 N. Y. Supp. 674.

84. *Mathews v. State*, 19 Neb. 330, 27 N. W. 234, explaining *Garrison v. People*, 6 Neb. 274; *Oleson v. State*, 11 Neb. 276, 9 N. W. 38, 38 Am. Rep. 366; *Murphy v. State*, 15 Neb. 383, 19 N. W. 489; *Dunn v. State*, 58 Neb. 807, 79 N. W. 719.

"Under our statute the accused is permitted to testify in his own behalf, and in that regard the statute has changed the common law rule so that where his testimony expressly denies that of the prosecutrix she

**Statutory Requirement.** — In still other jurisdictions corroboration is required by statute.<sup>85</sup> Under such a statute the court must instruct the jury as to the requirement of corroboration, even though no such charge is requested.<sup>86</sup> It is, however, the court's province to determine whether such evidence has been produced, though the jury must pass upon its weight and sufficiency.<sup>87</sup>

**Scope of Statute.** — Such an act applies, of course, only to the offense expressly mentioned; when the statute requires corroboration as to the crime of rape, this cannot be construed to include an assault with intent to commit rape;<sup>88</sup> nor a civil action therefor;<sup>89</sup> nor does it include the crime of adultery.<sup>90</sup>

(4.) **Sufficiency of Corroboration.** — It is not necessary in order to support a conviction of rape that the testimony of the prosecutrix be corroborated in every particular; corroboration as to material facts and circumstances will suffice.<sup>91</sup>

must be corroborated to authorize a conviction." *Mathews v. State*, 19 Neb. 330, 27 N. W. 234; *Mares v. Territory*, 10 N. M. 770, 65 Pac. 165; *Sowers v. Territory*, 6 Okla. 436, 50 Pac. 257.

A similar doctrine is laid down in *State v. Patrick*, 107 Mo. 147, 17 S. W. 666. This is qualified in *State v. Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1,095.

85. *Iowa*. — Code 1897, § 5,488.

*New York*. — Penal Code, § 283.

86. **Instruction Essential.** — "The evident purpose of the statute was to guard against convictions based alone on the testimony of an injured party in a class of cases where the interest and feeling are so apt to control, and the motive of revenge or sinister design so frequently exist. Corroboration is one of the essentials of conviction, without which the accused is entitled to an acquittal." *State v. Carnagy*, 106 Iowa 483, 76 N. W. 805.

Of course if there is no corroborative evidence a charge covering that subject is not only unnecessary but erroneous. *Coney v. State*, 108 Ga. 773, 36 S. E. 997.

87. *State v. Carnagy*, 106 Iowa 483, 76 N. W. 805; *State v. Bell*, 49 Iowa 440; *State v. McLaughlin*, 44 Iowa 82.

88. **Assault.** — *State v. Grossheim*, 79 Iowa 75, 44 N. W. 541; *State v. Hatfield*, 75 Iowa 592, 39 N. W.

910; *State v. Cook*, 92 Iowa 483, 61 N. W. 185.

The foregoing decisions were rendered under a statute since repealed. The present Iowa statute expressly includes such an assault.

In *State v. McIntire*, 66 Iowa 339, 23 N. W. 735, which was a prosecution for an assault to commit rape, the court after reviewing the testimony declared that if corroboration was necessary it was to be found in that case.

In such a prosecution the corroborating evidence must tend, of course, to connect the accused with the commission of the crime. *State v. Stowell*, 60 Iowa 535, 15 N. W. 417.

89. *Rogers v. Winch*, 76 Iowa 546, 41 N. W. 214.

90. *State v. Henderson*, 84 Iowa 161, 50 N. W. 758.

91. In *Dunn v. State*, 58 Neb. 807, 79 N. W. 719, the following charge was approved: "You are instructed that in the case of rape it is not essential that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense, and if the jury believe from the testimony of the prosecutrix and the corroborating circumstances and facts testified to by other witnesses that the defendant did make the assault as charged, . . . the law would not require that the testimony of the prosecutrix should be corroborated

**Circumstantial Evidence** will suffice to corroborate the prosecutrix.<sup>92</sup>

**Prompt Disclosure** of the commission of the crime is generally treated as a strong corroborating circumstance.<sup>93</sup>

**Admissions** on the part of the accused are sufficient corroboration to support a conviction.<sup>94</sup> It is not necessary that such admissions

by other witnesses as to what transpired at the immediate time and place when it is alleged the assault was made." *Hammond v. State*, 39 Neb. 252, 58 N. W. 92; *Fager v. State*, 22 Neb. 332, 35 N. W. 195; *Krum v. State*, 19 Neb. 728, 28 N. W. 278; *People v. Terwilliger*, 74 Hun (N. Y.) 310, 26 N. Y. Supp. 674; *People v. Adams*, 72 App. Div. 166, 76 N. Y. Supp. 361.

In *State v. Fountain*, 110 Iowa 15, 81 N. W. 162, the court charged: "There must be other evidence to corroborate the claims of the prosecuting witness." This was held to be sufficient ground for reversal, the appellate court saying: "The (claims) of the prosecutrix include all the claims she makes, which are, in substance, that the defendant had sexual intercourse with her in Johnson county when she was under fifteen years of age, and within eighteen months of the time when the indictment was returned. Strictly speaking, the first part of the paragraph quoted required evidence to corroborate all of the claims of the prosecuting witness in order to convict, and not merely corroboration which tended to connect the defendant with the commission of the offense, and therefore required more proof than the statute made necessary to a conviction."

<sup>92.</sup> *People v. Grauer*, 12 App. Div. 464, 42 N. Y. Supp. 721; *Montresser v. State*, 19 Tex. App. 281.

In the following cases the evidence was reviewed and the circumstances held sufficient to corroborate the prosecutrix: *State v. Sigg*, 86 Iowa 746, 53 N. W. 261; *State v. Watson*, 81 Iowa 380, 46 N. W. 868; *State v. Moore*, 81 Iowa 578, 47 N. W. 772; *People v. O'Connell*, 35 N. Y. St. 940, 12 N. Y. Supp. 477; *People v. Cullen*, 53 Hun 629, 5 N. Y. Supp. 886; *State v. McMillan*, 20 Mont. 407, 51 Pac. 827; *Rhea v. State*, 30 Tex. App. 483, 17 S. W. 931.

In *State v. Cassidy*, 85 Iowa 145, 52 N. W. 1, the evidence was held insufficient to corroborate the prosecutrix.

<sup>93.</sup> *England*.—*Rex v. Clark*, 2 Starkie 241; *Reg. v. Osborne*, C. & M. 622; *Rex v. Megson*, 9 Car. & P. 418; *Reg. v. Walker*, 2 M. & Rob. 212.

*Trimble v. Territory*, (Ariz.), 71 Pac. 932; *People v. Tierney*, 67 Cal. 54, 7 Pac. 37; *People v. Mayes*, 66 Cal. 297, 6 Pac. 691.

<sup>94.</sup> *State v. Forsythe*, 99 Iowa 1, 68 N. W. 446. "The morning after the crime was perpetrated, at a time when the injured woman had revealed it but to two persons, to whose house she had fled for safety after the outrage, bearing marks upon her person declaring the crime and its atrocious character—when no other persons were informed thereof, defendant made inquiries of a son of the persons of whom she had sought protection in regard to her declarations about the matter and declared that if he belonged 'to the Masons or Elder Davis clique' (these are his words) 'he would get clear.' These admissions very satisfactorily connect him with the crime." *State v. Comstock*, 46 Iowa 265.

"The defendant admits that he was with the prosecutrix at the time the offense is alleged to have been committed, going with her a distance of about one and one-half miles, during which time it was claimed by the state the offense was committed, but he denies that any act of sexual intercourse took place. A statement made by the defendant at or about the time of his arrest on the charge against him was in the nature of an admission and might very properly be charged as corroborative of the evidence of the prosecutrix." *George v. State*, 61 Neb. 670.

**Admissions in the Form of Letters.** *State v. Peres*, 27 Mont. 358, 71 Pac.

fix the exact time and place of committing the offense,<sup>95</sup> but a mere admission by the accused that he "insulted" the prosecutrix, without further particulars, will not be sufficient to corroborate her testimony, and it is error for the court in its charge to characterize as "admissions" explanations by which defendant asserts his innocence.<sup>96</sup>

**Marks of Violence** on the person of the prosecutrix may be proven, and the jury be permitted to determine whether her testimony is thereby sufficiently corroborated.<sup>97</sup> Mere opportunity to commit the offense is not usually sufficient corroboration,<sup>98</sup> but it has been

162; *State v. Roller*, 30 Wash. 692, 71 Pac. 718.

95. "There is evidence of the defendant's admissions to the effect that he had intercourse with the girl in the fall of 1891, and she was not thirteen years old until February 1, 1902. It is true that admission does not fix the exact time and place of the occurrence, but it is evidence tending to connect the defendant with the commission of the offense, which could be shown to have been committed by other evidence. It is said that it appears that the defendant was drunk when he made the admission. That fact does not appear to an extent that we can say his statements or admissions are of no force as evidence." *State v. Forsythe*, 99 Iowa 1, 68 N. W. 446.

96. "A man is informed by a third person that a woman is circulating a story that he had committed rape upon her. He does not take the trouble to deny the story, and, according to the ruling of this case, his omission in that regard is evidence against him to prove that he is guilty of the crime charged. It seems to me that silence under such circumstances is no proof whatever. It might as well be said that a defendant who is charged in open court with the crime, but refuses to speak or plead, remaining silent, thereby furnishes proof of his guilt. . . . But the learned trial judge also reminded the jury, as we have seen, that the defendant had admitted to another witness that he had 'insulted the girl.' When, where or how the insult was given does not appear, and it is claimed that this vague statement, without any identification of time, place or circumstance, is

'other evidence' of guilt in addition to the testimony of the complainant. It needs no argument to prove that it is entirely possible for a man to insult a woman without committing, or attempting, or intending to commit the crime of rape. There is no necessary legal connection between an insult and a felony, and an admission of the former does not tend in the least to prove the commission of the latter." *People v. Page*, 162 N. Y. 272, 56 N. E. 750; *Powell v. State*, (Miss.) 20 So. 4.

97. *State v. McLaughlin*, 44 Iowa 82; *People v. O'Connell*, 58 Hun (N. Y.) 609, 35 N. Y. St. 940, 12 N. Y. Supp. 477; *People v. Cullen*, 53 Hun 629, 5 N. Y. Supp. 886. "With regard to the fact, the corroborating circumstances are equally strong. That an unlawful connection was attempted may be inferred from the disease which she contracted; for, although it is admitted that the infection may be communicated without carnal intercourse, yet such a thing is not to be presumed, and when this fact is relied on only as a circumstance to strengthen her testimony, it cannot fail to have that effect. The lameness which was immediately observed by the mother, and the stains upon her clothes, although not absolutely conclusive, are certainly strong corroborating circumstances. I am therefore satisfied with the verdict." *State v. LeBlanc*, 3 Brev. (S. C.) 339. But see *State v. Stowell*, 60 Iowa 535, 15 N. W. 417.

98. *State v. Wheeler*, 116 Iowa 212, 89 N. W. 978, 93 Am. St. Rep. 236; *State v. Chapman*, 88 Iowa 254, 55 N. W. 489. Compare *State v. Painter*, 50 Iowa 317.

accepted by some courts.<sup>99</sup>

**j. Seduction.** — (1.) **In Absence of Statute.** — In the absence of statute expressly requiring it, the testimony of the prosecutrix need not be corroborated in order to convict one charged with the crime of seduction.<sup>1</sup> Such corroboration is not required under the rule which governs accomplices, for the prosecutrix is not usually considered an accomplice in that sense.<sup>2</sup> Nor does a statute requiring corroboration in prosecutions for a similar but distinct offense apply to the crime of seduction.<sup>3</sup>

(2.) **Statutory Rule.** — (A.) **IN GENERAL.** — In a large number of jurisdictions, however, statutes have been passed which require the testimony of the prosecutrix to be corroborated in order to sustain a conviction of this crime.<sup>4</sup> In at least one of the jurisdictions where such a statute is in force, an indictment based on the uncorroborated

99. "The supporting testimony was slight, but, we think, sufficient to warrant submission to the jury. It consisted, for the main part, of testimony by other witnesses that the defendant was seen going to and away from the house of the complainant, where she was alone, at about the time when, as she testifies, the crime was committed, and, by one witness, of immediate complaint on the part of the complainant, accompanied by the appearance of tears and distress, corresponding with her story of the wrong to which she had been subjected." *People v. McKeon*, 64 Hun (N. Y.) 504, 19 N. Y. Supp. 486.

"The positive statements of the prosecutrix as to the facts, with the corroborating fact that the defendant was seen coming from her room at the unseemly hour of 5 o'clock in the morning on the occasion testified to, left only the question whether the jury would give credence to the testimony, and this is concluded by their verdict in the affirmative." *People v. Ramgod*, 112 Cal. 669, 44 Pac. 1,071.

1. "The evidence of the prosecutrix, if believed by the jury and the judge who presided at the trial, as it must have been, was amply sufficient to justify the verdict; and, besides, it was in fact corroborated in several respects. The judgment cannot, therefore, be disturbed on this ground." *People v. Wade*, 118 Cal. 672, 50 Pac. 841.

## 2. Prosecutrix Not an Accomplice.

In *Keller v. State*, 102 Ga. 506, 31 S. E. 92, the trial court refused to charge as follows: "Under the law of Georgia seduction is a felony, and by (statute) the testimony of an accomplice, uncorroborated, is insufficient to convict. I charge you in this case that the testimony of the prosecuting witness, Florence W. Marshall, must be corroborated before there can be any conviction."

Upon exceptions being taken the appellate court said: "No error was committed in declining to give the jury this instruction. Where a virtuous, unmarried female has been cruelly betrayed, it is evident that she has been much more sinned against than sinning; and the law regards her as the victim, rather than as an accomplice, of him who accomplishes her ruin and brings about her downfall."

But in *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17, in construing a statute which expressly requires corroboration in a case of seduction, the court observed: "This is obviously a branch of the rule, recognized by our statute (*Gantt's Digest*, § 1,932,) which forbids a conviction upon the unsupported testimony of an accomplice. The woman is in such cases *particeps criminis*."

3. *People v. Wade*, 118 Cal. 672, 50 Pac. 841.

4. **Corroboration Required.** — *Alabama.* — *Harte v. State*, 172 Ala. 183, 23 So. 43; *Cooper v. State*, 90 Ala.

testimony of the prosecutrix will be quashed.<sup>5</sup>

(B.) DEGREE OF CORROBORATION. — The statutes of some states require the prosecutrix to be corroborated to the same extent as the principal witness in prosecutions for perjury.<sup>6</sup> Such a statute is more exacting than one which merely requires the testimony of the prosecutrix to be supported, as is the case in most of the other states.<sup>7</sup> Where, therefore, such testimony is met by defendant's denial, an equipoise of oath against oath results, and there can be no conviction,<sup>8</sup> and instructions which ignore this requirement of the statute will justify a reversal,<sup>9</sup> but the corroboration need not be tantamount to that of the prosecuting witness.<sup>10</sup> The corroborating evidence must in all cases be such as to connect the accused with the commission of the offense.<sup>11</sup>

641, 8 So. 821, 24 Am. St. Rep. 924; *Munkers v. State*, 87 Ala. 94, 6 So. 357.

*Arkansas*. — *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17.

*Indiana*. — *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798.

*Iowa*. — Code 1897, c. 5, 488; *State v. Wills*, 48 Iowa 671; *State v. Richards*, 72 Iowa 17, 33 N. W. 342.

*Kansas*. — Laws 1879, Ch. 31, § 36.

*Minnesota*. — *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642.

*Mississippi*. — Code 1892, § 1,298; *Ferguson v. State*, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

*Missouri*. — Rev. Stats. 1889, § 4,212; *State v. Davis*, 141 Mo. 522, 42 S. W. 1,083; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *State v. Wheeler*, 108 Mo. 658, 18 S. W. 924.

*Nebraska*. — Crim. Code, § 475.

*New Jersey*. — *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610.

*New York*. — *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177.

*North Carolina*. — *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574.

*Oklahoma*. — Stats. 1893, § 2,171; *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837.

*Pennsylvania*. — *Rice v. Com.*, 100 Pa. St. 28.

*South Dakota*. — *State v. King*, 9 S. Dak. 628, 70 N. W. 1,046.

*Virginia*. — *Milis v. Com.*, 93 Va. 815, 22 S. E. 863.

*Wisconsin*. — Statute construed in *West v. State*, 1 Wis. 186.

5. *Harte v. State*, 117 Ala. 183, 23 So. 43.

6. Corroboration Must Be Same as

in Perjury. — *Burn's Ind. Stats.* (1901), § 1,876; *Hinkle v. State*, 157 Ind. 237, 61 N. E. 196; *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798; *Callahan v. State*, 63 Ind. 198, 30 Am. Rep. 211; Rev. Stats. 1889, § 4,212; *State v. Davis*, 141 Mo. 522, 42 S. W. 1,083; *State v. Primm*, 98 Mo. 368, 11 S. W. 732; *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; *State v. Hill*, 91 Mo. 423, 4 S. W. 121; Gen. Stats. p. 1,086, § 204; *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610.

7. *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610; *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798.

8. *State v. Primm*, 98 Mo. 368, 11 S. W. 732; *State v. Brown*, 64 N. J. L. 414, 45 Atl. 800; *affirmed* 65 N. J. L. 687, 51 Atl. 1,109.

9. *Hinkle v. State*, 157 Ind. 237, 61 N. E. 196; *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349. For an approved instruction in prosecuting this crime see *State v. Wheeler*, 108 Mo. 658, 18 S. W. 924.

10. *State v. Davis*, 141 Mo. 522, 42 S. W. 1,083.

11. *Cooper v. State*, 90 Ala. 641, 8 So. 821, 24 Am. St. Rep. 924; *Munkers v. State*, 87 Ala. 94, 6 So. 357; *Cunningham v. State*, 73 Ala. 51; *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17; *State v. Coffman*, 112 Iowa 8, 83 N. W. 721; *State v. Kisko*, 111 Iowa 690, 83 N. W. 724; *State v. McGinn*, 109 Iowa 641, 80 N. W. 1,068; *State v. Lauderbeck*, 96 Iowa 258, 65 N. W. 158; *State v. Bollerman*, 92 Iowa 460, 61 N. W.



(C.) ELEMENTS TO BE CORROBORATED. — Under the Minnesota statute, which forbids conviction on the testimony of the prosecutrix, uncorroborated by other evidence, the corroboration must extend to every material element of the offense.<sup>12</sup> Thus the corroborative evidence must tend to establish the previous chastity of the prosecutrix.<sup>13</sup> But it was early recognized elsewhere that this was an extreme requirement,<sup>14</sup> and the prevailing rule at the present day is that the prosecutrix need not be corroborated as to previous chastity, or the fact that she was unmarried, but that the corroboration is sufficient if it extends to the promise of marriage and to the carnal connection.<sup>15</sup> In some states it need not even extend to the latter fact, and

183; *State v. Smith*, 84 Iowa 522, 51 N. W. 24; *State v. Bell*, 79 Iowa 117, 44 N. W. 244; *State v. Wells*, 48 Iowa 671; *State v. Danforth*, 48 Iowa 43, 30 Am. Rep. 387; *State v. Crawford*, 34 Iowa 40; *State v. Tully*, 18 Iowa 88; Okla. Stats. (1903), § 5,211; *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837. Compiled Laws, § 7,386. *Creighton v. State*, (Tex. Crim. App.), 61 S. W. 492.

12. **Minnesota Rule.** — *State v. Lockerby*, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656; *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *State v. Timmens*, 4 Minn. 325.

13. "The principal question in this case arises upon the introduction of evidence in corroboration of the complaining witness to prove her previous chaste character. In several of the states, under similar statutes, the courts hold that, the natural presumption being in favor of the chastity of the female, this supplies the place of evidence in the first instance, and no proof is required of her previous chaste character until it is assailed. The courts of other states, including our own, adopt the opposite rule; and this seems supported by the better reason. The presumption in favor of her chastity is overcome by the presumption of the innocence of the defendant, and the burden rests upon the state to prove the averment in the indictment." *State v. Lockerby*, 50 Minn. 363, 52 N. W. 958, 36 Am. St. Rep. 656. Compare *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642.

14. "The words of the statute, 'provided that no conviction shall be had under the provisions of the act on the testimony of the female se-

duced, unsupported by other testimony,' do not mean, or render it necessary, that such female should be corroborated on every material statement, or on both the seduction and the promise to marry. If it did, the intention and operation of the law would be defeated, as the seduction can, in scarcely any case, be proved except by the testimony of the person injured." *People v. Lomax*, 6 Abb. Pr. (N. Y.) 139.

15. **Alabama.** — *Suther v. State*, 118 Ala. 88, 24 So. 43; *Munkers v. State*, 87 Ala. 94, 6 So. 357; *Cunningham v. State*, 73 Ala. 51; *Wilson v. State*, 73 Ala. 527. Compare *Cooper v. State*, 90 Ala. 641, 8 So. 821.

**Iowa.** — *State v. Brown*, 86 Iowa 121, 53 N. W. 92; *State v. Smith*, 84 Iowa 522, 51 N. W. 24.

**Mississippi.** — *Ferguson v. State*, 71 Miss. 805, 15 So. 66, 42 Am. St. Rep. 492.

**New York.** — *Armstrong v. People*, 70 N. Y. 38; *People v. Kearney*, 110 N. Y. 188, 17 N. E. 736; *reversing* 47 Hun 119; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177; *Boyce v. People*, 55 N. Y. 644; *People v. Orr*, 92 Hun 199, 36 N. Y. Supp. 398; *affirmed* in 149 N. Y. 616, 52 Am. St. Rep. 707, 44 N. E. 1,127; *People v. Lomax*, 6 Abbott's Practice 139.

In *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177, it was said: "The statute provides 'that no conviction shall be had on the testimony of the female seduced, unsupported by other evidence.' It was claimed by the defendant's counsel that no conviction could be had unless the prosecutrix was supported by other evidence, not only as to the promise and illicit intercourse, but also as

corroboration as to the promise only is required.<sup>10</sup>

(D.) SUFFICIENCY OF CORROBORATION. — Circumstantial evidence may be sufficient to corroborate the prosecutrix,<sup>17</sup> but corroboration as to immaterial matters will, of course, not be sufficient.<sup>18</sup>

**Courtship.** — Evidence of attention amounting to courtship paid by the accused to the prosecutrix will be sufficient to corroborate the testimony of the latter.<sup>19</sup> But the courtship must be of such a charac-

to the facts of her being unmarried, and her previous chaste character. The judge, however, in substance, instructed the jury that no corroboration or support was necessary as to her being unmarried, or as to her chastity. On the point of her being 'unmarried' she was abundantly supported by other evidence; but as to her previous chastity there was no affirmative testimony, as there could not well be, except her own. But the judge was right in his construction of the statute. It does not contemplate that the female shall be supported or corroborated upon every material fact alleged. It is enough if the support extends to those facts which go to prove the offense charged. No corroboration or support is necessary to the points which merely indicate the person to be protected by the statute, viz: that she was an unmarried female and of previous chaste character. It was only necessary that she could be supported by direct evidence or proof of circumstances, as to the facts constituting the crime. These were the promise and the intercourse."

*Oklahoma.* — *Territory v. Harvey*, 11 Okla. 156, 65 Pac. 837.

*South Dakota.* — *State v. King*, 9 S. D. 628, 70 N. W. 1,046.

*Virginia.* — *Mills v. Com.*, 93 Va. 815, 22 S. E. 863.

**16. Corroboration Required as to Promise Only.** — *State v. Davis*, 141 Mo. 522, 42 S. W. 1,083; *State v. Eisenhour*, 132 Mo. 140, 33 S. W. 785; *State v. Wheeler*, 108 Mo. 652, 18 S. W. 924; *State v. Primm*, 98 Mo. 368, 11 S. W. 732; *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *Com. v. Walton*, 2 Brewst. (Pa.) 487; *Com. v. McCarty*, 2 Pa. L. J. 351, 4 Pa. L. J. 136.

**17. Missouri.** — *State v. Brass-*

*field*, 81 Mo. 151, 51 Am. Rep. 234; *State v. Marshall*, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63.

*New York.* — *Boyce v. People*, 55 N. Y. 644. *Compare* *Armstrong v. People*, 70 N. Y. 38.

*Pennsylvania.* — *Com. v. McCarty*, 2 Pa. L. J. 351, 4 Pa. L. J. 136.

*Texas.* — *Creighton v. State*, (Tex. Crim. App.), 61 S. W. 492; *Snodgrass v. State*, 36 Tex. Crim. App. 207, 36 S. W. 477.

In the following cases the corroboration was held to be sufficient: *Iowa.* — *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202.

*Indiana.* — *Callahan v. State*, 63 Ind. 198, 30 Am. Rep. 211.

*Oklahoma.* — *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837.

In the following cases the corroboration was held insufficient:

*Indiana.* — *La Rosae v. State*, 132 Ind. 219, 31 N. E. 798.

*Missouri.* — *State v. Primm*, 98 Mo. 368, 11 S. W. 732.

*North Carolina.* — *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574.

*New York.* — *People v. Kearney*, 110 N. Y. 188, 17 N. E. 736.

*Texas.* — *Gorzell v. State*, 43 Tex. Crim. App. 82, 63 S. W. 126; *Sledge v. State*, (Tex.), 63 S. W. 317.

**18. Crozier v. People**, 1 Park. Crim. Rep. (N. Y.) 453.

**19. State v. Baldoser**, 88 Iowa 55, 55 N. W. 97; *State v. Gunagy*, 84 Iowa 177, 50 N. W. 882; *State v. Smith*, 84 Iowa 522, 51 N. W. 24; *State v. Bell*, 79 Iowa 117, 44 N. W. 244; *State v. McClintick*, 73 Iowa 663, 35 N. W. 696; *State v. Heather-ton*, 60 Iowa 175, 14 N. W. 230; *State v. Curran*, 51 Iowa 112, 4 N. W. 1,006; *State v. Wells*, 48 Iowa 671; *State v. Shean*, 32 Iowa 88; *State v. Andre*, 5 Iowa 389, 68 Am. Dec. 708. *Compare* *State v. Wycoff*, 113 Iowa 670, 83 N. W. 713; *State v. Lauderbeck*, 96 Iowa 258, 65 N. W.

ter that the jury might infer a promise of marriage therefrom.<sup>20</sup> And where the relations of the parties are those of members of the same family, corroboration cannot be drawn from the fact of their association.<sup>21</sup> Evidence of similar attentions from others during the same period will also lessen if not destroy the effect of proving acts of courtship on the part of the accused.<sup>22</sup>

**Admissions** on the part of the accused will afford sufficient corroboration of the testimony of the prosecutrix.<sup>23</sup> And on this theory letters from the accused to the prosecutrix bearing on the relations between them are admissible in evidence.<sup>24</sup>

158; *State v. Eisenhour*, 132 Mo. 140, 33 S. W. 785; *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *State v. King*, 9 S. D. 628, 70 N. W. 1,046; *State v. Ayres*, 8 S. D. 517, 67 N. W. 611; *Creighton v. State*, (Tex. Crim. App.), 61 S. W. 492.

20. *Zabriskie v. State*, 43 N. J. L. 640, 39 Am. Rep. 610; *Rice v. Com.*, 100 Pa. St. 28. In the case last cited the higher court thus reviewed the instructions: "The learned judge also erred in charging: 'It is contended that this case requires the essentials, so far as the making of presents, writing of love letters and all of such things that pass between young people, to make out this case. But we have long passed that day, so far as courtship is concerned. . . . One man may desire to court the girl he desires to make his wife in a secluded place, or he may desire to keep it quiet; another may be in the habit of keeping company with a young lady and appear upon the public highway from time to time so that all may see him; hence there is no standard; each case must stand on its own four legs as the parties built it up.'

"This instruction was not calculated to aid the jury in arriving at a correct conclusion. In view of character of the evidence it was not only inadequate but misleading and erroneous. The attentions from which the jury were permitted to infer a promise of marriage were of an equivocal character. The plaintiff in error had been in the house of the prosecutrix but four times, according to her own statement and that of her mother, and then only for a short time. He met her out in the evenings, sometimes at church, walked

home with her, and left her at the gate. This is not the kind of intercourse that usually takes place between persons engaged to be married. It may tend to matrimony, but it is quite as likely to lead to something else. Circumstantial evidence of an engagement of marriage is to be found in the proof of such facts as usually accompany that relation. Among them may be mentioned letters, presents, social attentions of various kinds, visiting together in company, preparations for housekeeping, and the like. These and similar circumstances, especially when the attentions are exclusive and continued a long time, may well justify a jury in finding a promise of marriage. But the court below ignored all these matters, as being no longer essential, or, rather, as belonging to a past age, and virtually instructed the jury that attentions paid to a woman 'in a secluded place' are quite as satisfactory evidence of such promise."

21. *State v. Richards*, 72 Iowa 17, 33 N. W. 342.

22. *State v. Brown*, 86 Iowa 121, 53 N. W. 92.

23. *State v. Baldoser*, 88 Iowa 55, 55 N. W. 97; *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202; *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 683. Compare *Creighton v. State*, (Tex. Crim. App.), 61 S. W. 492. But see *State v. Kissock*, 111 Iowa 690, 83 N. W. 724; *State v. Whitworth*, 126 Mo. 573, 29 S. W. 595.

24. **Letters.**—*State v. Bell*, 79 Iowa 117, 44 N. W. 244; *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17; *Webb v. State*, (Miss. 1897), 21 So. 133.

**Evidence as to Birth of Child** is admissible,<sup>25</sup> but it is error to charge that such evidence corroborates the testimony of the prosecutrix.<sup>26</sup>

**Opportunity.** — It is not enough to show that the accused had opportunity to commit the offense.<sup>27</sup>

**No Self-Corroboation.** — The prosecutrix cannot, of course, corroborate herself.<sup>28</sup> Hence it is not sufficient to show by her that the accused admitted his guilt.<sup>29</sup> Nor is proof of preparation on her part for marriage generally admissible by way of corroboration.<sup>30</sup>

k. *Treason.* — At common law a conviction of treason might be based on the testimony of a single witness.<sup>31</sup> But by an act of parliament, passed in 1547, two witnesses or a voluntary confession were required in order either to convict or indict the accused for this offense.<sup>32</sup> That this legislation was for the benefit of the subject, proceeding from parliament rather than a concession from the crown, and was due to the unsettled political conditions of that period, which made the charge of treason peculiarly easy, more than to the ostensible desire to adopt the canon law rule,<sup>33</sup> is clear from the construction placed upon it by the common law judges, who were then subservient to the king. They held that the two witnesses required by

25. *State v. Clemons*, 78 Iowa 123, 42 N. W. 562; *State v. Wickliff*, 95 Iowa 386, 64 N. W. 282. Compare *People v. Kearney*, 110 N. Y. 188, 17 N. E. 736. *Reversing* 47 Hun (N. Y.) 149. As to exhibition of child in evidence. *State v. Horton*, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613; *State v. Danforth*, 48 Iowa 43, 30 Am. Rep. 387.

26. *State v. Coffman*, 112 Iowa 8, 83 N. W. 721, the court saying: "The corroboration required by the statute is such as tends to connect the defendant with the commission of the crime. The fact that a crime has been committed may be fully established by the testimony alone of the prosecuting witness. *State v. Smith*, 84 Iowa 522; *State v. McClin-tick*, 73 Iowa 663. The fact that an illegitimate child has been born might tend to prove seduction, but it does not of itself tend in any way to connect a particular person with that crime. *State v. McGinn*, 109 Iowa 641."

27. *State v. Kissock*, 111 Iowa 690, 83 N. W. 724; *State v. Burns*, 110 Iowa 745, 82 N. W. 325; *State v. Arraak*, 55 Iowa 258, 7 N. W. 601; *State v. Smith*, 54 Iowa 743, 7 N. W. 402; *State v. Painter*, 50 Iowa 317.

28. *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *State v. Kingsley*, 39 Iowa 439.

29. *State v. Eke*, 85 Iowa 35, 51 N. W. 1,146.

30. *State v. Lenahan*, 88 Iowa 670, 56 N. W. 292; *Cooper v. State*, 90 Ala. 641, 8 So. 821; *State v. Buxton*, 89 Iowa 573, 57 N. W. 417. But in *State v. Timmens*, 4 Minn. 325, evidence of such preparations and consultations on the part of the prosecutrix with her parents was received.

31. Kelyng, *Crown Cases* (3rd ed., 1873,) 22; *Woodbeck v. Keller*, 6 Cow. (N. Y.) 118.

32. **Statutory Rule.** — 5 Eng. Stats. at Large (1 Edward VI, Chap. 12, § 22.) By a subsequent act (5 & 6 Edward VI, § 12,) two witnesses were required for Attaint of Treason.

33. **Reason for the Rule.** — "And upon this occasion my lord chancellor in the lord's house was pleased to communicate a notion concerning the reason of two witnesses in treason, which, he said, was not very familiar, he believed, and it was this: Anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law now, and then, in use all over the Christian world, none can be condemned

statute need not testify to the same overt act, but that the testimony of each to a distinct act would suffice.<sup>34</sup> To meet this interpretation of the statute another act was passed in 1695, requiring that the testimony of the two witnesses should be "either both of them to the same overt act, or one of them to one and the other of them to another overt act of the same treason."<sup>35</sup> And in this form the act was incorporated into the constitution of the United States,<sup>36</sup> and of many states.<sup>37</sup> None of this legislation, however, was put in force in Ireland.<sup>38</sup>

**Scope of the Rule.** — The rule that two witnesses to the same overt act are necessary in order to convict of treason, applies only to the essentials of the crime, and not to mere incidental or collateral facts, like the citizenship of an accused who sets up the defense of alienage.<sup>39</sup> In England the rule has been held applicable to the finding of an indictment by a grand jury.<sup>40</sup> But a different construction has been adopted in this country.<sup>41</sup>

**Confessions** of one charged with treason, though proved by two witnesses, are insufficient to sustain a conviction, but are, neverthe-

of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor; and anciently heresy was treason; and from thence the parliament thought fit to appoint, that two witnesses ought to be for proof of high treason." *Strafford's Case*, T. Raymond, 407.

34. **Early Construction of the Statute.** — *Sir Henry Vane's Case*, 6 How. St. Trials, 119-130. *Case of 5 Popish Lords*, 7 How. St. Trials, 1218-1528. In the case last cited Baron Atkins observed: "That there must be two witnesses in the case of treason is a matter without question; but there are several overt acts that may contribute to the effecting of that treason. If a man designs to kill the king, and buys powder at one place at one time and a pistol at another place at another time, and promises a reward to one to assist him to do the thing at a third place and a third time, these are several overt acts. But if the law requires that each be proved by two witnesses, I do not well see how any man can be convicted of treason. In the case of *Sir Henry Vane*, and others, this very question was started, but was not thought worthy of debate; if it should be otherwise, it would touch the judgments which have been given upon this kind of proof; and what

would the consequences of that be, but that those persons who were executed upon those judgments have suffered illegally? And therefore I am of the opinion that it is not requisite there should be two witnesses to every overt act."

35. Stat. of VII Wm. II, Ch. III, § 2, 9 Eng. Stats. at Large, p. 390.

36. Art. III, § 3.

37. *Greenl. Ev.* (14th ed.), § 255, note 3. "In many other states there is no express law requiring that the testimony of both witnesses should be to the same overt act."

38. "That statute, not having been enacted in Ireland, the common law rule was enforced and convictions for treason were had upon the testimony of a single witness after the passing of that act (1 McNally 31, 1 Chitty C. L. 112, 13)." *Sutherland, J.*, in *Woodbeck v. Keller*, 6 Cow. (N. Y.) 118.

39. *Vaughn's Case*, 5 State Tr. 38, 2 Salk 634; *Rex v. Smith*, 1 East P. C. 130.

40. 1 East P. C. 128.

41. **Not Applicable to Indictment or Preliminary Hearing.** — Judge Kane in charging the federal grand jury in Maryland in 1851, after quoting the constitutional clause requiring two witnesses in treason, said: "This and the corresponding language in the Act of Congress of

less, admissible where the two witnesses to the overt acts have been called.<sup>42</sup>

**2. In Civil Actions at Law. — A. BREACH OF PROMISE.** — There is no rule at common law requiring corroboration of the plaintiff's testimony in actions for breach of a promise of marriage.<sup>43</sup> Under an act of parliament, however, the plaintiff's testimony must "be corroborated by some other material evidence in support of such promise."<sup>44</sup>

**Sufficiency of Corroboration.** — Under this statute testimony by a third party that the defendant when charged with making a promise failed to deny it, is sufficient to corroborate the plaintiff,<sup>45</sup> but is not sufficient corroboration that the defendant failed to answer letters

the 30th of April, 1790, seems to refer to the proofs on the trial, and not to the preliminary hearing before the committing magistrate, or the proceeding before the grand inquest. There can be no conviction until after the arraignment on bill found. The previous action in the case is not a trial and cannot convict, whatever be the evidence or the number of witnesses." 2 Wallace, Jr., 138.

**42.** *Crosfield's Case*, 26 How. St. Tr., (Eng.), 56 & 57, L. C. Baron. "If a man confesses before a magistrate that he is guilty of treason, and that confession of his should be proved by two witnesses, it may be disputed whether he shall be convicted on that evidence, because it is said there must be two witnesses to an overt act. If they have no other evidence but his confession, then will be a proper time to make your objection, but till then there is no reason to object against what is now offered." *Willis' Case*, 15 How. St. Tr. See also *Berwick's Case*, 18 How. St. Tr. 367; *Foster* 10; *Gregg's Case*, 14 How. St. Tr. 1379.

*Pennsylvania.* — *Respublica v. Roberts*, 1 Dall. 39; *Respublica v. McCarty*, 2 Dall. 86.

**43. Corroboration Not Required at Common Law.** — *Lowden v. Morrison*, 36 Ill. App. 495, the court saying (p. 499): "The third refused instruction is an attempt to get the court to usurp the functions of the jury and to declare, as a matter of law, that the unsupported testimony of the plaintiff, taken by itself, will not sustain a contract of marriage, with a positive contradiction from

the defendant, if the witnesses are equally credible. That was a question for the jury and not for the court." *Nearing v. Van Fleet*, 71 Hun 137, 54 N. Y. St. 308, 24 N. Y. Supp. 531; *Kelley v. Brennan*, 18 R. I. 41, 25 Atl. 346.

"The learned counsel of the appellant ask this court to hold that the testimony of the plaintiff alone, in such case, should be corroborated. This we cannot do, as the law now is. The plaintiff is a competent witness in her own behalf, and her interest in the event of the suit goes only to her credibility. There may be much force in the argument of the learned counsel, if addressed to the legislature. Before the statute allowed parties to testify in their own cases and in their own behalf, a charge like this had to be supported wholly by other testimony, and now a conviction of the crime of seduction under promise of marriage cannot be had if the testimony of the injured female is unsupported by other evidence. So long as the law remains as it is now, we have no right to say that her verdict cannot be supported by her testimony alone in such an action." *Giese v. Schultz*, 65 Wis. 487, 27 N. W. 353, 69 Wis. 521, 34 N. W. 913.

**44.** 32 & 33 Vict., Ch. 68, § 2; *Hickey v. Campion*, Ir. Rep. 6 C. L. 557, 20 Weekly Rep. 752; *Wilcox v. Gottfrey*, 26 L. T. Rep. N. S. 328.

**45. Failure to Deny Promise When Charged.** — "The evidence given in corroboration need not go to the length of establishing the contract; if the evidence support the

written to him by plaintiff and stating that he had made such a promise to her.<sup>46</sup>

**Evidence of Attentions** paid by the defendant to the plaintiff is sufficient corroboration of her testimony.<sup>47</sup>

**B. ACTIONS ON CONTRACTS. — a. Necessity.** — It has already been shown<sup>48</sup> that under the civil law the uncorroborated evidence of a single witness is insufficient to support a judgment. The one American state where the civil law prevails has enacted this rule into a statute as regards contracts relating to chattels and for the payment of money where the amount exceeds \$500, and these "must be proved by at least one verbal witness and other corroborating circumstances."<sup>49</sup> In Louisiana, therefore, the unsupported testimony of a single witness will not authorize a recovery on such a contract.<sup>50</sup>

promise it is enough. Here the sister says that she overheard a conversation between the plaintiff and defendant. She says she heard the plaintiff say, 'You always promised to marry me, and you don't keep your word.' To that the defendant makes no answer. It is true that he offered her money to go away, and it might be that a man might say, 'What shall I give you to go away?' without having made any promise to marry; but on the other hand, there is his silence, and from that silence the jury might come to the conclusion that he admitted the promise. I think that the verdict is against the evidence, but I cannot say that there was no evidence to go to a jury corroborating the plaintiff's testimony." *Bessela v. Stearn*, 2 C. P. Div. 265, 46 L. J. C. P. 467, 37 L. T. Rep. N. S. 588, 25 Weekly Rep. 561.

**Admissions.** — Testimony by plaintiff that the defendant, during a sickness in which she took care of him, said, "*who has a better right to take care of me than my wife*, and you know no one will ever be my wife but you," is sufficient, when corroborated by other evidence as to the italicised portion, to go to the jury under this statute. *Hickey v. Campion*, 6 Ir. C. L. 557, 20 Weekly Rep. 752.

<sup>46.</sup> *Wiedemann v. Walpole*, 2 Q. B. (1891) 534, 60 L. J. Q. B. 726, 40 Weekly Rep. 114: In this case, the court, commenting on the case of *Bessela v. Stearn*, 2 C. P. Div. 265, 46 L. J. C. P. 467: "That, however, was a very different case from

this. The court of appeal held that, having regard to the circumstances under which the statement was made, the fact that the defendant did not deny it was evidence of an admission that it was correct. The case only illustrates the limitation to be placed upon the doctrine that silence is not evidence of an admission unless it is reasonable to expect that if the statements made were untrue they would be met with an immediate denial."

<sup>47.</sup> *Nearing v. Van Fleet*, 71 Hun (N. Y.) 137, 54 N. Y. St. 308, 24 N. Y. Supp. 531.

<sup>48.</sup> *Supra* this title, p. 672.

<sup>49.</sup> Revised Civil Code of La. (1888), Art. 2,277. This is a substitute for Art. 2,257 of the former code. The Civil Code of Louisiana of 1808 made an exception in the case of mercantile contracts, but this was afterward repealed. *Gasquet v. Kokernot*, 5 La. 268; *Rost v. Henderson*, 4 Rob. (La.) 468.

**Parol Contracts.** — The former statute was also restricted to unwritten contracts. *Collins v. McElroy*, 15 La. Ann. 639; *Moore v. New Orleans*, 17 La. Ann. 312. And this included a verbal power of attorney. *Gardes v. Schroeder*, 17 La. Ann. 142; *Helm v. Ducayet*, 20 La. Ann. 417.

<sup>50.</sup> *State v. Judge*, 37 La. Ann. 380; *Turnage v. Wells*, 19 La. Ann. 135; *Brady v. McWilliams*, 19 La. Ann. 433; *Trabue v. Short*, 18 La. Ann. 257; *Alexander v. School Directors*, 16 La. Ann. 191; *McCrea v. Marshall*, 1 La. Ann. 29; *Bell v. Norwood*, 7 La. 95; *Gasquet v. Kokernot*,

Nor does the fact that the contract was made in another state where no such requirement exists necessarily relieve the plaintiff of the burden of making additional proof.<sup>51</sup>

But the statute does not apply to separate transactions, though the aggregate exceeds the statutory amount,<sup>52</sup> nor to the proof of incidental facts not essentially involving the cause of action,<sup>53</sup> nor to

5 La. 268; *Brent v. Slack*, 10 Rob. (La.) 371; *Succession of Segomo*, 7 Rob. (La.) 111; *Derbes v. Decur*, 5 Rob. (La.) 491.

A promise to accept a bill for an amount exceeding \$500 must be proved by corroborating circumstances in addition to the testimony of a single witness. *Robbins v. Lamberth*, 2 Rob. (La.) 304.

An item of more than \$500 for a draft alleged to have been lost, cannot be established, in proving an account, by the uncorroborated evidence of one witness. *Andrew v. Keenan*, 14 La. Ann. 705.

**The Deposit** as collateral security of a note for more than \$500 cannot be proved by a single witness. *Escurieux v. Chapau*, 12 Rob. (La.) 520.

**Guaranty.**—In order to establish a contract of guaranty of the payment of goods for an amount exceeding \$500, there must be corroborating circumstances in addition to the testimony of a single witness. *Dickson v. Sharretts*, 7 La. Ann. 54.

**Sales.**—Consent to annul an auction sale can be proved only by evidence which would be effectual in the case of the sale of real property. *Freret v. Meux*, 9 Rob. (La.) 414.

**Balance of Account.**—“The counsel for plaintiff endeavors to establish a distinction between an agreement to pay money, and proof of the balance of an account on settlement; and contends that the silence of the intestate, when the account was rendered showing a balance of seven hundred and forty-three dollars, proved by a single witness, is sufficient evidence of such balance. We cannot adopt this reasoning; proof of a state of indebtedness, from which an agreement to pay is a legal inference, is in substance proof of the agreement itself, and, where the amount exceeds five hundred dollars, the testimony of a single witness is

not sufficient.” *Bell v. Norwood*, 7 La. 95.

**51. Lex Loc.**—In *Shewell v. Raguet*, 17 La. 457, which was an action on a debt for more than \$500, incurred in Pennsylvania, the testimony of one witness that the defendant acknowledged the debt to him in Texas, was held insufficient to support a recovery. The court said: “We are not ready to say that if the *res gestae* in Pennsylvania was proved by a witness present at the time of the contract, such proof would not suffice. But we have before us evidence of a fact, which happened in the Republic of Texas, long after the contract was made, according to the *lex loci contractus*. It must therefore be tested according to the rules of evidence in this state. According to these there must be some corroborating circumstance to support the testimony of the witness. La. Code 2,257.”

**52. Gillespie v. Day**, 19 La. 263.

**53. Incidental Facts.**—In *Littell v. Marshall*, 1 Rob. (La.) 51, which was an action on a promissory note, the defendants set up as a defense a parol agreement, concerning which the court said: “It is further urged that, even admitting the defendant's right to prove by parol the agreement set up in answer, yet the amount exceeding five hundred dollars, it cannot be proved by a single witness without corroborating circumstances. To this it may be answered that the agreement is sought to be proved not as a subsisting covenant which the party seeks to enforce, but merely as the inducement to another contract, the performance of which is demanded of him. He seeks to prove the agreement like any other fact, constituting in reality a suspensive condition to the contract relating to the payment of the note.”

So the notice to the debtor re-



claims which have been reduced below the statutory amount,<sup>54</sup> nor to the establishment of a defense to an action on such a contract.<sup>55</sup>

b. *Sufficiency of Corroboration.*<sup>56</sup> — The fact that the testimony of one of the two witnesses offered is impeached will not necessarily render the proof insufficient.<sup>57</sup>

The Default of a defendant is sufficient corroboration to support a judgment against him rendered on the testimony of a single witness.<sup>58</sup>

Books of Account introduced in evidence, though belonging to the adverse party, may afford sufficient corroboration of one witness.<sup>59</sup>

C. ACTIONS FOR SLANDER — JUSTIFYING CHARGE OF PERJURY. In actions to recover damages for slander where the defense is justification, it can only be established by a *quantum* of proof which would be sufficient to convict the plaintiff in a criminal prosecution for perjury,<sup>60</sup> viz.: two witnesses, or one witness and corroborating

quired by the law of Louisiana, in case of the transfer of a claim, may be established by one witness. Succession of Delasize, 8 Rob. (La.) 259.

The testimony of one witness is sufficient to prove that a note secured by a mortgage upon a married woman's property was in fact given for the benefit of a partnership, composed of herself and husband. Bach v. Cornen, 5 La. Ann. 109.

Ownership of Property in dispute in an attachment suit may be proved by one witness, though its value exceeds \$500. Field v. Harrison, 20 La. Ann. 411.

54. *Reduced Claims.* — "The defendant has urged most earnestly that the demand in this case exceeded \$500, and that there is only one witness, Webb, to sustain it, without any corroborating circumstances. In the first place, the defendant, by his pleas of prescription and *res judicata*, has prevented us from examining a portion of the demand set up, and has thereby reduced the sum in controversy below \$500." Police Jury v. Fluker, 1 Rob. (La.) 389. Compare Field v. Harrison, 20 La. Ann. 411.

55. *Inapplicable to Defenses.* The testimony of a single witness is sufficient to establish the defense that the plaintiff in an action on a note is a fraudulent holder. Palmer v. Dinn, 2 La. Ann. 536.

Payment may also be proved by the testimony of one witness. O'Brien v. Flynn, 8 La. Ann. 307.

56. In the following cases the circumstances were held sufficient to corroborate the testimony of one witness. Warfield v. Ludewig, 9 Rob. (La.) 240; Police Jury v. Fluker, 1 Rob. 389; Tiunnard v. Hill, 10 La. Ann. 247; Succession of Piffet, 37 La. Ann. 871.

57. Rouzan v. Rouzan, 18 La. 425. Compare State v. Judge, 37 La. Ann. 380.

58. Webster v. Burke, 24 La. Ann. 137; Goepper v. Lusse, 30 La. Ann. 392; Harrison v. McCawley, 10 La. Ann. 270; Lopez v. Bergel, 7 La. 178; Leeds v. Debuys, 4 Rob. (La.) 258.

59. Goldsmith v. Friedlander, 20 La. Ann. 119.

60. *Proof Must Be Same as in Criminal Prosecution for Perjury.* "In an action of slander for charging the plaintiff with perjury, if the defendant plead the truth of the charge in bar of the action, he must introduce such proof in support of his plea as would be required to convict the plaintiff on an indictment for that offense." Spruil v. Cooper, 16 Ala. 791.

Lanter v. McEwen, 8 Blackf. (Ind.) 495; Byrket v. Monohon, 7 Blackf. (Ind.) 83, 41 Am. Dec. 213; Offutt v. Earlywine, 4 Blackf. (Ind.) 460, 32 Am. Dec. 40; Woodbeck v. Keller, 6 Cow. (N. Y.) 118, the

evidence.<sup>61</sup> The foundation of this rule is the analogy of the law respecting proof of perjury,<sup>62</sup> and the inconsistency of permitting a charge to be made with impunity by reason of evidence which would be insufficient upon a trial of the accused.<sup>63</sup> Whether the analogy extends so far as to require the evidence to establish the truth of the charge beyond a reasonable doubt is a subject upon which the courts are at variance.<sup>64</sup>

**D. PROOF OF USAGE.** — In at least one state the evidence of a single witness is insufficient to prove usage, and at least two witnesses are necessary for that purpose.<sup>65</sup>

**Insufficient Corroboration.** — Defendant's indorsement on a note is not sufficient corroboration of a single witness against him in an action thereon.<sup>66</sup>

**3. In Divorce Proceedings.** — **A. IN ENGLISH COURTS.** — Proceedings for divorce were formerly under the exclusive jurisdiction of the ecclesiastical courts administering the canon law, which, as has been shown, required the testimony of two witnesses in order to establish any material fact.<sup>67</sup> So long as the jurisdiction of these

court saying: "The defendant must affirmatively make out the fact of willful and corrupt falsehood, as the public prosecutor must upon an indictment. And if, in the latter case, the oath of the defendant is to be considered equivalent to the oath of a witness, why should not a like effect be given to it in a civil prosecution? The general rules of evidence are the same in both cases; and no principle is perceived which requires the adoption of a different rule in this case." See also *Clarke v. Dibble*, 16 Wend. (N. Y.) 601; *McKinley v. Rob*, 20 Johns. (N. Y.) 351; *Kincade v. Bradshaw*, 10 (N. C.) 63; *Coulter v. Stuart*, 2 Yerg. (Tenn.) 225.

<sup>61.</sup> *Spruil v. Cooper*, 16 Ala. 791. See *supra* this title, "PERJURY."

<sup>62.</sup> **Analogy of Perjury.** — *Coulter v. Stuart*, 2 Yerg. (Tenn.) 225, the court saying: "What is the difference between an accusation made by an individual, and one for the same matter made by the state? The only difference is in the consequences; the state, if she accuse and sustain her accusation, inflicts punishment; an individual, if he accuse and sustain the accusation of record, fixes upon the accused the deepest stain, and makes the evidence of it accessible to all the community."

"What is the issue to be tried?

Not the speaking of the words, for the speaking is admitted by the plea, *but the fact*, has the party accused been guilty of perjury? To prove or fix the charge upon the plaintiff in a civil case should require the same quantum of proof which would be required to convict him upon a criminal prosecution.

"The record evidence of a suit, with the averment of an oath having been taken falsely in that suit, is as much before the jury in the civil action as on the indictment; so is the fact of oath against oath, and therefore the rule of evidence to bring out the fact of perjury must be the same in both cases.

"The analogies of law certainly make it so, and we believe that the authorities are express upon the point. 2 Starkie 878, 879; Phil. Ev., 112, 113."

<sup>63.</sup> *Kincade v. Bradshaw*, 10 N. C. 63.

<sup>64.</sup> *Lanter v. McEwen*, 8 Blackf. (Ind.) 495, holds to the affirmative; *Spruil v. Cobb*, 16 Ala. 791, holds to the contrary.

<sup>65.</sup> *Oregon*.—Code (1887), § § 681, 778.

<sup>66.</sup> *Trabue v. Short*, 18 La. Ann. 257.

<sup>67.</sup> See *supra* this title, "INTRODUCTORY."

courts in divorce cases continued, such proceedings were subject to the general rule, and a decree would not be granted upon the testimony of a single witness.<sup>68</sup> So where the adverse party refused to submit to an inspection, the testimony of the complainant was held to be corroborated sufficiently to justify a decree.<sup>69</sup>

**B. IN THE UNITED STATES.** — The rule of the ecclesiastical courts has not generally been adopted in its entirety, but there has nevertheless been a general tendency to require corroborative evidence in divorce proceedings more than in ordinary civil actions.

*a. Testimony of Parties.* — Thus in most jurisdictions a divorce will not be granted upon the uncorroborated evidence of the complainant as to the ground for divorce.<sup>70</sup> In certain others it

#### 68. Rule in Ecclesiastical Courts.

*Evans v. Evans*, 1 Rob. Eccl. 165; *Simmons v. Simmons*, 1 Rob. Eccl. 566; *Donellan v. Donellan*, 2 Hagg. Eccl. 144; *Harris v. Harris*, 2 P. & D. 76.

But a divorce might be granted on the testimony of one witness where there were corroborating circumstances. *Curtis v. Curtis*, 5 Moore P. C. 252.

69. *H. v. P.*, 36 P. & D. 126; *F. v. D.*, 4 S. W. & Tr. 86.

70. **No Divorce on Complainant's Evidence Alone.** — *Arkansas.* — *Scarborough v. Scarborough*, 54 Ark. 20, 14 S. W. 1,098; *Kurtz v. Kurtz*, 38 Ark. 119; *Brown v. Brown*, 38 Ark. 324; *Rie v. Rie*, 34 Ark. 37.

*California.* — *Reid v. Reid*, 112 Cal. 274, 44 Pac. 564; *Venzke v. Venzke*, 94 Cal. 225, 29 Pac. 499; *Hagle v. Hagle*, 74 Cal. 608, 16 Pac. 518; *Haley v. Haley*, 67 Cal. 24, 7 Pac. 3; *Matthai v. Matthai*, 49 Cal. 90; *Evans v. Evans*, 41 Cal. 103.

*Illinois.* — *Jenkins v. Jenkins*, 86 Ill. 340.

*Iowa.* — *Code* (1897), § 3,173. Compare § 3,187. *Lewis v. Lewis*, 75 Iowa 200, 39 N. W. 271; *Potter v. Potter*, 75 Iowa 211, 39 N. W. 270.

*Minnesota.* — *Clark v. Clark*, 86 Minn. 249, 90 N. W. 390; *Westphal v. Westphal*, 81 Minn. 242, 83 N. W. 988; *True v. True*, 6 Minn. 458.

*Nebraska.* — *Paden v. Paden*, 28 Neb. 275, 44 N. W. 228.

*New Hampshire.* — "We must have evidence of the particulars which preceded and accompanied the desertion, in order that we may judge whether the case comes within the

statute. A detail of the circumstances which led to it must appear in the affidavit of the libellant, or there must be a statement of a want of knowledge of any reasons why it happened, and the account of the libellant must either be corroborated by other testimony, or, if no other persons have knowledge respecting the facts of the case, there must be evidence that the libellant sustains a good general character, in order to fortify the statements of the party, and to rebut any supposition that the desertion was occasioned by his or her misconduct." *Kimball v. Kimball*, 13 N. H. 222.

*New Jersey.* — *Grover v. Grover*, 63 N. J. Eq. 771, 50 Atl. 1,051; *Garcin v. Garcin*, 62 N. J. Eq. 189, 50 Atl. 71; *Hires v. Hires*, 61 N. J. Eq. 491, 48 Atl. 598; *Weigel v. Weigel*, 60 N. J. Eq. 322, 47 Atl. 183. Compare *Kloman v. Kloman*, 62 N. J. Eq. 153, 49 Atl. 810; *Herold v. Herold*, 47 N. J. Eq. 210, 20 Atl. 375, 9 L. R. A. 696; *Costill v. Costill*, 47 N. J. Eq. 346, 21 Atl. 35; *McShane v. McShane*, 45 N. J. Eq. 341, 19 Atl. 465; *Sandford v. Sandford*, 32 N. J. Eq. 420; *Franz v. Franz*, 32 N. J. Eq. 483; *Pullen v. Pullen*, 29 N. J. Eq. 541; *Tate v. Tate*, 26 N. J. Eq. 55; *Belton v. Belton*, 26 N. J. Eq. 449; *Palmer v. Palmer*, 22 N. J. Eq. 88; *Woodworth v. Woodworth*, 21 N. J. Eq. 251; *Fischer v. Fischer*, 18 N. J. Eq. 300; *Cummins v. Cummins*, 15 N. J. Eq. 138.

The rule in this state seems to have grown up independently and to be a modification of the canon law rule.

*New York.* — *Delling v. Delling*, 34

is provided by statute that no divorce may be granted solely on the declarations of the parties.<sup>71</sup> But this has been construed to have no reference to testimony, but only to extra judicial statements.<sup>72</sup> In a few jurisdictions there is said to be no inflexible rule of law which precludes the granting of a divorce upon the uncorroborated testimony of the plaintiff,<sup>73</sup> and in Pennsylvania, where divorce cases are tried to a jury, the verdict will be sufficiently supported if based on the testimony of the libellant alone.<sup>74</sup>

**Confessions and Admissions Insufficient Without Corroboration.** — In the ecclesiastical courts it was provided by the 105th canon of 1603,

Misc. 122, 69 N. Y. Supp. 479; *Fawcett v. Fawcett*, 29 Misc. 673, 61 N. Y. Supp. 108.

*Ohio.* — *Henry v. Henry*, 20 Weekly L. Bul. (Com. Pl.) 156.

See article "DIVORCE."

*71. Michigan.* — Compiled Stats. Vol. III, § 8,652.

*Nebraska.* — Compiled Stats. (1903), Ch. XXV, § 38.

*72. In Rosecrance v. Rosecrance*, 127 Mich. 322, 86 N. W. 800, the trial court refused a decree of divorce on the ground that the testimony of the complainant was unsupported. On appeal in reversing this action the court said: "We think the court's construction of § 8,652 erroneous. The declarations there referred to are confessions, as contradistinguished from testimony as a witness.

"While the conscience of the court is not to yield to testimony of a witness whom he disbelieves, and while we recognize the advantage of seeing and hearing the witness, and the presumption arising therefrom, this court is not concluded by the certification of disbelief, and by the presumption, from reviewing a case upon the merits. In the present case we are of the opinion that a divorce should have been granted upon the proofs."

*73. No Inflexible Rule.* — *Sylvis v. Sylvis*, 11 Colo. 319, 17 Pac. 912. "The rule, upon which the judges have usually acted in these cases, of not granting a divorce upon the uncorroborated testimony of the libellant, is merely a general rule of practice, and not an inflexible rule of law. When other evidence can be had, it is not ordinarily safe or fit to rely upon the testimony of the party only. But sometimes no other

evidence exists, or can be obtained. The parties are made competent witnesses by statute, and there is no law to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established." *Robbins v. Robbins*, 100 Mass. 150, 97 Am. Dec. 91; *Maget v. Maget*, 85 Mo. App. 6.

*74. Pennsylvania Rule.* — *Flattery v. Flattery*, 88 Pa. St. 27, the court saying: "This case was tried before a jury upon issues arising upon the petition and answer. The parties were examined in open court, where their credibility could be judged of by their conduct and appearance. The law has made the libellant a competent witness. Whether credible, was a question for the jury and not for the court. That she was flatly contradicted by her husband did not take the case away from the jury, is clear. It may be the credibility of the wife, and the want of credibility of the husband, were as clear to the minds of the jury as the light of noonday. On what principle, then, shall we say, though the law has made her competent, and has carried her testimony into the jury box, she was not to be believed, and that the testimony was legally insufficient? This was a matter for the legislature in passing the law, not for us."

See also *Krug v. Krug*, 22 Pa. Super. Ct. 572; *Ritchey v. Ritchey*, 6 Pa. Dist. Rep. 406; *Christman v. Christman*, 7 Pa. Co. Ct. Rep. 595.

The following decisions to the contrary may now be considered as overruled by the decision of the supreme court first above cited: *Winter v. Winter*, 7 Phil. 386; *Fulmer v. Fulmer*, 13 Phil. 166; *Dickenson v.*

"That credit be not given to the sole confessions of the parties themselves, howsoever taken up, either with or without the court."<sup>75</sup> This is also the rule of the civil law,<sup>76</sup> and it has been generally adopted, either by statute or judicial decision, in the United States, and a divorce will not regularly be granted upon the uncorroborated confessions or admissions of the parties.<sup>77</sup> In some states the rule has been carried so far as to exclude such statements entirely,<sup>78</sup> but generally they are admissible, and accorded proper weight if sufficiently corroborated.<sup>79</sup> On the other hand, there are cases which lend sup-

Dickenson, 1 Del. Co. Rep. 293; Pyle v. Pyle, 10 Phil. 58, 5 Leg. Gaz. 195, 30 Leg. Int. 208.

**75. Canon Law Rule.**—See this canon quoted in full in the argument for the appellant in *Harrison v. Harrison*, 4 Moore P. C. 101. The rule is also applied in the following cases: *Owen v. Owen*, 4 Hagg. 261; *Harris v. Harris*, 2 Hagg. 376; *Donellan v. Donellan*, 2 Hagg. 144; *Crewe v. Crewe*, 3 Hagg. 131; *Williams v. Williams*, 2 Consist. Rep. 304; *Mortimer v. Mortimer*, 1 Consist. Rep. 316; *Burgess v. Burgess*, 1 Consist. Rep. 227.

**76.** Pothier, *Contrat de Mariage*, Vol. II, Nos. 517-518; *Harriman v. McClelland*, 16 La. 26.

**77.** *King v. King*, 28 Ala. 315, where, after setting out the statute, the court says:

"The provision of the code above quoted was designed to guard against collusion between the husband and the wife. Whilst, therefore, it allows their confessions to be received, it denies *credit* to them, whenever they are unsupported. It is, in substance, the adoption of the 105th of the ecclesiastical canons of 1603."

See article "DIVERCE."

**78.** *Woolfolk v. Woolfolk*, 53 Ga. 661; *Matthews v. Matthews*, 41 Tex. 331; *Hansley v. Hansley*, 32 N. C. 500.

**79.** *Arkansas*.—*Rie v. Rie*, 34 Ark. 37. Compare *Welch v. Welch*, 16 Ark. 527.

*California*.—*Baker v. Baker*, 13 Cal. 88, the court saying: "The statute, as appears, does not in terms prohibit the introduction of confessions; but only provides that the decree shall not be granted on them. In this respect it is only affirmatory of the well estab-

lished rule of the common and of the English ecclesiastical law, which has been recognized from the earliest period both in England and the several states of the Union. The object of the rule is to prevent collusion between the parties. Without some limitation of this kind it would be in the power of the parties to obtain a divorce in all cases. The public is interested in the marriage relation and the maintenance of its integrity, as it is the foundation of the social system, and the law wisely requires proof of the facts alleged as the ground for its dissolution." See also *Evans v. Evans*, 41 Cal. 103.

*District of Columbia*.—*Kane v. Kane*, 7 D. C. 4.

*Georgia*.—*Woolfolk v. Woolfolk*, 53 Ga. 661.

*Indiana*.—*McCulloch v. McCulloch*, 8 Blackf. 60.

*Louisiana*.—*Mack v. Handy*, 39 La. Ann. 491, 2 So. 181; *Harmon v. McClelland*, 16 La. 26.

*Massachusetts*.—*Baxter v. Baxter*, 1 Mass. 346; *Holland v. Holland*, 2 Mass. 154. *Contra*.—*Billings v. Billings*, 11 Pick. 461.

*Michigan*.—*Sawyer v. Sawyer*, Walk. Ch. 48; *Rosecrance v. Rosecrance*, 127 Mich. 322, 86 N. W. 800.

*Minnesota*.—*True v. True*, 6 Minn. 458.

*Mississippi*.—*Armstrong v. Armstrong*, 32 Miss. 279.

*Missouri*.—*Twyman v. Twyman*, 27 Mo. 383.

*Nebraska*.—Comp. Stats. (1903) Ch. 25, § 38.

*New Hampshire*.—*White v. White*, 45 N. H. 121; *Washburn v. Washburn*, 5 N. H. 195.

*New Jersey*.—*Kloman v. Kloman*, 62 N. J. Eq. 153, 49 Atl. 810; *Garcin v. Garcin*, 62 N. J. Eq. 189, 50 Atl.

port to the doctrine that a confession may be sufficient if there is nothing to indicate collusion between the parties.<sup>80</sup>

b. *Other Witnesses Than Parties*. — In New Jersey the canon law rule seems to have been revived, and the chancery court has declared itself "reluctant to grant a divorce on the evidence of a single witness altogether uncorroborated."<sup>81</sup>

**Proof of Adultery.** — It is also the general rule, derived, no doubt, from the former requirements of the ecclesiastical courts, that a divorce will not be granted on the ground of adultery, supported only by the testimony of prostitutes.<sup>82</sup> For similar reasons it has been held that a divorce on this ground will not be granted upon the uncorroborated evidence of the defendant's paramour,<sup>83</sup> and the rule has also been extended so as to include detectives.<sup>84</sup>

C. SUFFICIENCY OF CORROBORATION. — a. *Abandonment and Desertion*.<sup>85</sup> — Testimony of one of the parties that they had not, during a certain period, maintained marital relations is not corroborated by

71; *Perkins v. Perkins*, 59 N. J. Eq. 515, 46 Atl. 173; *Summerbell v. Summerbell*, 37 N. J. Eq. 603 (containing a full review of the authorities); *Miller v. Miller*, 2 N. J. Eq. 139, 32 Am. Dec. 417; *Clutch v. Clutch*, 1 N. J. Eq. 474. Compare *Jones v. Jones*, 17 N. J. Eq. 351.

*New York*. — *Betts v. Betts*, 1 Johns. Ch. 197; *Devanbagh v. Davanbagh*, 5 Paige 554; *Montgomery v. Montgomery*, 3 Barb. Ch. 132; *Lyon v. Lyon*, 62 Barb. (N. Y.) 138; *Steffens v. Steffens*, 16 Daly (N. Y.) 363, 11 N. Y. Supp. 424; *Phillips v. Phillips*, 24 Misc. 334, 52 N. Y. Supp. 489; *Sigel v. Sigel*, 47 N. Y. St. 397, 20 N. Y. Supp. 377.

*North Carolina*. — *Hansley v. Hansley*, 32 N. C. 506.

*Texas*. — *Matthews v. Matthews*, 41 Tex. 331.

*Vermont*. — *Gould v. Gould*, 2 Aik. 180; *Richardson v. Richardson*, 50 Vt. 119.

80. *Billings v. Billings*, 11 Pick. (Mass.) 461; *Owen v. Owen*, 4 Hagg. 61. In *Glasscock v. Glasscock*, 94 Ind. 163, a divorce was granted to the defendant upon evidence introduced by the plaintiff only.

81. *Miller v. Miller*, 20 N. J. Eq. 216.

82. *Ginger v. Ginger*, 1 P. & D. (Eng.) 37; *Moller v. Moller*, 115 N. Y. 466, 22 N. E. 169; *Banta v. Banta*, 3 Edw. Ch. (N. Y.) 295; *Turney v.*

*Turney*, 4 Edw. Ch. (N. Y.) 566. In a prosecution for rape, however, it is error for the court to criticise such testimony. *State v. Tuttle*, 67 Ohio St. 440, 66 N. E. 524, 93 Am. St. Rep. 689.

83. *Steffens v. Steffens*, 16 Daly (N. Y.) 363, 11 N. Y. Supp. 424; *Anonymous*, 5 Rob. (N. Y.) 611; *Fawcett v. Fawcett*, 29 Misc. 673, 61 N. Y. Supp. 108; *Delling v. Delling*, 34 Misc. 122, 69 N. Y. Supp. 479.

In such cases the paramour is treated as an accomplice (*Anon.* 5 Rob. [N. Y.] 611,) and it is an elementary rule that one accomplice cannot corroborate another. *Short v. State*, (Tex. Crim. App.), 67 S. W. 114; *Platt v. Platt*, 5 Daly (N. Y.) 295; *Moller v. Moller*, 115 N. Y. 466, 22 N. E. 169; *Sopwith v. Sopwith*, 4 Sw. & Tr. 246.

84. *Moller v. Moller*, 115 N. Y. 466, 22 N. E. 169; *Dunn v. Dunn*, (N. J.), 21 N. E. 466.

85. In the following cases the evidence was held insufficient to justify a divorce on the ground of abandonment and desertion. *Hagle v. Hagle*, 74 Cal. 608, 16 Pac. 508; *Garcin v. Garcin*, 62 N. J. Eq. 189, 50 Atl. 71; *Herold v. Herold*, 47 N. J. Eq. 210, 20 Atl. 675, 9 L. R. A. 696; *Costill v. Costill*, 47 N. J. Eq. 346, 21 Atl. 35; *McShane v. McShane*, 45 N. J. Eq. 341, 19 Atl. 465.

other evidence that they occupied different apartments.<sup>86</sup>

b. *Adultery*. — Testimony of the parties concerning this ground for divorce may be corroborated by circumstantial evidence,<sup>87</sup> but it should be such as to establish the fact, not only by fair inference, but as a necessary conclusion.<sup>88</sup>

*Undue Familiarities* between the one accused and a third party may afford sufficient corroboration,<sup>89</sup> as will also association with loose characters.<sup>90</sup>

c. *Cruelty*. — Where extreme cruelty is the ground on which divorce is asked, it is sufficient if plaintiff be corroborated as to some of the acts complained of as constituting the ground of divorce, and it is not necessary that the corroboration should extend to all.<sup>91</sup> And where it is clear that there is no collusion, plaintiff's testimony will find sufficient corroboration in that of the defendant, if the latter agrees with the former in the more important particulars, though it differs in certain minor details.<sup>92</sup>

d. *Drunkenness*. — Testimony of other witnesses tending to show that the defendant became an habitual drunkard after his marriage with plaintiff sufficiently corroborates her testimony on this point, although there is no direct evidence except her own to this effect.<sup>93</sup>

e. *Impotence*. — A confession on the part of the defendant of non-consummation of the marriage, coupled with a refusal on his part to undergo inspection, is a sufficient ground for a decree of nullity of the marriage *causa impotentiae*.<sup>94</sup>

4. *In Probate Proceedings*. — A. FORMER RULE. — The probate of wills was formerly under the jurisdiction of the ecclesi-

86. *Hires v. Hires*, 61 N. J. Eq. 491, 48 Atl. 598.

87. *Stiles v. Stiles*, 167 Ill. 576, 47 N. E. 867; *Moller v. Moller*, 115 N. Y. 466, 22 N. E. 169.

In the following cases the evidence was held insufficient by way of corroboration: *Donellan v. Donellan*, 2 Hagg. (Eng.) 144; *Jenkins v. Jenkins*, 86 Ill. 340; *Lyon v. Lyon*, 62 Barb. 138; *Delling v. Delling*, 34 Misc. 122, 69 N. Y. Supp. 479.

88. *Philips v. Philips*, 24 Misc. 334, 52 N. Y. Supp. 489.

89. *Noverre v. Noverre*, 1 Rob. (Eccl. Eng.) 428; *Harris v. Harris*, 2 Hagg. 410; *Gould v. Gould*, 2 Aik. (Vt.) 180.

90. *Armstrong v. Armstrong*, 32 Miss. 279; *Evans v. Evans*, 41 Cal. 103; *Jones v. Jones*, 17 N. J. Eq. 351.

91. *Wolff v. Wolff*, 102 Cal. 433, 36 Pac. 767; *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298; *Cooper v.*

*Cooper*, 88 Cal. 45, 25 Pac. 1,062; *Clark v. Clark*, 86 Minn. 249, 90 N. W. 390; *Westphal v. Westphal*, 81 Minn. 242, 83 N. W. 988.

92. *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.

In the following cases corroboration was held sufficient: *Venzke v. Venzke*, 94 Cal. 225, 29 Pac. 499; *Matthai v. Matthai*, 49 Cal. 90; *Schipper v. Schipper*, 57 Ill. App. 170.

In the following cases it was held that the testimony of the plaintiff was not sufficiently corroborated: *Haley v. Haley*, 67 Cal. 24, 7 Pac. 3; *Potter v. Potter*, 75 Iowa 211, 39 N. W. 270; *Robinson v. Robinson*, 65 Mo. App. 216, 2 Mo. App. 6, 129; *Weigel v. Weigel*, 60 N. J. Eq. 322, 47 Atl. 183.

93. *Lewis v. Lewis*, 75 Iowa 200, 39 N. W. 271.

94. *Harrison v. Harrison*, 4 Moore, P. C., 96.

astical courts, and by the rule of the canon law there prevailing, adminicular circumstances were necessary to support the testimony of a single witness to a testamentary act.<sup>95</sup> The influence of this rule is seen in the statutes which exist in most jurisdictions requiring two or more witnesses for the attestation of a will. This relates, however, to the execution merely, and does not have the effect of requiring any particular number of witnesses in order to establish the will.<sup>96</sup>

**B. LOST WILLS.**—Since the transfer of probate jurisdiction to the civil courts, the rule has also prevailed, in the absence of statute, that the contents of a lost or destroyed will may be proved by the testimony of a single witness, and that no corroboration is absolutely required.<sup>97</sup>

95. "The court cannot wholly pass over without notice the point of law—whether the evidence of one witness, unsupported by any circumstances, makes legal proof of a testamentary act. The recognition of the sufficiency of such evidence seems to be big with all the dangers against which the statute of frauds was intended to guard.

"By the general law of these courts one witness does not make full proof; not that two witnesses are required to each particular fact, nor to every part of a transaction, for it often happens that to the contents of a will, or to instructions, there is only one witness—the confidential solicitor, or other drawer—but there are, and must be, adminicular circumstances to the transaction, such as the expressed wishes of the testator to make his will, the sending for the drawer of it, his being left alone with the deceased for that known purpose, some previous declarations or subsequent recognitions, some extrinsic circumstances, in short, showing that a testamentary act was in progress, and tending to corroborate the act itself." *Theakston v. Marson*, 4 Hagg. 290.

96. *Illinois*.—In the matter of *Paige*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395.

*Kentucky*.—*Welch v. Welch*, 2 T. B. Mon. 83, 15 Am. Dec. 126.

*New York*.—*Dan v. Brown*, 4 Cow. 483; *Jackson v. Legrange*, 19 Johns. 386; *Jauncey v. Thorne*, 2 Barb. Ch. 40.

*Pennsylvania*.—*Kisecker's Est.*, 190 Pa. St. 476, 42 Atl. 886.

*Vermont*.—*Thornton v. Thornton*, 39 Vt. 122.

*Virginia*.—*Lambert v. Cooper's Exrs.*, 29 Gratt. 61.

97. **No Corroboration Required at Common Law.**—*England*.—*Sugden v. Lord St. Leonards*, 1 P. D. 154.

*Delaware*.—*Kearns v. Kearns*, 4 Harr. 83.

*Illinois*.—In the matter of *Paige*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395.

*Kentucky*.—*Baker v. Dobyns*, 4 Dana 220.

*Missouri*.—*Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130; *Graham v. O'Fallon*, 4 Mo. 601, the court saying: "The only remaining point is, whether one witness is not by law sufficient to establish the contents of a lost will? I am not aware that there are any but two cases at common law where more than one witness is required to establish a fact. The one is, in case of treason, and the other in chancery, where the defendant denies by his answer on oath, the matter of the bill, two witnesses are required to overturn the answer. We know that, although by the English statute of wills three witnesses are required to attest a will, when it is so attested by three, any one of them is sufficient to prove that the others did attest in the testator's presence, and that the testator signed and executed the same—was of sound and disposing mind, etc. Our statute of wills re-



**Statutory Rule.** — In some jurisdictions the rule of the ecclesiastical courts has been revived by statute, with regard to lost wills, and two witnesses are thereby made necessary in order to establish their contents.<sup>98</sup> Under such a statute the two witnesses must be able to testify at least as to the substance of the whole will, and it is not sufficient that each can testify as to a part;<sup>99</sup> nor can the will be established where the two witnesses differ materially as to its contents,<sup>1</sup> nor where they merely testify from hearsay.<sup>2</sup>

**C. TRANSACTIONS WITH DECEDENTS.** — A statute of New Mexico requires evidence of transactions with a party since deceased to be corroborated "by some other material evidence" in order that a judgment may be founded thereon.<sup>3</sup> Such other evidence must tend to support the evidence already given, independently and of its own strength.<sup>4</sup>

**5. In Equity Cases.** — **A. OVERCOMING ANSWERS.** — Under the chancery practice the answer is treated as evidence on behalf of the defendant, and its averments must be met by evidence amounting to that of more than one witness, or the answer would be taken as true.<sup>5</sup> Like most of the rules of chancery, this was derived from the civil law, but it is not the only trace in chancery of the civil law rule which requires two witnesses in all cases.

**B. ESTABLISHMENT OF TRUSTS.** — Thus there was some early chancery authority for the doctrine that the testimony of a single

quires two witnesses to attest the will. Now, if this be done, is it not the law that either of these will be sufficient to prove all the other facts required by law to exist? I think it is. How does it happen, then, to be supposed by counsel that the contents of a lost will must be proved by two witnesses? It is because it is said to be the rule by the civil law in the ecclesiastical courts of England and because this court in the case of *Graham v. O'Fallon*, 3 Mo. R. 511, have cited the rule as found in Toller, p. 71. But the counsel are greatly mistaken when they suppose the court meant to decide that two witnesses were absolutely necessary to establish the contents of a lost will. It will be seen that the question was not then before the court, how many witnesses are necessary to establish the contents of a lost will, but the question was, can a will destroyed or lost be set up at all by proving the contents? This power of the court to set up, by parol proof of the contents of a lost deed, a will, or even a record, is in my opinion a common law power, not

depending on civil law rules (except in civil law courts); see 3 Mo. R., p. 510, same case. The case in Toller never was cited by this court to prove two witnesses were necessary to prove the contents of a lost will, nor does the author even affirm the law was so, but it had been done."

*New Jersey.* — *Coddington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874.

*New York.* — *Dan v. Brown*, 4 Cow. 483; *Jackson v. Vermilyea*, 6 Cow. 677.

*98. Arkansas.* — *Mansfield Digest*, § 6,547.

*New York.* — *Code*, § 2,621.

*99. McNally v. Brown*, 5 Redf. (N. Y.) 372. *Compare Collyer v. Collyer*, 4 Dem. (N. Y.) 53.

*1. Sheridan v. Houghton*, 6 Abb. N. C. (N. Y.) 234.

*2. Matter of Waldron's Will*, 19 Misc. 333, 44 N. Y. Supp. 353.

*3. N. M. Comp. Laws* (1884), § 2,082.

*4. Gildersleeve v. Atkinson*, 6 N. M. 250, 27 Pac. 477.

*5. This subject has already been treated. See Vol. I, p. 904.*

witness is insufficient to establish a trust.<sup>6</sup> And this rule has been adopted in its entirety in Texas.<sup>7</sup>

#### IV. ADMISSIBILITY.

**1. In General.**—Corroborative evidence is admissible according to the same general rules which apply in receiving other evidence.<sup>8</sup> But it is never permissible, under the guise of corroboration, to enter upon the investigation of a purely collateral issue.<sup>9</sup>

**6.** "In early chancery practice, the rule was perhaps so held; the court adopting the rule of the Roman law, *responsio unius non omnino audiat*, when the main fact alleged in the bill was directly denied by the answer. *Baker v. Williamson*, 4 Pa. St. 456.

"There is no material evidence but that of the trustee, who is made a competent witness by a release. She swears to no fact or circumstance capable of being investigated or contradicted; but merely to a naked declaration, supposed to be made by the husband himself, admitting that the purchase was made with the trust money. This is in all cases most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides the slightest mistake or failure of recollection may totally alter the effect of the declaration. There are no corroborating circumstances by any writing under his hand. In most of the cases there has been at least something in writing; some account by which it appeared that the fund was laid out." *Lench v. Lench*, 10 Vesey 510. Compare *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582.

**7. Texas Rule.**—*Miller v. Thatcher*, 9 Tex. 482, 60 Am. Dec. 172; *Cuney v. Dupree*, 21 Tex. 211; *Hall v. Layton*, 16 Tex. 262.

Although this doctrine is professedly founded on the English chancery cases it may well be supposed that the Spanish civil law, which formerly prevailed in Texas and under which two witnesses were necessary, has not been without its influence in this particular, since in no other American jurisdiction has the early chancery rule been carried to such an extent.

**8. In a Prosecution for Homicide** committed during an altercation between the deceased and the accused, caused by the latter's keeping company with the former's daughter, where proof is received as a part of the *res gestae* of a declaration by the deceased that he had whipped his daughter for going with the accused, the daughter's testimony that he had whipped her for that reason is also admissible by way of corroboration. *Turner v. State*, (Tex. Crim. App.), 46 S. W. 830.

**Partial Corroboration.**—In a prosecution for shooting craps a witness who saw defendant at a game, but not playing, may testify for the purpose of corroborating one who saw him playing. *Washington v. State*, (Tex. Crim. App.), 50 S. W. 341.

**9. Corroboration as to Collateral Matter Not Allowed.**—In *Stewart v. Anderson*, 111 Iowa 329, 82 N. W. 770, which was an action for breach of promise, a conversation between two of the witnesses relative to the birth of the plaintiff's child was excluded. The court said: "It is a matter of human experience that memory of dates and events depends largely on others associated more or less closely with them, and for this reason a witness is allowed to speak of contemporaneous circumstances, not in detail, but of their existence as confirming his recollection. That *Salmonds* and *Otis* had the talk is not disputed. The important inquiry was directed to the time of its occurrence. The answer to the first inquiry had no bearing on that subject. The second and the third answers tended to corroborate *Watson's* testimony that he quit work that day, which was not disputed, but in no manner to confirm the witness' recollection of the time. The rule ought

## 2. When Corroboration Is Required by Law. — General Rule.

Whenever the law requires corroborating evidence on certain points it necessarily removes all question as to the admissibility of such evidence, provided it is really corroborative;<sup>10</sup> nor is it always an objection that the corroboration includes an immaterial as well as a material part.<sup>11</sup>

**Rape.** — So in states where corroboration is required of the testimony of the prosecutrix in rape cases, it is permissible to show by way of corroboration that the witness made complaint soon after the alleged commission of the crime.<sup>12</sup>

## 3. When Credibility of Witness Is Assailed. — A. IN GENERAL.

Whenever the credibility of a witness is assailed, evidence to corroborate his testimony is thereby rendered admissible, even though

not to be extended, save under peculiar circumstances, so as to permit the litigant to introduce evidence in corroboration of a purely collateral matter stated by another in aid of recollection. Possibly cases may arise where the main issue is so necessarily connected with the collateral fact as that such evidence ought to be received. See *Inhabitants of Northbrookfield v. Inhabitants of Warren*, 82 Mass. 173. How far such an investigation should be carried is ordinarily within the sound discretion of the court, and it may be safely said not to have been abused in prohibiting all corroboration of a purely collateral matter not in dispute." Compare *Atlanta, etc., R. Co. v. Strickland*, 116 Ga. 439, 42 S. E. 864.

10. "It is always permissible to strengthen a witness' testimony by connected incidents showing its consistency and reasonableness." *Bruton v. State*, 21 Tex., 337.

11. **Accomplice's Testimony.** — In *Bruton v. State*, 21 Tex. 337, a witness, an accomplice, had testified that he had been at New Orleans, and a letter of introduction given him by a house in that city was received in evidence as corroborating his statement. The supreme court said: "This letter was objected to by defendant, because it was a corroboration of Dixon's testimony in an immaterial part; which objection was overruled, and this ruling of the court is assigned as error. Our code establishes the rule, in accordance with what is the practice of courts

generally, requiring the testimony of an accomplice to be corroborated in some matter connecting the defendant with the commission of the offense. Code C. P., art. 653, 1 Greenl. Ev., § 831, and note; 1 Phil. Ev. 34.

This must of course be in a material matter. And the court so charged the jury in this case. The question here presented is, that where the testimony of an accomplice is corroborated in numerous important and material parts of his evidence, will the admission by the court of a corroboration in an immaterial part vitiate the verdict found by the jury upon the whole of the evidence. No authority has been found establishing such doctrine. Indeed it would often be almost impossible to permit a corroboration in a material part, without at the same time permitting it in an immaterial part.

"A case might happen that an undue importance might be attached to a corroboration in immaterial matters by which the jury would be misled. But there is no indication in the record that such could have been the case here. We do not think that the admission of this testimony by the court under the circumstances was error, though it had been deemed immaterial."

12. *Iowa.* — "It is true that at the time the complainant had not been examined as a witness, and the rule seems to be that evidence of the fact that she made complaint is admissible only in corroboration of her testimony. But, conceding that evidence of her statement did not ap-

such corroboration is not required by law.<sup>13</sup> In the absence of such attack, however, and of some requirement as to corroboration, the

pear to be admissible at that time, we cannot see how the defendants were prejudiced. She afterwards testified." *State v. Mitchell et al.*, 68 Iowa 116, 26 N. W. 44.

*Connecticut.*—*State v. Kinney*, 44 Conn. 153, 26 Am. Rep. 436.

*Ohio.*—*McCombs v. State*, 8 Ohio St. 643; *Laughlin v. State*, 18 Ohio 99; *Johnson v. State*, 17 Ohio 594.

*Texas.*—*Sentell v. State*, 34 Tex. Crim. App. 260, 30 S. W. 226.

In other jurisdictions, only the fact of making the complaint may be shown, and not the particulars.

*England.*—*Reg. v. Walker*, 2 M. & Rob. 212; *Reg. v. Osborne*, C. & M. 622.

*Alabama.*—*Griffin v. State*, 76 Ala. 29.

*Georgia.*—*Scott v. State*, 48 Ga. 420; *Lowe v. State*, 97 Ga. 792, 25 S. E. 676.

*Indiana.*—*Thompson v. State*, 38 Ind. 39.

*New York.*—*Baccio v. People*, 41 N. Y. 265.

### 13. Attack on Credibility of Witness Opens Door to Corroboration.

*California.*—*Wade v. Thayer*, 40 Cal. 578.

*Connecticut.*—*Lockwood v. Betts*, 8 Conn. 130.

*Georgia.*—*John v. State*, 16 Ga. 200.

*Indiana.*—*Coffin v. Anderson*, 4 Blackf. 395.

*Kansas.*—*State v. Hendricks*, 32 Kan. 559, 4 Pac. 1,050.

*Kentucky.*—*Clymer v. Com.*, 23 Ky. L. Rep. 1,041, 64 S. W. 409.

*Louisiana.*—*State v. Desforges*, 48 La. Ann. 73, 18 So. 912; *State v. Fontenot*, 48 La. Ann. 283, 19 So. 113.

*Massachusetts.*—*Green v. Gould*, 3 Allen 465. *Compare Coleman v. Lewis*, (Mass. 1903), 67 N. E. 603.

*New Hampshire.*—*French v. Merrill*, 6 N. H. 465.

*New York.*—*Hawley v. Hawley*, 48 App. Div. 301, 62 N. Y. Supp. 671.

*North Carolina.*—*March v. Harrell*, 46 N. C. 329, the court saying: "Where the credibility of a witness is attacked, from the nature of his

evidence, from his situation, from bad character, from proof of previous inconsistent statements, or from imputations directed against him in cross-examination, the party who has introduced him may prove other consistent statements, for the purpose of corroborating him. *Johnson v. Patterson*, 2 Hawks 183; *State v. Twitty*, *ibid.* 449; *State v. George*, 8 Ired. 324; *Hoke v. Fleming*, 10 Ired. 263; *State v. Dove*, *ibid.* 469." See also *State v. Morton*, 107 N. C. 890, 12 S. E. 112, 10 L. R. A. 527; *State v. Brabham*, 108 N. C. 793, 13 S. E. 217.

*Texas.*—*Loomis v. Stewart*, (Tex. Civ. App. 1893), 24 S. W. 1,078; *Holbert v. State*, 9 Tex. App. 219, 35 Am. Rep. 738.

### Impeachment by Experiments.

"On the trial the state introduced as witnesses two young women, who on the night of the alleged homicide occupied a room in the second story of a hotel distant about 57 feet from defendant's saloon (near which the deceased received the injuries from which he died), and who testified that, on being awakened by the noise outside, they looked out of a ventilator in the storm window, and saw and heard an altercation and scuffle between two men on the sidewalk, the voice of one of whom they recognized as that of the defendant. One of the evident purposes of the cross-examination of these witnesses was to impeach their testimony by eliciting facts tending to show that they could not have seen or heard what they claimed to have done from their position at the window. There was also introduced in evidence a photograph of the *locus in quo*, accompanied by measurements of the distances between the various points referred to in the testimony of the young women. The state then introduced a witness who had made two experiments to ascertain how far and what points he could see from this same window, and, against the objection of the defendant, was allowed to testify as to the results, which tended to corroborate the tes-

general rule is that evidence will not be received for the sole purpose of strengthening testimony already offered.<sup>14</sup> Nevertheless the fact

timony of the young women as to what they saw and heard. One of these experiments was made a few days after the alleged homicide by looking through the ventilator in the outer or storm window, precisely as the young women testified to having done. The other was made shortly before the trial, after the storm window had been removed, and the witness raised the permanent window two or three inches, and looked and listened through the opening. The only evidence as to the result of the second experiment was that the witness distinctly recognized the defendant's voice while conversing in an ordinary tone of voice in front of his house—a distance as great or greater than at which the girls testified to have heard it.

"The admission of the evidence as to the results of these experiments is assigned as error. This was not prejudicial error, for at least two reasons: First, the evidence did not tend to establish any fact that was not already self-evident from the photographs and measurements in evidence. Second, the defendant had the right to impeach the testimony of the young women by showing as the result of experiments that they could not have seen and heard from this window what they testified to. If he had done so, it would have been competent for the state to show by experiments that they could have seen and heard it. But it can make no difference whether the defendant attempted to impeach their evidence by actual experiments, or by other evidence tending to show that it was physically impossible for them to see what they testified to." *State v. Smith*, 78 Minn. 362, 81 N. W. 17.

**Impeachment by Photograph.**—In *State v. Welch*, 22 Mont. 92, 55 Pac. 927, which was a prosecution for murder, the accused when arrested was found to have on his person a photograph of the wife of his alleged accomplice, and this was introduced in evidence on behalf of the prosecution. The trial court permitted the accused to explain the circumstances

attending the possession of the photograph, but rejected an offer of other testimony tending to corroborate the accused. In reversing the judgment the supreme court said: "The sole purpose the state could have had in using the picture before the jury was that they might be afforded the privilege of inferring an intimacy, possibly criminal in its nature, between Welch and the wife of George Geddes. In admitting the photograph the court practically advised the jury that it was proper evidence for them to consider, and that they might place upon the circumstances of its possession by defendant any construction they saw fit, and then, by refusing to permit Miller to testify in the matter, tacitly intimated to the jury that the defendant had not the right to explain it except by his own evidence, as to the weight of which in general the jury were given the usual instruction."

See article "CREDIBILITY."

14. *Connecticut*.—"Evidence was introduced to show that there was talk between the parties in regard to accepting an order from Gilmond on the defendant, and the plaintiff's counsel asked its witness, Oswin W. Humiston, this question: 'Mr. Gilmond and you have both testified about an order. Now, after the talk about an order on Cox, please state whether, after that talk, you inquired of me whether an order was necessary, and if so, what was said?' Plaintiff's counsel claimed to be able to show by the answer that Mr. Humiston had asked Mr. Newton—plaintiff's regular counsel—whether an order was necessary; that he had stated to said counsel, and been advised by him, that if there was no dispute, but the facts were in accordance with his statement, an order was not necessary, but that if there was any doubt about it a factorizing suit ought to be brought at once. The court, upon the defendant's objection, excluded the evidence, and the plaintiff excepted.

"The plaintiff claims that the fact that its witness and agent made the

same statement to counsel, in the day and time of it, that he made in court upon the trial, and that the plaintiff acted upon advice predicated upon such statement, tended to confirm and corroborate the witness both as to the reliability as well as the accuracy of his statement. It is said that 'was an act. It was not in the nature of hearsay or mere report. It was as much an act done in the business of the corporation as an entry on the books of the corporation would have been.'

"But we think this statement irrelevant to the question presented. It is not an inquiry whether this may be regarded as what is sometimes called a verbal act, or whether, if so, it is an act done in the business of the plaintiff corporation. Both of these claims might be conceded and the query still remain untouched, whether public policy would permit parties to make evidence for themselves by statements not against but in furtherance of interest, out of court, in the absence and without the knowledge of the opposite parties. The question is not a new one. To hold that it would, would require the reversal of an overwhelming weight of authority and of thoroughly established and recognized rules of evidence." *Builders Supply Co. v. Cox*, 68 Conn. 380, 36 Atl. 797. See also *Baxter v. Camp*, 71 Conn. 245, 41 Atl. 803, 71 Am. St. Rep. 169, 42 L. R. A. 514.

*Georgia*.—*Hamilton v. Conyers*, 28 Ga. 276; *Atlantic, K. & N. R. Co. v. Strickland*, 116 Ga. 439, 42 S. E. 864.

*Indiana*.—*Coffin v. Anderson*, 4 Blackf. (Ind.) 395.

*Iowa*.—*State v. Rorabacher*, 19 Iowa 154.

*Louisiana*.—*State v. Carter*, 51 La. Ann. 442, 25 So. 385.

*Massachusetts*.—*Bryant v. Tidgewell*, 133 Mass. 86.

*Mississippi*.—*Owens v. State*, 33 So. 718; *Madden v. State*, 65 Miss. 176, 3 So. 328.

*Missouri*.—*State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *State v. Levy*, 90 Mo. App. 643, the court saying: "The unsworn statements of Binder would naturally be given some weight in corroboration of his testi-

mony as a witness. But we are not aware of any valid rule which would make such statements admissible in the circumstances here disclosed. On the contrary they appear to us obviously improper. *Riney v. Vanlandingham*, 9 Mo. (original ed.), 816, (reprint) 807."

*New York*.—*Jackson v. Etz*, 5 Cow. 314; *Adams v. Greenwich Ins. Co.*, 70 N. Y. 166.

*Texas*.—*Morton v. State*, (Tex. Crim. App.), 71 S. W. 281; *Mercer v. State*, (Tex. Crim. App.), 66 S. W. 555.

**Evidence of Insolvency to Rebut Proof of Interest.**—In *Bryant v. Tidgewell*, 133 Mass. 86, in order to show that one of the defendants was not interested in the cause, evidence of her insolvency was offered. The court said: "Whether evidence of the kind offered ought ever to be received to rebut evidence of interest or bias, is at least doubtful, and it may perhaps depend upon the nature of the evidence it is offered to rebut; but we think it ought never to be received in the first instance, when offered by the party who calls the witness for the purpose of supporting his testimony."

Where one of the state's witnesses testifies that he was induced by the accused's father to swear falsely before the coroner's jury, and was contradicted by the father as to the facts and circumstances of the alleged influence, a conversation between the two witnesses after the false testimony was given is not admissible merely to corroborate the state's witness. *Evans v. State*, 95 Ga. 468, 22 S. E. 298.

**Personal Injuries.**—In *Atlanta, K. & N. R. Co. v. Strickland*, 116 Ga. 439, 42 S. E. 864, which was an action for personal injuries, evidence was received to the effect that the principal witness for the plaintiff had stated on the day following the occurrence of the injury that he was present and saw it. The appellate court in reversing the judgment on this ground says: "This was admitted because the railroad company had claimed, and had endeavored to show, that the witness was not present, but had manufactured his testimony. We do not think that a wit-

that evidence may incidentally corroborate an unimpeached witness will not always require its exclusion.<sup>15</sup> The attack on credibility which will permit the application of the general rule must, however, be more than merely contradictory; it must actually impeach the witness.<sup>16</sup>

ness can be 'bolstered up' in this way. The error seems to us to have been material, because we can readily conceive how such testimony would probably have a strong influence upon the minds of the jury in passing upon the credibility of the witness. We know of no authority which sustains this ruling. . . . It would, we think, be unfortunate to permit testimony of this character. A designing and unscrupulous witness might, in anticipation of a trial, mention to different credible witnesses that he was present and saw an occurrence; and these witnesses, in the event that the other side took the position that the account was untrue or fabricated, might be sworn in corroboration, and much time be consumed in the investigation of a purely collateral issue. It might be that the witness would claim that a number of parties were present, and these parties might disagree among themselves, and a large part of valuable time be consumed in determining what a witness said out of court and not under oath."

Testimony of a witness for the state that he and the accused committed a misdemeanor cannot be corroborated by evidence that the witness has pleaded guilty to this identical offense. *Branson v. State*, 99 Ga. 194, 24 S. E. 404.

**15. Evidence Admissible Though Incidentally Corroborative. — Seduction.** — Evidence of subsequent conduct on the part of the defendant in a seduction case, in seeking to continue the illicit relations with the seduced person, may be received as tending to corroborate the principal charge. *Russell v. Chambers*, 30 Minn. 54, 16 N. W. 458.

**Replevin.** — Where the plaintiff, in an action to replevy a trunk and contents, described the same in testifying, one who was called in a short time previous to the alleged taking and who examined the property for

the purpose of insuring it, may testify regarding the same by way of corroboration. *Oyler v. Dantoff*, 36 Or. 357, 59 Pac. 474.

**Divorce.** — Where plaintiff in a petition for divorce alleged a refusal for more than five years previous to maintain marital relations, it was held proper to admit as tending to corroborate plaintiff's testimony, evidence of statements made from seven to twelve years previous indicating an aversion to marital duties on the part of the defendant. *Leach v. Leach*, 46 Kan. 724, 27 Pac. 131.

**Action on Note.** — Where the pledgee of a promissory note, testified that before its maturity he asked the pledgor where the maker and indorser lived, and was told that he need not seek them as the pledgor would pay it, evidence of the indorser's financial reputation may be admitted as corroborating the testimony of the pledgee. *Coleman v. Lewis*, (Mass. 1903), 67 N. E. 603.

**Murder.** — See *State v. Hayward*, 62 Minn. 474, 65 N. W. 63, on the admission of corroborative evidence in murder cases.

16. "The appellant had introduced one Hayden as a witness, who testified to certain facts. Afterwards the respondent introduced testimony tending to show a different state of facts. Then appellant sought to put in additional testimony in support of the statements of Hayden. The ground upon which he sought this was that the respondent by its testimony had impeached the witness Hayden, and that on that account he was entitled to sustain him. If testimony had been introduced which was strictly in impeachment of the witness Hayden, there would be force in the contention of appellant that he should have been allowed to put in testimony to sustain him. But evidence tending to establish a different state of facts from that testified to

**B. MODE OF CORROBORATION.** — a. *Proof of Prior Declarations.* **Testimony Assailed as Recent Fabrication.** — If the attack on the credibility of the witness consists of a charge that his testimony is a recent fabrication, it is always permissible to corroborate him by proving prior declarations by him to the same effect.<sup>17</sup>

**Motive of Swearing Falsely Charged.** — A similar rule obtains where the impeachment of the witness consists in charging that he testified under the influence of a motive to swear falsely.<sup>18</sup> But in both of these instances the evidence offered must tend to corroborate the witness as to the particular matter in respect to which his testi-

by Hayden was not impeaching testimony, within the meaning of the rule which allows a party to sustain a witness who has been impeached by testimony offered on the part of the other party." *State v. Nelson*, 13 Wash. 523, 43 Pac. 637. See also *Bradley v. Freed*, (Tenn. Ch. 1898), 51 S. W. 124.

17. *California.* — *People v. Doyell*, 48 Cal. 85 (*Dictum*).

*Illinois.* — *Gates v. People*, 14 Ill. 433, *Stolp v. Blair*, 68 Ill. 541.

*Kansas.* — *State v. Petty*, 21 Kan. 54.

*New Hampshire.* — "On the trial of this case, the defendants, with a view to discredit the testimony of the plaintiff's witness, proved that the witness had given on other occasions, and within a week or ten days after the time of the transaction of which he testified, a very different account from what he had stated on the stand; and the defendants contended that the testimony given by the witness on trial was a new fabrication, got up by him since the suit; to rebut which, the plaintiff offered to prove that the witness had given the same account of the transaction the next morning after it had happened as he had given in his testimony on the trial. The doctrine seems to be recognized that under special circumstances, evidence to the extent contended for may be admitted." *French v. Merrill*, 6 N. H. 465. But see *Reed v. Spalding*, 42 N. H. 114.

*New York.* — *Robb v. Hackley*, 23 Wend. 50; *Baber v. Broadway & S. A. R. Co.*, 9 Misc. 20, 29 N. Y. Supp. 40; *McLain v. British & F. M. Ins. Co.*, 16 Misc. 336, 38 N. Y. Supp. 77; *Dechert v. Municipal Elec. L. Co.*,

39 App. Div. 490, 57 N. Y. Supp. 225.

*Texas.* — *English v. State*, 34 Tex. Crim. App. 190, 30 S. W. 233; *Jones v. State*, 38 Tex. Crim. App. 142, 41 S. W. 626; *Scott v. State*, (Tex. Crim. App.), 47 S. W. 531; *Gill v. State*, (Tex. Crim. App.), 38 S. W. 190; *Williams v. State*, 24 Tex. App. 637, 7 S. W. 333.

18. *Stolp v. Blair*, 68 Ill. 541; *Gates v. People*, 14 Ill. 433.

*Kansas.* — *State v. Petty*, 21 Kan. 54.

*Maryland.* — *Baltimore R. R. Co. v. Knee*, 83 Md. 77, 34 Atl. 252.

*New York.* — *Robb v. Hackley*, 23 Wend. 50; *Herrick v. Smith*, 13 Hun 446; *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun 90. *Compare Dechert v. Municipal Elec. L. Co.*, 39 App. Div. 490, 57 N. Y. Supp. 225.

*Vermont.* — *State v. Flint*, 60 Vt. 304, 14 Atl. 178.

**New Hampshire Rule.** — "To make the former statements of the witness competent in his own favor, it should ordinarily be made to appear that, at the time he made the statement, he stood in some different relation to the cause or party from that he now occupies, and that the change in his position has been such that, though his present statement is in favor of his interests, yet that the former one, at the time it was made, must have been, or at least must have appeared to be, directly against his interests. And in any case such statements of a witness, made at any time, and offered as evidence in his own favor after he has been impeached, should be received with great caution. But in the case at bar we cannot discover any such change of circumstances in the wit-



mony has been impeached.<sup>19</sup> And the consistent statements offered by way of corroboration must have antedated the alleged declarations which have been shown for the purpose of impeachment.<sup>20</sup>

**Prior Consistent Statements Admitted Generally.** — Under the early English rule previous declarations by the witness, harmonizing with his testimony, were admitted independently of the special circumstances just alluded to.<sup>21</sup> And this doctrine has been adopted in many

ness as to render the evidence competent on any ground." *Reed v. Spalding*, 42 N. H. 114.

19. *Baltimore C. Pass. R. Co. v. Knee*, 83 Md. 77, 34 Atl. 252. This was an action for personal injuries, and the character of the evidence offered and the law applicable thereto are thus discussed by the court: "The witness, Winters, had sworn that he was present at the happening of the accident, and gave a narrative of all the facts as he saw them. The defendant produced witnesses who swore he was not present. This went to a substantial impeachment of Winters. (30 Md. 104.) To sustain him, the plaintiff offered to prove that two days after the accident, Winters told O'Kane that he was present and saw a man hurt at the corner of Broadway and Chase streets, but told him nothing more. Nothing was said about the details of the accident. The issue in the case was, how was the plaintiff injured? The fact of Winters' presence was in itself quite immaterial, and, if it was not, it could not have been proved or disproved by hearsay. His credibility would undoubtedly suffer if the jury could be made to believe he was absent; and it is because of this that it became competent for the plaintiff to rebut the evidence of the defendant's witnesses that he was not there. But Winters' unsworn declarations were not admissible for the purpose, and it is not so contended. Nor does the declaration made to O'Kane that he (Winters) was present and saw a man hurt have any tendency to confirm the statement as to the manner in which the plaintiff was hurt. It is difficult to perceive how a declaration like this can prove, or tend to prove, that the narrative of facts made in his sworn statement is not a fabrication, made to meet the emergencies of the case, or that

his recollection has not varied. And while it is clear that if his absence from the scene of the transaction were established to the satisfaction of the jury, it would utterly destroy the witness' credibility, we cannot perceive how the fact of his having said, two days later, that he was present and saw a man hurt, furnishes even the slightest test that his narrative of how the man was hurt was made by him either honestly or correctly, or that an unsworn declaration, when compared with his testimony, supplied 'a test of the witness' recollection as well as of his integrity.' The rule is not to be extended, but is to be strictly applied; and only such testimony of this kind as will measure up these requirements is admissible."

20. *Conrad v. Griffey*, 11 How. (U. S.) 480; *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1,050; *State v. Fontenot*, 48 La. Ann. 283, 19 So. 113, the court saying: "We think that, where evidence has been offered tending to show bias, improper motive, or recent fabrication on the part of a witness, statements accounting for the testimony given, made prior to the contradiction proved on the other side, is admissible." *Thompson on Trials*, Vol. I, Par. 579.

"To allow consistent statements, for the purpose of giving support to the credit of a witness, made after the contradictory representations by which it is sought to impeach him, would be to put it in the power of every unprincipled witness to bolster his credit, and perhaps escape the just consequences of his own falsehood and tergiversation." *Queener v. Morrow*, 1 Coldw. (Tenn.) 123; *Dicker v. State*, (Texas), 32 S. W. 541.

21. **Early English Rule.** — "Several witnesses were received and allowed to prove that William May-

American jurisdictions,<sup>22</sup> though in most of them the corroborating evidence is admitted only after impeachment.<sup>23</sup> In accordance with

nard did at several times discourse and declare the same things, and to the like purpose, that he testified now. And the Lord Chief Baron said, though a hearsay was not to be allowed as a direct evidence, yet it might be made use of to this purpose, viz., to prove that William Maynard was constant to himself, whereby his testimony was corroborated." *Luttrell v. Reynell*, 1 Mod. 282. Compare *Friend's Case*, 13 How. St. Tr. 31, 32.

22. *Burnett v. Wilmington & N. M. R. Co.*, 120 N. C. 517, 26 S. E. 819, where the court, per Clark, J., reviewed the authorities in that jurisdiction as follows: "It is competent to corroborate a witness by showing that previously he had made the same statement as to the transaction as that given by him on the trial. *Johnson v. Patterson*, 9 N. C. 183; *State v. Twitty*, *Id.* 449; *State v. George*, 30 N. C. 324; *State v. Dove*, 32 N. C. 469; *Bullinger v. Marshall*, 70 N. C. 520; *State v. Laxton*, 78 N. C. 564; *State v. Parrish*, 79 N. C. 610; *Jones v. Jones*, 80 N. C. 247; *State v. Blackburn*, *Id.* 474; *Roberts v. Roberts*, 82 N. C. 29; *State v. Boon*, 82 N. C. 648; *McLeod v. Bullard*, 84 N. C. 515, 529; *Davis v. Council*, 92 N. C. 725; *State v. Brewer*, 98 N. C. 607, 3 S. E. 819; *State v. Jacobs*, 107 N. C. 873, 12 S. E. 248; *State v. Freeman*, 100 N. C. 429, 5 S. E. 921; *State v. Ward*, 103 N. C. 419, 8 S. E. 814; *State v. Morton*, 107 N. C. 890, 12 S. E. 112; *State v. Brabham*, 108 N. C. 793, 13 S. E. 217; *Hooks v. Houston*, 109 N. C. 623, 14 S. E. 44; *Gregg v. Mallett*, 111 N. C. 74, 15 S. E. 936; *State v. McKinney*, 111 N. C. 683; *Byrd v. Hudson*, 113 N. C. 203, 18 S. E. 209. Indeed the witness himself is competent to testify to the consistent statements previously made by him. *State v. George*, *supra*; *March v. Harrell*, 46 N. C. 329; *State v. Mitchell*, 89 N. C. 521; *State v. Whitfield*, 92 N. C. 831; *MacRea v. Malloy*, 93 N. C. 154; *State v. Rowe*, 98 N. C. 629; *State v. Rhyne*, 109 N. C. 794, 3 S. E. 943; *Sprague v. Bond*, 113 N. C. 551, 18 S. E. 701;

*Wallace v. Grizzard*, 114 N. C. 488, 19 S. E. 760; *State v. Staton*, 14 N. C. 813, 19 S. E. 96.

In view of these, and yet other decisions continuously from those of the first chief justice of this court above cited from 9 N. C., down to the present, uniformly sustaining the competency of such evidence, it admits of a mild surprise that such exception should be again presented to this court."

See also the following subsequent authorities: *Rittenhouse v. Wilmington N. & M. R. Co.*, 120 N. C. 544, 26 S. E. 922; *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887; *Little v. Ratliff*, 126 N. C. 262, 35 S. E. 469.

23. *Connecticut*. — *Lockwood v. Betts*, 8 Conn. 130; *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

*District of Columbia*. — *United States v. Neverson*, 1 Mackey 152.

*Indiana*. — *Hobbs v. State*, 133 Ind. 404, 32 N. E. 1,019, 18 L. R. A. 774; *Ramey v. State*, 127 Ind. 243, 26 N. E. 818; *Dodd v. Moore*, 92 Ind. 397; *Brookbank v. State*, 55 Ind. 169; *Dailey v. State*, 28 Ind. 285; *Perkins v. State*, 4 Ind. 222; *Beauchamp v. State*, 6 Blackf. 299; *Coffin v. Anderson*, 4 Blackf. 395.

*Kansas*. — "It is well settled by the authorities that if a witness be impeached by proof of his having previously made statements out of court inconsistent with his testimony in court, he may then be corroborated by evidence of other statements made by him out of court in harmony with his testimony, if made immediately after the occurrences of which he has testified took place, and made before he has any reason or ground for fabricating an untrue or false statement; and such corroborating evidence is not limited to those statements made by him before the time when his statements given in evidence to impeach him were made, but may be extended to other statements made by him afterward." *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1,050.

*Louisiana*. — *State v. Dudoussat*, 47 La. Ann. 977, 17 So. 685; *State v. Cady*, 46 La. Ann. 1,346, 16 So.

this rule a written statement on the part of the witness is admissible,<sup>24</sup> if read over to him, even where it is not prepared, but merely

195; *State v. Waggoner*, 39 La. Ann. 1919, 3 So. 119.

*Maryland*. — *Bloomer v. State*, 48 Md. 521; *McAleer v. Horsey*, 35 Md. 439; *Cooke v. Curtis*, 6 Harr. & J. 93.

*Massachusetts*. — *Com. v. Wilson*, 1 Gray 337.

*Missouri*. — *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218.

*New York*. — *People v. Vane*, 12 Wend. (N. Y.) 78; *Hotchkiss v. Germania Ins. Co.*, 5 Hun (N. Y.) 90; *Jackson v. Etz*, 5 Cow. 314.

*Pennsylvania*. — *Hester v. Com.*, 85 Pa. St. 139; *Henderson v. Jones*, 10 Serg. & R. 322, 13 Am. Dec. 676.

*South Carolina*. — *Lyles v. Lyles*, Hill Ch. 76.

*Tennessee*. — *Green v. State*, 27 Tenn. 50, 36 S. W. 700; *Hayes v. Cheatham*, 74 Tenn. 1; *Third Nat'l Bank v. Robinson*, 60 Tenn. 479; *Queener v. Morrow*, 1 Coldw. 123; *Dossett v. Miller*, 3 Sneed 72.

*Texas*. — *Sexton v. State*, (Tex. Crim. App.), 45 S. W. 920; *Kirk v. State*, 35 Tex. Crim. App. 224, 32 S. W. 1,045; *Dicker v. State*, (Tex. Crim. App.), 32 S. W. 541; *Stephens v. State*, (Tex.), 26 S. W. 728; *Campbell v. State*, (Tex.), 32 S. W. 774; *Parker v. State*, (Tex.), 34 S. W. 265; *Hamilton v. State*, 36 Tex. Crim. App. 372, 37 S. W. 431; *Williams v. State*, 24 Tex. App. 637, 7 S. W. 333; *Holbert v. State*, 9 Tex. App. 219, 35 Rep. 738.

*Vermont*. — *State v. Dornin*, 32 Vt. 158.

**Murder.** — In *Green v. State*, 97 Tenn. 50, 36 S. W. 700, which was a prosecution for murder, the state was allowed to prove the previous declarations of certain witnesses to the effect that the accused had hidden the gun with which he committed the alleged crime. In answer to the objection on the part of the defendant, the supreme court said: "There was no error in admitting proof of statements made by the two women, Winnie Pirtle and Mattie Motley, in the presence of Bart Green, to the effect that he had hidden the gun. The two women were examined on the trial, and testified that the de-

fendant came to the Pirtle house on the morning the murder was committed, took the gun from the smoke-house, and hid it. There was no error in the permitting other witnesses to state that these two witnesses had made similar statements on the afternoon of the killing, in their presence and that of defendant. The fact that defendant denied the statement at the time it was made would not render incompetent proof that these two women charged him with the act, since such evidence would be proof of previous confirmatory statements tending to support the credibility of the witnesses. *Queener v. Morrow*, 1 Coldw. 123."

**Reason for the Rule.** — "The rule is, that where it is attempted to be established that the statement of a witness on oath is a recent fabrication, or where it is sought to destroy the credit of the witness by proof of contradictory representations, evidence of his having given the same account of the matters at a time when no motive existed to misrepresent the facts ought to be received, because it naturally tends to inspire confidence in the sworn statement." *Hayes v. Cheatham*, 74 Tenn. 1.

"There are cases in which the correctness of this rule is denied. It seems, however, not unreasonable that where it is attempted to impeach the testimony of the witness by proof that he has made other statements, he should be permitted to discredit such evidence by showing that in conversations with other persons his declarations have been consistent with his sworn statements." *Dailey v. State*, 28 Ind. 285.

24. *Little v. Ratliff*, 126 N. C. 262, 35 S. E. 469, where in an action for the conversion of a mule, a release prepared and signed by the wife of the owner of the mule was received in evidence for the purpose of proving plaintiff's title. The court said:

"The receipt itself would not have been original evidence, as it was not written or signed by the husband, Washington; but when she testified

signed by him;<sup>25</sup> so the testimony of the witness in the trial of another case may be introduced,<sup>26</sup> as likewise his evidence before the grand jury,<sup>27</sup> or a coroner's jury.<sup>28</sup>

**Contrary Rule.** — The doctrine that prior consistent declarations may be received in corroboration of the testimony of an impeached witness has been repudiated in a large number of jurisdictions, and it is held that these are attempts to strengthen judicial evidence by extra judicial statements, and that they infringe the general prohibition of hearsay evidence.<sup>29</sup>

that she wrote it, at the request of her husband, in his presence, and handed it to the plaintiff, we think it was at least corroborative evidence of what she had just sworn—that the plaintiff bought the mule and paid \$80 in cash."

25. *Rittenhouse v. Wilmington St. R. Co.*, 120 N. C. 544, 26 S. E. 922, the court saying: "It made no difference that such declaration was not written by the witness. That it was read over to him and signed by him made it his as fully as if he had written it."

26. *Hester v. Com.*, 85 Pa. St. 139; *Henderson v. Jones*, 10 Serg. & R. 322, 13 Am. Dec. 676.

27. *Perkins v. State*, 4 Ind. 222; *Goode v. State*, 32 Tex. Crim. App. 505, 24 S. W. 102.

28. *Sims v. State*, 36 Tex. Crim. App. 154, 36 S. W. 256.

29. **Prior Consistent Declarations Excluded.** — *England.* — *King v. Parker*, 3 Doug. 242, 26 E. C. L. 95; *Buller N. P.* 294; *Brazu's Case*, 1 E. C. L. 443; *Berklet Peerage Case*, 2 Phil. Ev. 974, note 3.

*United States.* — *Ellicott v. Pearl*, 10 Pet. 412; *Conrad v. Griffey*, 11 How. 480; *U. S. v. Holmes*, 1 Cliff. 98, 26 Fed. Cas. No. 15,382. But see *Wright v. Deklyne*, 1 Pet. C. C. 199, 30 Fed. Cas. No. 18,076.

*Alabama.* — *James v. State*, 115 Ala. 83, 22 So. 565; *Green v. State*, 96 Ala. 29, 3 So. 525; *McKelton v. State*, 86 Ala. 594, 6 So. 301, overruling *Sonneborn v. Bernstein*, 49 Ala. 168; *Fallin v. State*, 83 Ala. 5, 3 So. 525; *Adams v. Thornton*, 82 Ala. 260, 3 So. 20; *Childs v. State*, 55 Ala. 25; *Nichols v. Stewart*, 20 Ala. 358.

*California.* — *Mason v. Vestal*, 88

Cal. 396, 28 Pac. 213, 22 Am. St. Rep. 310; *Barkley v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413; *People v. Doyell*, 48 Cal. 85.

*Colorado.* — *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295, 25 L. R. A. 341; *Davis v. Graham*, 2 Colo. App. 210, 29 Pac. 1,007.

*Connecticut.* — *Builders Sup. Co. v. Cox*, 68 Conn. 380, 36 Atl. 797.

*Georgia.* — *Fussell v. State*, 93 Ga. 450, 21 S. E. 97; *McCord v. State*, 83 Ga. 521, 10 S. E. 437; *Georgia R. & B. R. Co. v. Oaks*, 52 Ga. 410.

*Illinois.* — *Stolp v. Blair*, 68 Ill. 541.

*Iowa.* — *State v. Vincent*, 24 Iowa 570, 95 Am. Dec. 753.

*Maine.* — *Sidelinger v. Bucklin*, 64 Me. 371; *Pulsifer v. Crowell*, 63 Me. 22; *Ware v. Ware*, 8 Me. 42.

*Massachusetts.* — *Com. v. Jenkins*, 10 Gray 485, the court saying: "But such corroboration is altogether too slight and remote. Indeed, if admitted and followed out to its legitimate result, it might properly lead to a protracted inquiry to ascertain which of the two statements had been made most frequently by the witness; and when this was determined, then it would be necessary to ask the jury to believe the witness, if he had repeated the statement made before them a greater number of times than the contradictory one which had been proved to impeach his evidence. It is obvious that such a course of inquiry would furnish no means by which the credit due to the testimony of a witness could be satisfactorily ascertained." See also *Loomis v. N. Y. H. N. R. Co.*, 159 Mass. 39, 34 N. E. 82; *Com. v. James*, 99 Mass. 438.

**b. Self-Corroboation.**—As a rule when corroborative evidence is required it means other evidence than that of the witness who must be corroborated, and therefore a witness cannot usually corroborate himself.<sup>30</sup> But in North Carolina the witness may testify that he had previously made statements to others corresponding with his present testimony.<sup>31</sup>

*Missouri.*—Riney v. Valandingham, 9 Mo. 816.

*New Hampshire.*—Reed v. Spalding, 42 N. H. 114.

*New York.*—Robb v. Hackley, 23 Wend. 50; Dudley v. Bolles, 24 Wend. 465; Butler v. Truslow, 55 Barb. 293; Smith v. Stickney, 17 Barb. 489; Herrick v. Smithe, 13 Hun 446; People v. Finnegan, 1 Park. Crim. Rep. 147.

The following cases, which follow the earlier English rule, may now be considered as overruled in New York: Jackson v. Etz, 5 Cow. 314; People v. Vane, 12 Wend. 78. But see Adam v. Greenwich Ins. Co., 70 N. Y. 166.

*South Carolina.*—State v. Thomas, 3 Strob. L. 269; Davis v. Kirksey, 2 Rich. L. 176. Compare State v. Gilliam, 66 S. C. 419, 45 S. E. 6.

*Texas.*—Doucette v. State, (Tex. Crim. App.), 45 S. W. 800; Conway v. State, 33 Tex. Crim. App. 327, 26 S. W. 401.

*Utah.*—Silva v. Pickard, 10 Utah 78, 37 Pac. 86.

*Vermont.*—Gibbs v. Linsley, 13 Vt. 208.

**Affidavits at Former Hearing.**  
It is not permissible to show that after a former verdict affidavits were made by two of the witnesses in support of a motion for a new trial and harmonizing with their testimony at the subsequent trial. Loomis v. New York N. H. R. R. Co., 159 Mass. 39, 34 N. E. 82.

**Evidence at Coroner's Inquest.**  
Witnesses cannot be corroborated by the introduction of evidence previously given by them at a coroner's inquest. State v. Gilliam, 66 S. C. 419, 45 S. E. 6.

**Letters written by a witness cannot** be received for the purpose of corroborating him, though containing other matter affecting the party against whom he testifies. Pulsifer v. Crowell, 63 Me. 22.

**30. Self Corroboation Not Usually Allowed.**—*Iowa.*—State v. Kingsley, 39 Iowa 439; State v. Lenahan, 88 Iowa 670, 56 N. W. 292; State v. Buxton, 89 Iowa 573, 57 N. W. 417.

*Louisiana.*—Cormier v. Le Blanc, 8 Mart. N. S. (La.) 457; Robbins v. Lambeth, 2 Rob. (La.) 304.

*Missouri.*—State v. McCaskey, 104 Mo. 644, 16 S. W. 511, the court saying: "It is the evidence of the woman as to the promise of marriage that must be corroborated. There must be some evidence independent of the principal witness as to the promise of marriage. In this case there is an attempt to evade this plain statutory provision by the principal witness testifying first to the promise of marriage and then to 'the circumstances' that corroborated her. This is clearly not the law. She must be corroborated by some witness other than herself." State v. Hill, Ros. Crim. Ev. (6 Am. ed.) 765; State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; State v. Primm, 98 Mo. 368, 11 S. W. 732.

*North Dakota.*—State v. Kent, 5 N. D. 538, 67 N. W. 1,052.

*Texas.*—Gabrielsky v. State, 13 Tex. App. 428.

But in State v. Timmens, 4 Minn. 325, evidence of preparations for marriage on the part of the prosecutrix in a seduction case was held admissible, though elsewhere this is treated as a species of self corroboration. See Iowa case above cited.

**31.** "The testimony of George Ratliff that he had made statements to others of the same matters testified to by him on the trial was competent to corroborate him; Burnett v. Railroad, 120 N. C. 517, where the numerous cases to that point have been collected, and there have been several since." Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887.

It is also the rule generally that a witness that has been impeached will be permitted to explain his testimony so as to support his credibility.<sup>32</sup>

## V. PRODUCTION.

**1. Order of Proof.** — Corroborative evidence is not usually received as a part of the examination in chief.<sup>33</sup>

**A Confession** should not generally be admitted until the independent proof required by the rule has been introduced.<sup>34</sup>

Corroboration of the prosecutrix in a rape case by showing that she made complaint soon after the commission of the alleged crime cannot be received until she herself has testified, but if she testifies

**32. Corroborative Explanation Admissible.** — *Alabama.* — Henry v. State, 107 Ala. 22, 19 So. 23; Anderson v. State, 104 Ala. 83, 16 So. 108; Johnson v. State, 102 Ala. 1, 16 So. 99; Yarbrough v. State, 71 Ala. 376; Burke v. State, 71 Ala. 377; Henderson v. State, 70 Ala. 23, 45 Am. Rep. 72; Campbell v. State, 23 Ala. 44.

*California.* — People v. Wessel, 98 Cal. 352, 33 Pac. 216.

*Idaho.* — Douglas v. Douglas, 4 Idaho 293, 38 Pac. 934.

*Illinois.* — Bressler v. People, 117 Ill. 422, 8 N. E. 62.

*Iowa.* — Hoover v. Cary, 86 Iowa 494, 53 N. W. 415.

*Louisiana.* — State v. Claire, 41 La. Ann. 1,067, 6 So. 806.

*Michigan.* — Jourdan v. Patterson, 102 Mich. 602, 61 N. W. 64.

*Montana.* — Kennelly v. Savage, 18 Mont. 119, 44 Pac. 400.

*New York.* — Ferris v. Hard, 135 N. Y. 354, 32 N. E. 129.

*Vermont.* — State v. Bedard, 65 Vt. 278, 26 Atl. 719.

*Wisconsin.* — Dufresne v. Weise, 46 Wis. 290, 1 N. W. 59.

Thus "in a bastardy proceeding the prosecutrix may be allowed to testify that on a former trial she was so frightened that she did not know what she was testifying to." Anderson v. State, 104 Ala. 83, 16 So. 108.

So the fact that the witness previously stated out of court that he did not recognize the accused as one of the participants in the crime charged, may be explained by showing that

the statement was made in order to throw the accused off his guard and prevent his escape. State v. Bedard, 65 Vt. 278, 26 Atl. 719.

Where on cross-examination the witness repudiates an alleged conversation which was afterwards testified to by an adverse witness, the first may be recalled in order to get his version of the alleged conversation. Hoover v. Cary, 86 Iowa 494, 53 N. W. 415.

**33.** Jackson v. Etz, 5 Cow. (N. Y.) 314; White v. Black, 14 Pa. Super. Ct. 459. Compare Dodd v. Norris, 3 Campb. 519. The rule formerly seems to have been different. See Harrison's Case, 12 How. St. Tr. 860, 861.

In Green v. Gould, 3 Allen (Mass.) 465, the following facts appear in the statement of the case:

"Daniel Bryant was called as a witness by the plaintiffs and contradicted the evidence of Perry. Thereupon the defendant called John F. Hay, who was permitted to testify, under objection, in corroboration of Perry." Of this the court said in the opinion:

"The testimony of Hay, in confirmation of Perry, was properly admitted. The only possible objection to it which occurs to us is that Hay as well as Perry should have been called to testify before Bryant was called. But the order in which those witnesses might testify was a matter of judicial discretion, the exercise of which is not subject to revision."

**34.** State v. Laliyer, 4 Minn. 277; Ryan v. State, 100 Ala. 94, 14 So. 868.

afterward, the reversal of the prescribed order is harmless error.<sup>35</sup>

**2. Province of Court and Jury.** — Where corroborative evidence is required, the question whether the evidence offered is really of a corroborative character, and therefore admissible, is for the court; its weight and sufficiency — whether it amounts to corroboration — is for the jury.<sup>36</sup>

**35.** *State v. Mitchell*, 68 Iowa 116, 26 N. W. 44.

**36.** *Alabama.* — *Winslow v. State*, 76 Ala. 42.

*Iowa.* — *State v. Kissock*, 111 Iowa 690, 83 N. W. 724; *State v. Bess*, 109 Iowa 675, 81 N. W. 152; *State v. Carnagy*, 106 Iowa 483, 76 N. W. 805; *State v. Smith*, 84 Iowa 522, 51 N. W. 24; *State v. Bell*, 49 Iowa 440; *State v. McLaughlin*, 44 Iowa 82.

*Kentucky.* — *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387.

*Minnesota.* — *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *State v. Timmens*, 4 Minn. 325.

*Missouri.* — *State v. Patterson*, 73 Mo. 695, 712.

*New Mexico.* — “The court is first to determine whether there is any corroborating evidence; its weight is then for the jury.” *Gildersleeve v. Atkinson*, 6 N. M. 250, 27 Pac. 477.

*New York.* — *Crandall v. People*, 2 Lansing 309.

---

## COUNSEL.—See Attorney and Client; Privileged Communications.

# COUNTERFEITING.

BY EDWARD W. TUTTLE.

## I. THE STATE'S CASE, 744

1. *In General*, 744
2. *Scienter*, 744
  - A. *In General*, 744
  - B. *Possession of Other Counterfeits*, 745
  - C. *Passing of Other Counterfeits*, 746
  - D. *Possession of Instruments and Materials*, 747
  - E. *Presumption of Scienter*, 747
3. *Intent*, 747
4. *Existence of Bank*, 748
5. *Competency of Witnesses*, 748
  - A. *Genuineness of Bill*, 748
  - B. *Counterfeiting Machinery*, 749
6. *Production of Counterfeit*, 749

## II. EVIDENCE IN DEFENSE, 750

### CROSS-REFERENCES.

Accomplices;  
Best and Secondary Evidence;  
Character;  
Declarations;  
Forgery;  
Intent.

### I. THE STATE'S CASE.

1. *In General*. — The nature, competency and sufficiency of the evidence in counterfeiting cases vary with the nature and scope of the particular statute upon which the charge is founded.<sup>1</sup>

2. *Scienter*. — A. *IN GENERAL*. — Guilty knowledge of the false character of the alleged counterfeit may be proved by showing the

1. Rev. Stat. U. S. §§ 5413-5479, 24 and 25 Vict. c. 99; see state statutes.

**Fraudulent Possession.** — A fraudulent sale to any person is competent evidence to support the charge of

fraudulent possession. U. S. v. Biebusch, 1 Fed. 213.

**Counterfeits of Different Kind.** On an indictment for having in possession a counterfeit bill with intent to sell it as such, evidence that the



circumstances and surroundings of the defendant, and conditions under which the act occurred.<sup>2</sup>

**B. POSSESSION OF OTHER COUNTERFEITS.** — The fact that the defendant had in his possession other counterfeit money is competent evidence of *scienter*.<sup>3</sup>

prisoner had, when arrested, counterfeit bills of another bank, was held inadmissible. *People v. Stewart*, 5 Mich. 657.

Passing a counterfeit as genuine is not admissible to support an indictment for selling counterfeit money as such. *Vanvalkenburg v. State*, 11 Ohio. 405; *Hutchins v. State*, 13 Ohio 198.

2. *U. S. v. Doeblor*, Baldw. 519, 25 Fed. Cas. No. 14,977.

**Circumstances Showing Guilty Knowledge.** — It is lawful to prove that the prisoner uttered the note at different times and places where it had been suspected and challenged as false, and that he had declared it to be genuine and true; or that he had attempted to secrete himself or avoid the officer, or other facts of a similar nature tending to evince the *scienter* of the prisoner, since by words and actions of men only can their thoughts or knowledge be discovered. *State v. Smith*, 5 Day (Conn.) 175, 5 Am. Dec. 132.

**Printing Genuine Bills.** — In *Com. v. Hall*, 4 Allen (Mass.) 305, evidence that defendant had been employed in printing parts of genuine bank bills was admitted to show guilty knowledge; so also the fact that on being arrested defendant swallowed a bill similar to those passed by him.

**Declarations of Defendant.** — Defendant's previous declaration to the witness of the purpose for which he was going to the house where he was apprehended among counterfeiters is admissible. *U. S. v. Craig*, 4 Wash. C. C. 729, 25 Fed. Cas. No. 14,883. And in *State v. Smith*, 5 Day (Conn.) 175, 5 Am. Dec. 132, his conversation with one who had passed counterfeit bills of the same bank was held competent.

**Previous Statements. — Unopened Letter.** — Previous statements of the defendant, showing that he was at that time engaged in the business of counterfeiting, are admissible; but

an unopened letter containing counterfeit money is not competent evidence of guilty knowledge. *Com. v. Edgerly*, 10 Allen (Mass.) 184.

**Association With Counterfeiters.** Evidence that the defendant endeavored to engage a person to procure for him counterfeit money, inquired whether he had brought any, and declared he intended to cultivate the acquaintance of a counterfeiter, is admissible to prove *scienter*. *Finn v. Com.*, 5 Rand. (Va.) 701.

**Res Gestae.** — Defendant's statements made at the time of passing other counterfeit notes are admissible as part of the *res gestae*. *McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510.

So evidence of defendant's relation to other persons in whose possession bad bills from the same plate had been found is admissible as part of the *res gestae*. *U. S. v. Taranto*, 74 Fed. 219; *U. S. v. Roudenbush*, Baldw. 514, 27 Fed. Cas. No. 16,198.

3. *England.* — *Rex v. Wylie*, 4 Bos. & P. 92.

*United States.* — *Bottomley v. U. S.*, 1 Story 135; *U. S. v. Burns*, 5 McLean 23, 24 Fed. Cas. No. 14,691; *U. S. v. Doeblor*, Baldw. 19, 25 Fed. Cas. No. 14,977; *U. S. v. King*, 5 McLean 208, 26 Fed. Cas. No. 15,535; *U. S. v. Mitchell*, Baldw. 366, 26 Fed. Cas. No. 15,787; *U. S. v. Noble*, 5 Cranch C. C. 371, 27 Fed. Cas. No. 15,895.

*California.* — *People v. Frank*, 28 Cal. 507.

*Connecticut.* — *State v. Spalding*, 19 Conn. 233, 48 Am. Dec. 158.

*Indiana.* — *McCartney v. State*, 3 Ind. 353, 56 Am. Dec. 510.

*New York.* — *People v. Davis*, 21 Wend. 309.

*Ohio.* — *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767.

*Rhode Island.* — *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168.

*South Carolina.* — *State v. Petty*, Harp. L. 59; *State v. Williams*, 2 Rich. L. 418, 45 Am. Dec. 741.

**C. PASSING OF OTHER COUNTERFEITS.**—The passing of other similar counterfeits by the defendant at about the same time is admissible to show his guilty knowledge.<sup>4</sup>

*Virginia.*—Martin v. Com., 2 Leigh 745; Hendrick v. Com., 5 Leigh 707.

**Coin of Different Denomination.**—“The possession of other counterfeit coin, although of different denomination, would go far to show guilty knowledge.” U. S. v. Goughnour, 25 Fed. Cas. No. 15,238; Reg. v. Foster, 3 C. L. R. 681, 6 Cox C. C. 521.

**Notes of Different Banks.**—The fact that defendant had in his possession a parcel of counterfeit checks and drafts on other banks, and others printed on bank paper not filled up, was held admissible to show *scienter* in U. S. v. Noble, 5 Cranch C. C. 371, 27 Fed. Cas. No. 15,895.

**Subsequent Possession.**—The possession of other counterfeit bills several days after passing the bill mentioned in the indictment was held competent evidence. Com. v. Price, 10 Gray (Mass.) 472, 71 Am. Dec. 668; Harrison's Case, 2 Lew. C. C. 118.

**Possession of Associate.**—The possession of an associate in the common purpose of passing bad bills is in law the possession of the defendant, and is admissible to show the latter's guilty knowledge. U. S. v. Hinman, Baldw. 292, 26 Fed. Cas. No. 15,370; State v. Spalding, 19 Conn. 233, 48 Am. Dec. 158.

But in Griffin v. State, 14 Ohio St. 55, the fact that similar bills were found upon a *particeps criminis*, fifty days after the sale charged, was held not admissible, there being no evidence of any intercourse or association between the defendant and such other party during the intervening time.

**Possession of Notes.**—**Counterfeiting Coin.**—Possession of bad notes is not competent evidence of guilty knowledge on an indictment for passing counterfeit coin, since there is not sufficient connection between them. Stalker v. State, 9 Conn. 341; U. S. v. Goughnour, 25 Fed. Cas. No. 15,238; Bluff v. State, 10 Ohio St. 547; but see Lane v. State, 16 Ind. 14.

**Spurious Notes.**—The possession of *spurious* as distinguished from counterfeit notes, both signed and unsigned, is admissible to show *scienter*. State v. Brown, 4 R. I. 528, 70 Am. Dec. 168.

4. *Maine.*—State v. McAllister, 24 Me. 139.

*Massachusetts.*—Com. v. Bigelow, 8 Metc. 235.

*New Jersey.*—State v. Robinson, 16 N. J. L. 507; State v. Van Houten, 3 N. J. L. 672, 4 Am. Dec. 407.

*Rhode Island.*—State v. Brown, 4 R. I. 528, 70 Am. Dec. 168.

*Virginia.*—Hendrick v. Com., 5 Leigh 707.

*Contra.*—State v. Odel, 3 Brev. (S. C.) 552.

**Rule Stated.**—“Evidence of passing notes of the same manufacture and appearance at other times and to other persons is also admissible if their general resemblance to the one laid in the indictment is such that a person who knows the one to be a counterfeit could not reasonably believe the other were genuine. . . . But where the notes are so different in their appearance that the knowledge of the one being a counterfeit would not be a reasonable ground to believe the other was so, the evidence is not admissible unless there is some connection between the acts of passing them both.” U. S. v. Roudenbush, Baldw. 514, 27 Fed. Cas. No. 16,198.

**Time Intervening Between Acts.**—Where it was objected that the note was delivered after the one laid in the indictment, the court said: “Nor is it material that there was an interval, or how long, so there is any fair ground for presuming the two acts of uttering to have been so connected as to show a *scienter*.” U. S. v. Doebler, Baldw. 519, 25 Fed. Cas. No. 14,977.

In People v. Frank, 28 Cal. 507, the court said: “The admissibility of this character of evidence must be left in a great measure to the discretion of the judge who tries the case.” Rex v. Salisbury, 5 Car. & P. 155.

Three Years previous is too long.

**D. POSSESSION OF COUNTERFEITING INSTRUMENTS AND MATERIALS.** — Guilty knowledge may also be shown by evidence that the defendant had in his possession instruments and materials designed for counterfeiting.<sup>5</sup>

**E. PRESUMPTION OF SCIENTER.** — There can be no legal presumption of guilty knowledge.<sup>6</sup>

**3. Intent.** — The fraudulent intent in an indictment for making, possessing or passing counterfeits with intent to defraud may be proved by showing defendant's acts and circumstances,<sup>7</sup> and may

*Morris v. State*, 8 Smed. & M. (Miss.) 762.

**Pending Indictments** for such other acts does not vary the rule. *Com. v. Stearns*, 10 Metc. (Mass.) 256.

**Prior Acquittal.** — "The fact that the defendant had been indicted and acquitted of the other uttering did not render the evidence illegal, though it may have weakened its force. The acquittal of the defendant may have been on the ground that the state failed to identify him," etc. *State v. Robinson*, 16 N. J. L. 507; *State v. Houston*, 1 Bailey (S. C.) 300; *People v. Frank*, 28 Cal. 507.

But in *State v. Tindal*, 5 Harr. (Del.) 488, the court said that upon proof of acquittal "such facts could no longer be considered evidence of guilty knowledge." *Reg. v. Goodwin*, 10 Cox C. C. 534.

**Imperfect Identification** of the defendant as the party who passed other notes, at the same time, in the same town, does not render evidence of those acts inadmissible. *People v. Clarkson*, 56 Mich. 164, 22 N. W. 258.

5. *People v. Davis*, 21 Wend. (N. Y.) 309; *Spencer v. Com.*, 2 Leigh (Va.) 751; *U. S. v. King*, 5 McLean 208, 26 Fed. Cas. No. 15,535; *U. S. v. Burns*, 5 McLean 23, 24 Fed. Cas. No. 14,691; *State v. Antonio*, 3 Brev. (S. C.) 562.

*Contra.* — *State v. Odel*, 3 Brev. (S. C.) 552.

**Coining Instruments.** — **Possessing Notes.** — On an indictment for possession of counterfeit bank notes, evidence that defendant had in his possession instruments for making spurious coin is not admissible. *Bluff v. State*, 10 Ohio St. 547.

**Demonstrative Evidence** — Permitting a plating machine, taken from the defendants, to be operated in the

presence of the jury by an expert, to demonstrate that it could be used for plating coins such as defendants were charged with having made and uttered, is not error. *Taylor v. U. S.*, 89 Fed. 954, 32 C. C. A. 449.

**6. Scienter Not Presumed.** — In *Wash v. State*, 16 Gratt. (Va.) 530, the court said: "The question of guilty knowledge involved in the present case is of a different character from that of presumed intention from a given state of facts. The guilty knowledge is itself a fact constituting an essential ingredient of the offense charged. The actual existence of the fact must be proved either directly or by such other facts and circumstances as can leave no reasonable doubt that the fact does exist." *Spencer v. Com.*, 2 Leigh (Va.) 751; *State v. Morton*, 8 Wis. 352; *People v. Page*, 1 Idaho 189.

But in the last case cited, where the charge was passing counterfeit gold dust, it was held that a legal presumption of guilty knowledge would arise from proof of the fact that the dust was spurious and that defendant had attempted to pass it, contrary to the rule in counterfeiting cases, because its non-genuine character could be so easily tested.

7. *U. S. v. Burns*, 5 McLean 23, 24 Fed. Cas. No. 14,691; *U. S. v. King*, 5 McLean 208, 26 Fed. Cas. No. 15,535.

**Presumption From Possession.** Mere possession of a counterfeit with knowledge of its false character raises no legal presumption of fraudulent intent. *Brown v. People*, 9 Ill. 439.

**Defrauding Particular Person.** Where, by statute, an intent to defraud a particular person is necessary, such intent is not sufficiently proved by evidence that the defendant sold counterfeit money to one cog-

be presumed from the manufacture<sup>8</sup> or passing of the counterfeit with knowledge of its false character.<sup>9</sup>

**4. Existence of Bank.** — The existence of the bank whose notes have been counterfeited, when necessary to be proved,<sup>10</sup> may be shown by secondary evidence of very general character,<sup>11</sup> unless the form of the statute makes stricter proof necessary.<sup>12</sup>

**5. Competency of Witnesses.** — **A. GENUINENESS OF BILL.** — Any person well acquainted with genuine bills or coin of the kind imitated is a competent witness as to the character of the alleged counterfeit.<sup>13</sup>

nizant of its real character. *Hooper v. State*, 8 Humph. (Tenn.) 93.

But where the indictment charged an intent to defraud F and "others," evidence that F, acting in concert with the police and representing himself to defendant as one of the "brotherhood," purchased from him counterfeit money as such, was held sufficient to support a conviction. *People v. Farrell*, 30 Cal. 316.

**Passing One Coin.** — The mere act of passing a counterfeit coin on one occasion is not of itself evidence of an intention to deceive, but the manner in which it was done and other attending circumstances must be considered. *U. S. v. Hopkins*, 26 Fed. 443.

**8.** *U. S. v. Abrams*, 18 Fed. 823; *U. S. v. Otey*, 31 Fed. 68; *State v. McPherson*, 9 Iowa 53.

**9.** *McGregor v. State*, 16 Ind. 9; *People v. Page*, 1 Idaho 189; *State v. Mix*, 15 Mo. 153.

**10. Proof Unnecessary.** — Where the statute makes criminal the possession of any counterfeit bill, etc., "issued or purporting to be issued by any corporation or company," etc., it is held that the existence of the corporation need not be proved, but that it is sufficient if the bill purports on its face to be issued by an authorized company, the word purporting being intended to qualify the whole of the succeeding clause. *People v. Davis*, 21 Wend. (N. Y.) 309; *People v. Peabody*, 25 Wend. (N. Y.) 472; *State v. Hayden*, 15 N. H. 355; *Com. v. Smith*, 6 Serg. & R. (Pa.) 568; *State v. Van Hart*, 17 N. J. L. 327.

**Judicial Notice.** — Courts take judicial notice of the legal existence of domestic banks. *Owen v. State*,

5 Sneed (Tenn.) 493; *State v. Twitty*, 2 Hawks (N. C.) 248.

**Existence Alleged.** — When the legal existence of the bank is alleged, though unnecessarily, it must be proved. *State v. Newland*, 7 Iowa 242, 71 Am. Dec. 444; *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168; *Com. v. Smith*, 6 Serg. & R. (Pa.) 568; but see *People v. Ah Sam*, 41 Cal. 645.

**11.** *People v. Davis*, 21 Wend. (N. Y.) 309.

**Reputation Sufficient.** — Incorporation of the bank may be proved by showing that it was known and acted as a banking company, and issued bank bills which were received as current. *People v. Ah Sam*, 41 Cal. 645; *People v. Davis*, 21 Wend. (N. Y.) 309; *People v. McDonnell*, 80 Cal. 285, 22 Pac. 190, 13 Am. Dec. 159; *Sasser v. State*, 13 Ohio 453; *Reed v. State*, 15 Ohio 217.

**12. Necessary by Statute.** — The form of some statutes seems to require proof of the legal existence of the bank. *Kennedy v. Com.*, 2 Met. (Ky.) 36; *Benson v. State*, 5 Minn. 19; *State v. Morton*, 8 Wis. 352.

But in Wisconsin by later cases it is an actual and not legal existence which is required. *Snow v. State*, 14 Wis. 479; *State v. Cole*, 19 Wis. 129, 88 Am. Dec. 678.

**Uttering as an Admission.** — "The uttering as true a note purporting to be issued by a particular bank is an admission or statement of the existence of a genuine bill and of the bank issuing it, by the utterer, sufficient, in the absence of proof to the contrary, to prove their existence." *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168.

**13. Kentucky.** — *Watson v. Cresap*, 1 B. Mon. 195, 36 Am. Dec. 572.

**B. COUNTERFEITING MACHINERY.**—Any person whose experience has made him familiar with counterfeiting machinery and appliances may testify as to their use.<sup>14</sup>

**6. Production of Counterfeit.**—The alleged counterfeit is the best evidence of its character, and must be produced,<sup>15</sup> unless out of the jurisdiction,<sup>16</sup> in the defendant's possession,<sup>17</sup> or otherwise satisfac-

*Massachusetts.*—*Com. v. Carey*, 2 Pick. 47.

*New Hampshire.*—*Furber v. Hiliard*, 2 N. H. 480; *State v. Carr*, 5 N. H. 367.

*North Carolina.*—*State v. Allen*, 1 Hawks 6, 9 Am. Dec. 616; *State v. Harris*, 5 Ired. L. 287.

*Ohio.*—*State v. Kinny*, 1 Tapp. 169.

*South Carolina.*—*State v. Tutt*, 2 Bailey L. 44, 21 Am. Dec. 508.

*Virginia.*—*Martin v. Com.*, 2 Leigh 745.

**Bank Officer Not Necessary.**—It is not necessary that the witness be an officer of the bank whose notes have been counterfeited. *Jones v. State*, 11 Ind. 357; *Com. v. Carey*, 2 Pick. (Mass.) 47; *State v. Tutt*, 2 Bailey L. (S. C.) 44, 21 Am. Dec. 508; *U. S. v. Holtsclaw*, 2 Hayw. 379, 26 Fed. Cas. No. 15,384.

**Handwriting of Bank Officer.** One who has never seen the president write, but is familiar with genuine notes, containing his signature, may testify as to its genuineness. *U. S. v. Holtsclaw*, 2 Hayw. 379, 26 Fed. Cas. No. 15,384, and cases cited in note 13 above. *Hess v. State*, 5 Ohio 5, 22 Am. Dec. 767.

**Actual Acquaintance** with similar genuine notes was held not necessary to enable a banker to testify as to the character of the alleged counterfeit, in *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219, *Campbell, J.*, said: "Those who are in the habit of handling money constantly become sufficiently skilled to detect from its appearance, with some degree of certainty, whether it is genuine. This knowledge is not necessarily obtained from seeing other bills of the same series or even of the same denomination." But see *State v. Brown*, 4 R. I. 528, 70 Am. Dec. 168, where testimony of an experienced bank cashier was held incompetent because he could not swear positively that he

had ever seen a note of the bank in question.

**Expert.**—**Who Is.**—In *Payson v. Everett*, 12 Minn. 216, the witness stated, "I am somewhat acquainted with the currency of the country," and "I do not consider myself an expert in money according to the strict definition of the term." His opinion was held incompetent.

**Bank Note Detectors** (pamphlets) are not admissible to prove the false character of a note. *Payson v. Everett*, 12 Minn. 216.

**14. Rule Stated.**—Where various materials and appliances had been found in defendant's house, a deputy marshal whose experience in similar cases had made him familiar with counterfeiting tools, was permitted to testify as to their use. The court said: "A rule excluding all persons except officials of the mint from testifying on the subject as experts would be inconvenient. . . . The testimony of any person whose attention has been from any cause particularly directed to the subject, and whose observation has been in any mode particularly bestowed upon it, must be received." *U. S. v. Tarr*, 28 Fed. Cas. 16,434.

**15.** *State v. Osborn*, 1 Root (Conn.) 152; *Smith v. Holebrook*, 2 Root (Conn.) 45; *Com. v. Bigelow*, 8 Metc. (Mass.) 235.

**16.** *Reed v. State*, 15 Ohio 217; *Kirk v. Com.*, 9 Leigh (Va.) 627.

**17.** *Armitage v. State*, 13 Ind. 441; *McGregor v. State*, 16 Ind. 9; *U. S. v. Doebler, Baldw.* (U. S.) 519; 25 Fed. Cas. No. 14,977; *State v. Ford*, 2 Root (Conn.) 93; *State v. Potts*, 9 N. J. L. 26, 17 Am. Dec. 449.

**Contents of Bill.**—**Notice to Defendant.**—In *Armitage v. State*, 13 Ind. 441, it was held that while notice to defendant was necessary in order to prove the character of a bill in his possession by secondary evidence, yet in order to prove its contents in such

torily accounted for.<sup>18</sup>

## II. EVIDENCE IN DEFENSE.

The defendant may show in defense his good character,<sup>19</sup> that he supposed the counterfeit genuine, or that he resorted to the usual and approved tests to determine its character.<sup>20</sup>

manner, notice must be given to defendant, and for this purpose the allegations in the indictment are not sufficient. See articles "BEST AND SECONDARY EVIDENCE" and "FORGERY."

18. *State v. Cole*, 19 Wis. 129, 88 Am. Dec. 678, and cases cited under notes 16, 17.

19. **Good Character.**—To rebut the presumption of fraudulent intent the accused may give evidence of his general good character, and where there is any doubt, good character will outweigh ordinary presumptions and circumstances merely suspicious. *U. S. v. Roudenbush*, Baldw. 514, 27 Fed. Cas. No. 16,198; *Griffin v. State*, 14 Ohio St. 55.

Failure to introduce evidence of a good character is a strong circumstance against the defendant. *State v. McAllister*, 24 Me. 139. See article "CHARACTER."

20. *State v. Morton*, 8 Wis. 352.

**Counterfeit Detector.**—To rebut

guilty knowledge defendant may show that he examined a "counterfeit detector." *State v. Morton*, 8 Wis. 352.

**Failure to Explain.**—The fact that the accused, when arrested, made no attempt to explain his situation, how he got the counterfeit, nor any assertion of his innocence is a circumstance which may be considered against him. *U. S. v. Kenneally*, 5 Biss. 122, 26 Fed. Cas. No. 15,522; *People v. Reilly*, 51 Hun 624, 4 N. Y. Supp. 81.

The fact that defendant gave different accounts as to the person from whom he got the note, and did not on trial attempt to explain, is sufficient evidence to support a conviction. *Perdue v. State*, 2 Humph. (Tenn.) 494.

**Declarations** of defendant as to his never having been there before, when arrested, are admissible, but only to repel any unfavorable conclusion from his silence. *U. S. v. Craig*, 4 Wash. (C. C.) 729, 25 Fed. Cas. No. 14,883.

# CREDIBILITY.

BY CHARLES W. HATTON.

- I. PROVINCE OF THE COURT, 752**
- II. PROVINCE OF THE JURY, 753**
- III. PRESUMPTIONS, 755**
  - 1. *In General*, 755
  - 2. *Not Destroyed by Race, Color or Servitude*, 756
  - 3. *Intoxicants, Opium or Morphine*, 756
  - 4. *Positive and Negative Statements*, 757
- IV. STATUS, 759**
  - 1. *Residence and Occupation*, 759
  - 2. *As to History and Antecedents*, 759
    - A. *Specific Acts of Misconduct*, 760
    - B. *Mere Accusations*, 762
    - C. *Extent of Rule*, 762
- V. TESTS OF CREDIBILITY, 763**
  - 1. *In General*, 763
  - 2. *Memory, Power of Observation*, 764
  - 3. *Probability of His Statements*, 766
  - 4. *Manner of Testifying*, 766
  - 5. *Opportunity*, 767
  - 6. *Motive*, 768
    - A. *In General*, 768
    - B. *Pecuniary Interest*, 769
    - C. *Unfriendliness*, 771
    - D. *Interest*, 771
- VI. EFFECT OF STATEMENTS, 774**
  - 1. *Contradictions*, 774
  - 2. *Corroboration*, 775
  - 3. *Mistake*, 776
  - 4. *Intentional Falsehood*, 777
    - A. *Rule, Falsus in Uno*, 777
    - B. *Suppression of Facts*, 779
    - C. *Admission of Untruthfulness*, 779

## CROSS-REFERENCES.

Contradiction of Witnesses; Corroboration; Cross-Examination; Impeachment.

## I. PROVINCE OF THE COURT.

The province of the court is to call the attention of the jury to any matters which legitimately affect the credibility of the witnesses.<sup>1</sup> The testimony of each witness should be subjected to the same test, and the court should carefully avoid any expression calculated to discredit the testimony of any particular witness<sup>2</sup> or por-

1. *United States*.—*Reagan v. U. S.*, 157 U. S. 301; *Fidelity Mut. L. Ins. Co. v. Jeffords*, 107 Fed. 402.

*Arizona*.—*Halderman v. Territory*, (Ariz.), 60 Pac. 876.

*Arkansas*.—*Bing v. State*, 52 Ark. 263, 12 S. W. 559.

*California*.—*People v. Anderson*, 105 Cal. 32, 38 Pac. 513.

*New Jersey*.—*Faulkner v. Pater-son R. Co.*, 65 N. J. L. 181, 46 Atl. 765.

*Pennsylvania*.—*Watkins v. Moore*, 192 Pa. St. 211, 43 Atl. 1,022.

*Rhode Island*.—*State v. Hoxsie*, 15 R. I. 1, 22 Atl. 1,059, 2 Am. St. Rep. 838.

In *People v. Hare*, 57 Mich. 505, 24 N. W. 843, the court said: "There is nothing improper, however, and in many cases it is important that the court should comment upon the nature of such testimony, as the circumstances may prompt, and point out the various grounds of suspicion which may attach to it, to call the jury's attention to the situation and temptation under which such witnesses may be placed, and the motives by which they may be actuated, and any other circumstances which, in the nature of the situation, may go to confirm or discredit the witness; but further than this the court should not go."

In *Wharton v. State*, 45 Tex. 2, the court stated as its opinion, "There are well-established rules and principles of law by which the credibility of witnesses is to be impeached. And if the jury desire to determine the credence which they will give their evidence by these rules, the court, when asked, should instruct the jury in regard to them; otherwise they may mistakenly suppose the testimony of a witness is impeached and entitled to no credence, which, if better advised of the law, they would believe without hesitation."

*Contra*.—*People v. Shattuck*, 109 Cal. 673, 42 Pac. 315. The husband, mother and daughter of the defendant had been examined in her behalf. The court in giving the instructions said: "It is proper, however, for the jury to bear in mind the relationship between them and the defendant, and the manner in which they may be interested by your verdict, and the very grave interest they must feel in it. And it is proper for the jury to consider whether their position and interest may not affect their credibility or color of their testimony." *Held*, the instruction erroneous because it violates the constitutional provision that judges should not charge juries with respect to matters of fact.

In *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36, a court had instructed the jury that the testimony of an accomplice ought to be viewed with distrust. *Held*, that this the court should not have done. To tell the jury what weight to give, or not to give, any particular evidence, is to express an opinion upon a matter of fact. See also *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1,003; *Wastl v. Montana U. R. Co.*, 17 Mont. 213, 42 Pac. 772; *Kauffman v. Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124.

2. *California*.—*People v. Christenson*, 85 Cal. 568, 24 Pac. 888.

*Illinois*.—*Rafferty v. People*, 72 Ill. 37.

*Indiana*.—*Moore v. Ross*, 139 Ind. 200, 38 N. E. 817.

*Minnesota*.—*Harriott v. Holmes*, 77 Minn. 245, 79 N. W. 1,003.

*Montana*.—*State v. McClellan*, 23 Mont. 532, 59 Pac. 924, 75 Am. St. Rep. 558.

*Tennessee*.—*Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272.

*Texas*.—*Davidson v. Wallingford*, 88 Tex. App. 619, 132 S. W. 1,030.

*West Virginia*.—*State v. Hull*, 45 W. Va. 767, 32 S. E. 240.



tions<sup>3</sup> of the evidence. It is error for the court to inform the jury directly or indirectly that a certain fact must, as a matter of law, be regarded in determining the question of credibility.<sup>4</sup>

## II. PROVINCE OF THE JURY.

The jury are the sole and exclusive judges of the credibility of witnesses,<sup>5</sup> and in considering whom they will or will not believe

*Wisconsin*.—McKeon *v.* Chicago, M. & St. P. R. Co., 94 Wis. 477, 69 N. W. 175, 59 Am. St. Rep. 909, 35 L. R. A. 252.

3. *Alabama*.—Gibson *v.* Snow Hdwe. Co., 94 Ala. 346, 10 So. 304.

*California*.—People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45.

*Illinois*.—Mullins *v.* People, 110 Ill. 42.

*Missouri*.—State *v.* Young, 99 Mo. 666, 12 S. W. 879.

*Texas*.—Copeland *v.* State, 36 Tex. Crim. App. 575, 38 S. W. 210; White *v.* Houston R. Co., (Tex. Civ. App.), 46 S. W. 382.

*Washington*.—Gilmore *v.* Seattle R. Co., (Wash.), 69 Pac. 743.

*Wisconsin*.—Valley Lumb. Co. *v.* Smith, 71 Wis. 304, 37 N. W. 412, 5 Am. St. Rep. 216.

4. *Illinois*.—Johnson *v.* People, 140 Ill. 350, 29 N. E. 895.

*Indiana*.—Pennsylvania Co. *v.* Hunsley, 23 Ind. App. 37, 54 N. E. 1,071, citing many Indiana cases.

*Kansas*.—Kansas Pac. R. Co. *v.* Little, 19 Kan. 267.

*Michigan*.—People *v.* Jenness, 5 Mich. 305.

*Nebraska*.—Long *v.* State, 23 Neb. 33, 36 N. W. 310.

*North Carolina*.—State *v.* Shields, 110 N. C. 497, 14 S. E. 779.

5. *United States*.—U. S. *v.* Murphy, 16 Pet. 203; Snyder *v.* Fiedler, 139 U. S. 478; Mutual L. Ins. Co. *v.* Logan, 87 Fed. 637; Wackerle *v.* Mutual L. Ins. Co., 14 Fed. 23.

*Alabama*.—Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188.

*Arkansas*.—Hamilton *v.* State, 62 Ark. 543, 36 S. W. 1,054.

*California*.—People *v.* Eckert, 16 Cal. 111; People *v.* Gibson, 53 Cal. 601; Fox *v.* Oakland Cons. St. R.

Co., 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

*Colorado*.—Kansas Pac. R. Co. *v.* Ward, 4 Colo. 30; Davidson *v.* People, 4 Colo. 145; Simonton *v.* Rohm, 14 Colo. 51, 23 Pac. 86; Fleetwood *v.* Barnett, 11 Colo. App. 77, 52 Pac. 293.

*Florida*.—Glover *v.* State, 22 Fla. 493.

*Illinois*.—Rafferty *v.* People, 72 Ill. 37; Stampofski *v.* Steffens, 79 Ill. 303; Waters *v.* People, 172 Ill. 367, 50 N. E. 148; McGregor *v.* Reid, 178 Ill. 464, 53 N. E. 323, 69 Am. St. Rep. 332.

*Indiana*.—Young *v.* Gentis, 7 Ind. App. 199, 32 N. E. 796.

*Iowa*.—Cottrell *v.* Piatt, 101 Iowa 231, 70 N. W. 177.

*Kansas*.—State *v.* Barber, 2 Kan. App. 679, 43 Pac. 800.

*Kentucky*.—Barnard *v.* Com., 10 Ky. L. Rep. 143, 8 S. W. 444; Peoples *v.* Com., 87 Ky. 487, 9 S. W. 810; Newport N. & M. V. R. Co. *v.* Mitchell, 17 Ky. L. Rep. 1,086, 33 S. W. 622.

*Louisiana*.—State *v.* Breckenridge, 33 La. Ann. 310; State *v.* Bazile, 50 La. Ann. 21, 23 So. 8.

*Massachusetts*.—Com. *v.* Barry, 91 Mass. 276.

*Montana*.—Wastl *v.* Montana U. R. Co., 17 Mont. 213, 42 Pac. 772.

*Nebraska*.—Murphey *v.* Virgin, 47 Neb. 692, 66 N. W. 652; Boice *v.* Palmer, 55 Neb. 389, 75 N. W. 849.

*New York*.—Joy *v.* Deifendorf, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484; Murr *v.* Western Assur. Co., 50 App. Div. 4, 64 N. Y. Supp. 12; Becker *v.* Koch, 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515.

*North Carolina*.—Cogdell *v.* Southern R. Co., 129 N. C. 398, 40 S. E. 202.

may take into account their experience among men.<sup>6</sup> The jury should determine the credibility of witnesses even though the opposing party has offered nothing to contradict the testimony,<sup>7</sup> and they are not bound to accept the statements of a witness because unimpeached and uncontradicted by the evidence given by other witnesses.<sup>8</sup> He may impeach and contradict himself or state inherent

*Oregon.*—*State v. Lucas*, 24 Or. 168, 33 Pac. 538.

*Pennsylvania.*—*Deihl v. Rodgers*, 169 Pa. St. 316, 32 Atl. 424, 47 Am. St. Rep. 908; *Prowattain v. Tindall*, 80 Pa. St. 295.

*South Carolina.*—*State v. Anderson*, 24 S. C. 109.

*Texas.*—*Doss v. State*, 21 Tex. 505, 2 S. W. 814; *Franklin v. State*, (Tex. Crim. App.), 28 S. W. 472; *Smith v. Merchants' & P. Nat. Bank*, (Tex. Civ. App.), 40 S. W. 1,038; *International G. N. R. Co. v. Phillips*, (Tex. Civ. App.), 69 S. W. 107.

*Washington.*—*Gilmore v. Seattle R. Co.*, (Wash.), 69 Pac. 743.

*West Virginia.*—*State v. Thompson*, 21 W. Va. 741; *Akers v. De Witt*, 41 W. Va. 229, 23 S. E. 669; *Young v. West Virginia P. R. Co.*, 44 W. Va. 218, 28 S. E. 932.

**Where No Conflict Exists.**—In *Heldt v. State*, 20 Neb. 492, 30 N. W. 626, the court held that "Even where there is no conflict in the testimony, the jury are the judges of the credibility of the witnesses, and may entirely discredit such testimony as to them may seem unworthy of belief."

6. *U. S. v. Hall*, 44 Fed. 864, 10 L. R. A. 324; *Cicero & P. St. R. Co. v. Meixner*, 55 Ill. App. 288; *Cincinnati, H. & I. R. Co. v. Creger*, 150 Ind. 625, 50 N. E. 760; *Renard v. Grande*, 29 Ind. App. 579, 64 N. E. 644; *State v. Maine C. & R. Co.*, 86 Me. 309, 29 Atl. 1,086; *People v. Hite*, 8 Utah 461, 33 Pac. 254.

In *Jenney Elec. Co. v. Branham*, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395, the court said: "Jurors should be, and as a rule are, selected because of their extensive experiences among men. The school of experience which men attend, in their varied relations among men, imparts a keenness of mental vision which enables them the more readily to see the motives and to judge of

the selfish or unselfish interests of men. This education, be it much or little, is a part of the juror, and should not, if possible, be laid aside in passing upon the inducements, which may surround a witness, to speak falsely. . . . The value of experience is not to be given up when a man becomes a juror and is required to apply the tests of credit to the heart and mind of the witness; but whatever qualification that experience gives should be employed to the end that the whole truth may be known and acted upon."

In *Daggers v. Van Dyck*, 37 N. J. Eq. 130, the court said: "Evidence, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous, and is outside of judicial cognizance. Evidence is generally considered improbable when it imputes to the parties to a transaction, occurring in the ordinary course of business, conduct inconsistent with the principles by which men, similarly situated, are usually governed."

7. *Davis v. Hays*, 89 Ala. 563, 8 So. 131; *Lesser v. Wunder*, 9 Daly (N. Y.) 70.

8. *United States.*—*Tracy v. Phelps (Town)*, 22 Fed. 634.

*Florida.*—*Atzroth v. State*, 10 Fla. 207.

*Massachusetts.*—*Com. v. Loewe*, 162 Mass. 518, 39 N. E. 192.

*Michigan.*—*Durant v. People*, 13 Mich. 351.

*Minnesota.*—*Hoffman v. Chicago, M. & St. P. R. Co.*, 43 Minn. 334, 45 N. W. 608.

*Missouri.*—*Price v. Lederer*, 33 Mo. App. 426.

improbabilities when giving his testimony,<sup>9</sup> or the jury may believe that he is honestly mistaken.<sup>10</sup> All the tests of credibility should be applied to learn the exact truth in the matter,<sup>11</sup> and the jury may base their estimate of the amount of credit which shall attach to the testimony of a witness upon immaterial as well as material matters.<sup>12</sup> They must not decide whether or not he is a credible witness by evidence undisclosed at the trial;<sup>13</sup> nor are they at liberty to reject the testimony of any witness from mere caprice,<sup>14</sup> or because they may prefer the result which in that way becomes open to them.<sup>15</sup>

### III. PRESUMPTIONS.

1. **In General.** — A witness is presumed to speak the truth.<sup>16</sup> This

*Nebraska.* — *Chezem v. State*, 56 Neb. 496, 76 N. W. 1,056.

*New York.* — *Kearney v. Mayor*, 92 N. Y. 617; *Joy v. Diefendorf*, 130 N. Y. 6, 28 N. E. 602, 37 Am. St. Rep. 484.

*Texas.* — *International R. Co. v. Johnson*, 23 Tex. Civ. App. 160, 55 S. W. 772; *Galveston G. & S. A. R. Co. v. Eckles*, 25 Tex. 179, 60 S. W. 830.

*Wisconsin.* — *Moore v. Ellis*, 89 Wis. 108, 61 N. W. 291; *Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38, 71 N. W. 69.

9. *United States.* — *Quock Ting v. U. S.*, 140 U. S. 417.

*Minnesota.* — *Klason v. Rieger*, 22 Minn. 59; *Schwartz v. Germania L. Ins. Co.*, 21 Minn. 215; *Hawkins v. Sanby*, 48 Minn. 69, 50 N. W. 1,015; *Anderson v. Liljengren*, 50 Minn. 3, 52 N. W. 219.

*New York.* — *Elwood v. Western U. T. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Kavanaugh v. Wilson*, 70 N. Y. 177.

*Wisconsin.* — *Barnard v. State*, 88 Wis. 656, 60 N. W. 1,058.

In *Anderson v. Liljengren*, 50 Minn. 3, 52 N. W. 219, Mitchell, J., said: "A witness may be contradicted by the facts he states as completely as by direct adverse testimony. A court or jury is not bound to accept it as true merely because there is no direct testimony contradicting it where it contains such inherent improbabilities or contradictions, which alone, or in connection with other circumstances in evidence, satisfy them of its falsity."

10. *Lautner v. Kann*, 184 Pa. St.

334, 39 Atl. 55; *Cicero St. R. Co. v. Meixner*, 55 Ill. App. 288.

11. *Rider v. People*, 110 Ill. 11.

12. *Wallace v. State*, 28 Ark. 531; *Rider v. People*, 110 Ill. 11; *Reeder v. Traders' Nat. Bank*, 28 Wash. 139, 68 Pac. 461.

13. *Railroad Co. v. Owen*, 90 Ga. 265, 15 S. E. 853; *Collins v. State*, 94 Ga. 394, 19 S. E. 243; *Purdy v. People*, 140 Ill. 46, 29 N. E. 700; *Neace v. Com.*, 23 Ky. L. Rep. 125, 62 S. W. 733; *Riley v. State*, 75 Miss. 352, 22 So. 890.

14. *Chicago & G. T. R. Co. v. Foster*, 46 Ill. App. 621; *Seibert v. Erie R. Co.*, 49 Barb. (N. Y.) 583; *Lomer v. Meeker*, 25 N. Y. 361; *Cunningham v. Gans*, 61 N. Y. St. 249, 29 N. Y. Supp. 979; *Connelly v. Central Vt. R. Co.*, 74 N. Y. St. 214, 38 N. Y. Supp. 587.

15. *Edler v. Uchtmaun*, 10 Ill. App. 488; *Rockford, R. I. & St. L. R. Co. v. Coultas*, 67 Ill. 398; *Boe v. Lynch*, 20 Mont. 80, 49 Pac. 381.

16. *United States.* — *Hauss v. Lake Erie R. Co.*, 105 Fed. 733.

*Alabama.* — *Crane v. State*, 111 Ala. 45, 20 So. 590.

*California.* — *People v. McLane*, 60 Cal. 412.

*Georgia.* — *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154.

*Illinois.* — *Johnson v. People*, 140 Ill. 350, 29 N. E. 895.

*Montana.* — *State v. Dotson*, 26 Mont. 305, 67 Pac. 938.

*Oregon.* — *State v. Pomeroy*, 30 Or. 16, 46 Pac. 797.

*Tennessee.* — *Sawyers v. State*, 15 Lea 694.

*Texas.* — *Jackson v. State*, 33 Tex.

presumption is but a *prima facie* one,<sup>17</sup> and may be repelled by the testimony and demeanor of the witness.<sup>18</sup>

**2. Not Destroyed by Race, Color or Servitude.** — The credibility of a witness is not to be tested by the color of the witness, or by the race to which he belongs;<sup>19</sup> nor should the testimony be refused credence simply because the witness is a convict,<sup>20</sup> or has been a slave.<sup>21</sup>

**3. Intoxicants, Opium or Morphine.** — The fact that a witness is a

Crim. App. 281, 26 S. W. 194, 47 Am. St. Rep. 30.

*Contra.* — In *State v. Taylor*, 57 S. C. 483, 35 S. E. 729, 76 Am. St. Rep. 575, held, that "There is a presumption that the character or reputation of a witness is good until it is impeached by testimony, but we are not aware of any law which authorizes a statement that there is a presumption that what such witness tells is the truth. The jury may infer from the unimpeached character of a witness that the witness intends to tell the truth, but whether what he tells is in fact true depends upon the conclusions of the jury in view of the whole evidence before them, unaffected by any presumption as to whether it is true or not. Otherwise, the presumption of the defendant's innocence, which follows through the trial to the verdict, would be met by a counter-presumption of his guilt if a state's witness narrated circumstances from which a jury might infer guilt."

17. In *State v. Thomas*, 77 N. C. 520, it was held that a judge may properly instruct the jury that the law presumes, and that they should presume, that a witness speaks the truth, unless there be some reason for thinking otherwise. But this is not a presumption of law in a technical sense, but of fact, being drawn from our experience of human veracity. Its force depends upon a number of circumstances which the jury must consider before acting on it. It has no artificial force.

See also *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154.

**As to Defendant in a Criminal Prosecution.** — In *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154, the court said: "We think that there is a *prima facie* presumption that all wit-

nesses not impeached tell the truth, and that there is no presumption one way or the other respecting the truth of the prisoner's statement" (not made on oath). "Upon the truth of that the jury are to pass unaided by any preliminary presumption for or against him."

18. *State v. Dotson*, 26 Mont. 305, 67 Pac. 938; *Kenny v. Lembeck*, 53 N. J. Eq. 20, 30 Atl. 525.

19. *Clarke v. State*, 35 Ga. 75; *Davis v. Meaux*, 15 Ky. L. Rep. 308, 22 S. W. 324; *McDaniel v. Monroe*, 63 S. C. 307, 41 S. E. 456.

In *Shelp v. U. S.*, 81 Fed. 694, the court held that it may be that an Indian, whose religious ideas have not been as fully developed as some white man's, may have as keen a preception of the facts which transpired in his presence, and be as able to satisfy a jury of the truth of his statements, as any white man could do.

20. *People v. McLane*, 60 Cal. 412; *People v. Putman*, 129 Cal. 258, 61 Pac. 961; *State v. Dalton*, 20 R. I. 114, 37 Atl. 673; *Keith v. State*, (Tex. Crim. App.), 56 S. W. 628.

In *Tennessee Coal, Iron & R. Co. v. Haley*, 85 Fed. 534, an ex-convict was called as a witness to facts coming within his knowledge and observation while serving his sentence in the employment of the plaintiff in error. As the defendant was compelled to call this witness and present him to the jury as an ex-convict, it was proper to inquire of the man himself how far his liberty was restrained, to show his obedient and law-abiding conduct, as an offset to his conviction, and to show absence of ill-feeling or animosity toward his employer, against whom he was called to testify.

21. *Davis v. Meaux*, 15 Ky. L. Rep.

habitual user of intoxicants,<sup>22</sup> morphine,<sup>23</sup> or opium,<sup>24</sup> does not necessarily affect the reliability of his statements for truth, unless the mental faculties are thereby affected,<sup>25</sup> or the witness was under the influence of the drug at the time the event happened about which he testified.<sup>26</sup>

**4. Positive and Negative Statements.** — The observation of a fact by some is entirely consistent with the failure of others to observe or the forgetfulness of the occurrence,<sup>27</sup> and to this extent it is the rule

308, 22 S. W. 324, where the proposition is not stated but plainly assumed.

22. *Finch v. State*, 81 Ala. 41, 1 So. 565; *People v. Kahler*, 93 Mich. 625, 53 N. W. 826.

In *State v. Castello*, 62 Iowa 404, 17 N. W. 605, the court, in directing the jury as to the effect of the witness' condition, used the following language: "The fact that a witness present at the death of Salberg, and who, testifying as to facts, was under the influence of liquor to any extent, does not affect his credibility, if you find that, at the time he was testifying, he distinctly remembered the facts as they occurred. It is the truth that the law seeks, and the condition of the witness is immaterial, except as a means of determining his ability and desire to know and tell the truth." The supreme court said: "We think the instruction correct. It does not follow that the capacity of observation and the powers of memory are destroyed by intoxication, which is not to the degree producing stupor. While it must be admitted that intoxication does not destroy credibility, it undoubtedly impairs it. But if the evidence of one who was intoxicated at the time of the occurrence of which he testified is corroborated, or if his memory of the transaction appears to be distinct and clear, he is entitled to belief."

23. *Botkin v. Cassady*, 106 Iowa 334, 76 N. W. 722; *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.

24. *Eldridge v. State*, 27 Fla. 162, 9 So. 448; *State v. White*, 10 Wash. 611, 39 Pac. 160.

In *State v. King*, (Minn.), 92 N. W. 965, it was urged that the court erred in refusing to permit defendant to prove the fact that the state's

witness, Edwards, was a confirmed opium eater, and had been addicted to its use for years, and, further, that the use of opium renders the user unreliable in his statements and prone to falsehood. *Held*, "That whether the witness was a confirmed opium eater or not, or whether the indulgence renders the user unreliable and untruthful in his statements, was a collateral issue, which the court properly declined to try. The witness was before the court. His mental condition was obvious to both court and jury, and it was for them to say whether he was in a condition of mind to understand and appreciate his testimony; whether he was fabricating, or whether his testimony was straightforward and unequivocally given. His appearance, demeanor, and the manner in which he gave his testimony were sufficient to inform the jury of his mental faculties, and from which they could judge his credibility."

25. *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294; *Com. v. Howe*, 9 Gray (Mass.) 110.

26. *State v. Feltes*, 51 Iowa 495, 1 N. W. 755; *State v. Grear*, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296; *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655, 41 Pac. 998, 31 L. R. A. 294; *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *Mace v. Reed*, 89 Wis. 440, 62 N. W. 186; *Kuenster v. Woodhouse*, 101 Wis. 216, 77 N. W. 165.

27. *Horn v. Baltimore & O. R. Co.*, 54 Fed. 301.

In *Ralph v. Chicago & N. W. R. Co.*, 32 Wis. 177, an action was brought to recover the value of a quantity of rope which the plaintiff alleged he delivered to defendant. The testimony of two witnesses, T.

that the positive testimony of an otherwise credible witness to a fact is entitled to more weight than that of another of equal credibility who testifies negatively.<sup>28</sup> But while, as a general rule, this statement

and B., both appearing to be worthy of belief, was received. The testimony of T. was affirmative. He swears positively to the affirmative fact that he delivered the rope in the freight room of the depot by the direction of B. Held, there is but little room in this testimony for failure of memory. He either did so or he has probably committed perjury. The testimony of B., although somewhat positive in form, is negative in effect. It means but little more than that she has no recollection of the transaction to which T. testifies. In her case there is more room for failure of recollection. A single question put to her by T. when she was otherwise, and perhaps intently, engaged about something else, and a brief reply, was the whole of the transaction so far as she was concerned. It is not strange if it made no impression upon her mind and passed at once from her recollection.

**28. United States.**—Crew v. St. Louis, K. & N. W. R. Co., 20 Fed. 87.

**Alabama.**—Pool v. Devers, 30 Ala. 672; Stoddard v. Kelly, 50 Ala. 452.

**Dakota.**—Pielke v. Chicago, M. & St. P. R. Co., 5 Dak. 444, 41 N. W. 669.

**Delaware.**—Parvis v. Philadelphia, W. & B. R. Co., 8 Houst. 436, 17 Atl. 702.

**Georgia.**—Matthews v. Poythress, 4 Ga. 287; Aden v. Edmundson, 85 Ga. 883, 11 S. E. 776; Humphries v. State, 100 Ga. 260, 28 S. E. 25; Kimbrough v. State, 101 Ga. 583, 29 S. E. 39; Hollis v. Sales, 103 Ga. 75, 29 S. E. 482.

**Illinois.**—Frizell v. Cole, 42 Ill. 362; Chicago & R. I. R. Co. v. Still, 19 Ill. 499, 71 Am. Dec. 236.

**Kansas.**—Missouri Pac. R. Co. v. Pierce, 39 Kan. 391, 18 Pac. 305.

**Louisiana.**—Hepburn v. Citizens' Bank, 2 La. Ann. 1,007, 46 Am. Dec. 564; Socola v. Chess Carley Co., 39 La. Ann. 344, 1 So. 824.

**Mississippi.**—Lucas v. Goff, 33 Miss. 629.

**New York.**—Van Patten v. Schenectady R. Co., 62 N. Y. St. 378, 30 N. Y. Supp. 501.

**North Carolina.**—Cawfield v. Ashville R. Co., 111 N. C. 597, 16 S. E. 703.

**Pennsylvania.**—Frantz v. Lenhart, 56 Pa. St. 365.

**Vermont.**—Farmers & Mech. Bank v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

**Wisconsin.**—Ralph v. Chicago & N. W. R. Co., 32 Wis. 177; Joannes v. Millerd, 90 Wis. 68, 62 N. W. 916; Shekey v. Eldredge, 71 Wis. 538, 37 N. W. 820.

The court charged the jury in *Stitt v. Huidekopers*, 17 Wall. (U. S.) 384, that "It is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed." Mr. Justice Miller, in delivering the opinion of the court, stated that "The charge was a sound exposition of a recognized rule of evidence of frequent application, and the reason of the rule, as stated in the charge, dispenses with the need of further comment."

In the case of *Haun v. Rio Grande W. R. Co.*, 22 Utah 346, 62 Pac. 908, Judge Baskin, commenting upon the general rule as to positive and negative evidence, held, "That the general rule of evidence that affirmative testimony is of higher character and of greater weight than negative is not applicable (1) when negative witnesses who are credible and who were in a position where they could readily hear and see what transpired, and directed their attention thereto, testify that they did not see or hear the occurrence testified to by the affirmative witnesses; (2) when negative witnesses who are

is correct, more weight will often be attached to the position of the witness for observing the facts,<sup>29</sup> or whether his attention was directed thereto, than to the affirmative or negative form of the testimony.<sup>30</sup>

#### IV. STATUS.

**1. Residence and Occupation.**—A witness may be questioned in his examination in chief with regard to his residence, occupation, the positions then or previously held by him, that the jury may fairly estimate the value and weight of his testimony;<sup>31</sup> but one cannot strengthen the credibility of one of his own witnesses by making such inquiries concerning him of other witnesses.<sup>32</sup>

**2. As to History and Antecedents.**—The opposing party may make a full inquiry into his history, as to matters affecting his character and antecedents, to show the true character of the witness, thereby preventing an over-estimation of his testimony in the minds of the jury.<sup>33</sup>

credible, and who were in a position where they could readily hear and see what transpired, and directed their attention thereto, testify positively that the occurrences testified to by the affirmative did not happen.

In this case these exceptions only, and not the general rule, apply to the testimony disclosed by the record. If there were no exceptions to the general rule in question, affirmative testimony in no instance could be overcome by negative testimony, however strong the negative testimony might be. . . . In view of the character of the testimony submitted to the jury in this case, it was error for the court to state this general rule without stating its exceptions."

29. *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424; *Wilson v. McGhee*, 4 Ky. 34.

30. *Atlanta & W. P. R. Co. v. Johnson*, 66 Ga. 259; *Georgia Pac. R. Co. v. Freeman*, 83 Ga. 583, 10 S. E. 277; *Olsen v. Oregon Short Line*, 9 Utah 129, 33 Pac. 623.

31. *Cochran v. U. S.*, 157 U. S. 286; *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855; *Roop v. State*, 58 N. J. L. 479, 34 Atl. 749.

In *State v. Haynes*, 7 N. D. 352, 75 N. W. 267, the following instructions were objected to: "You should take into consideration his general character, what his business

is and has been, who he is, where he comes from, and what his antecedents are, if the same have been proven. These are all circumstances which it is proper to consider in determining for yourself just what weight should be given to the testimony of any particular witness, either for the state or for the defendant, who has testified in this case." The court said: "We fail to see wherein this instruction is faulty. It is purely cautionary, and is fair and impartial." "The jury cannot know too much of a witness to properly weigh his testimony." *Castenholz v. Heller*, 82 Wis. 30, 51 N. W. 432.

32. *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855.

33. In *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203, *Campbell, J.*, said: "A large latitude has been given, where the circumstances seemed to justify it, in allowing a full inquiry into the history of witnesses, and into many other things tending to illustrate their true character. This may be useful in enabling the court or jury to comprehend just what sort of person they are called upon to believe, and such a knowledge is often very desirable. It may be quite as necessary, especially where strange or suspicious witnesses are brought forward, to enable counsel to extract from them the whole

A. SPECIFIC ACTS OF MISCONDUCT. — Specific acts of misconduct, involving moral turpitude, or tending to disgrace the witness, may be disclosed upon cross-examination, and be considered by the jury to affect and injure the credibility of the witness;<sup>34</sup> the acts may

truth on the merits. . . . He may be proved by record evidence to have been convicted of infamous crimes, but not to have done other infamous deeds, nor to have undergone personal disgrace. And even as to previous conviction of infamous crimes, the rule is seldom of any great service, because no one can be expected to know in advance what witnesses may appear, nor what may have been their history. Unless the remedy is found in cross-examination, it is practically of no account. It has always been held that within reasonable limits a witness may, on cross-examination, be very thoroughly sifted upon his character and antecedents. Within the discretion of the court we think a witness may be asked concerning all antecedents which are really significant, and which will explain his credibility, and it is certain that proof of punishment in a state prison may be an important fact for this purpose."

In *Carroll v. State*, 32 Tex. Crim. App. 431, 24 S. W. 100, 40 Am. St. Rep. 786, the court said: "This character of cross-examination is permitted upon the theory that where a man's life or liberty depends upon the testimony of another, it is of the highest importance that they whom the law makes the exclusive judges of the facts and of the *credibility* of the witnesses, should know how far the witness is to be trusted. They ought to know his surroundings and status, so as not to give to one belonging to the criminal class the same credit as he whose character is irreproachable. If, therefore, it should appear on cross-examination that the witness had a previous criminal experience, or spent a part of his life in jail, or was convicted, or has suffered some infamous punishment, or had been in jail on a criminal charge, it would tend to shake or impair his credit, and the jury should have such information. While it may seem hard to compel a witness

to commit perjury or destroy his own standing before the court, it would seem absurd to place the feelings of a profligate witness in competition with the substantial rights of the parties in the case."

34. *California*. — *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697; *People v. Crowley*, 100 Cal. 478, 35 Pac. 84.

*Connecticut*. — *State v. Ward*, 49 Conn. 429.

*Indiana*. — *Van Cleave v. State*, 150 Ind. 273, 49 N. E. 1,060.

*Iowa*. — *State v. O'Brien*, 81 Iowa 93, 46 N. W. 861.

*Kentucky*. — *Burdette v. Com.*, 93 Ky. 76, 18 S. W. 1,011; *Roberts v. Com.*, 14 Ky. L. Rep. 219, 20 S. W. 267.

*Louisiana*. — *State v. Callian*, 109 La. 346, 33 So. 363.

*Massachusetts*. — *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491.

*Michigan*. — *People v. Arnold*, 40 Mich. 710; *People v. Foote*, 93 Mich. 38, 52 N. W. 1,036; *People v. Turney*, 124 Mich. 542, 83 N. W. 273; *Conkey v. Carpenter*, 106 Mich. 1, 63 N. W. 990.

*Missouri*. — *State v. South*, 145 Mo. 663, 47 S. W. 790; *State v. Martin*, 124 Mo. 514, 28 S. W. 12.

*Nebraska*. — *Hill v. State*, 42 Neb. 503, 60 N. W. 916.

*New York*. — *Maine v. State*, 9 Hun 113; *Lindsley v. Miller*, 3 App. Div. 127, 39 N. Y. Supp. 393; *People v. Conroy*, 153 N. Y. 174, 47 N. E. 258.

*North Dakota*. — *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1,003; *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1,052, 35 L. R. A. 518; *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482.

*Ohio*. — *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496.

*Texas*. — *Woodson v. State*, 24 Tex. App. 153, 6 S. W. 184; *Williams v. State*, 28 Tex. App. 301, 12 S. W. 1,103; *Goode v. State*, 32 Tex. Crim. App. 505, 24 S. W. 102; *Brown v. State*, (Tex. Crim. App.), 24 S.



tend to show a relationship between the parties and the witness,<sup>35</sup> or that the witness is possessed of such a character as to be unworthy of belief.<sup>36</sup> If the specific act alleged is a felony it is proper

W. 639; *Chavarria v. State*, (Tex. Crim. App.), 63 S. W. 312.

*Utah*.—*People v. Hite*, 8 Utah 461, 33 Pac. 254.

In *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61, a witness who testified in behalf of defendant was cross-examined as to his past life and conduct, and after stating that he had been under arrest, he was asked what he had been arrested for, when an objection was made that the record was the best evidence, and further that it was only a civil arrest. Johnson, J., said: "For the purpose of judging the character and credit of a witness, he may be cross-examined as to specific facts tending to disgrace or degrade him, although collateral to the main issue, and touching on matters of record. Such questions are allowed when there is reason to believe that allowing them will tend to the ends of justice, and are asked for the purpose of honestly discrediting the witness."

In *Wheeler v. State*, 112 Ga. 43, 37 S. E. 126, error was assigned upon the following charge: "A witness may be discredited by showing that such witness has been living a life of moral turpitude, or of committing immoral acts; the effect and weight of such evidence in all cases to be determined by the jury." The rule is that a witness cannot be impeached by proof that he has led a life of moral turpitude or has been guilty of immoral acts, but, when a witness' own testimony discloses that such are the facts with respect to his life and conduct, the jury may consider such evidence in determining the credibility of his testimony; the weight and effect of such facts being entirely for the jury.

J. Campbell held, in *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203, that, "It cannot be doubted that a previous criminal experience will depreciate the credit of a witness to a greater or less extent, in the judgment of all persons, and there must be some means of reaching this his-

tory. The rules of law do not allow specific acts of misconduct of a disgraceful character to be proved against a witness by others. . . . Unless the remedy is found in cross-examination, it is practically of no account."

In *South Bend (City) v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792, the court held that "If the cross-examination tends merely to disgrace the witness, but relates to a collateral and independent fact, and goes clearly to the credit of the witness, whether in such case he has the privilege to decline or not, the matter so far rests in the discretion of the trial court that in the absence of a claim of privilege, if the question relate to a matter of recent date and would materially assist the jury or the court in forming an opinion as to his credibility, the court will usually require an answer, over the objection of counsel, but may sustain an objection." See *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70.

**When Defendant Offers Himself as a Witness.**—In *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1,052, 35 L. R. A. 518, the court held that "Where a cross-examiner seeks to impair the credibility of a witness by proof of collateral crimes, he should be confined to specific acts. He may ask the witness whether or not he committed the act, or whether he has been convicted thereof, or imprisoned therefor. But, manifestly, the interrogatories should be so framed as to permit the witness to admit or deny the act itself. He should not, for impeachment purposes, be asked questions which simply suggest inference."

35. *Tla-Koo-Yel-Lee v. U. S.*, 167 U. S. 274; *State v. Ferguson*, 71 Conn. 227, 41 Atl. 769; *Totten v. Burhans*, 103 Mich. 6, 61 N. W. 58; *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *Magruder v. State*, 35 Tex. Crim. App. 214, 33 S. W. 233; *Exon v. State*, 33 Tex. Crim. App. 46, 26 S. W. 1,088.

36. *Parker v. State*, 136 Ind. 284,

to show it either by the examination of the witness or by a record of the judgment.<sup>37</sup>

B. MERE ACCUSATIONS. — Some courts hold that mere accusations furnish no proof of guilt, and cannot be used to affect the credibility of the witness.<sup>38</sup> Texas courts hold that cross-examination as to accusations involving moral turpitude must be permitted.<sup>39</sup>

C. EXTENT OF RULE. — The general rule is that the limit of cross-examination to affect credibility is a matter of discretion in the trial court not subject to review on writ of error or appeal, unless the discretion is abused.<sup>40</sup>

35 N. E. 1,105; *Shears v. State*, 147 Ind. 51, 46 N. E. 331.

37. *Alabama*. — *Smith v. State*, 129 Ala. 89, 29 So. 699, 87 Am. St. Rep. 47.

*Arkansas*. — *Anderson v. State*, 34 Ark. 257.

*California*. — *People v. Elster*, (Cal.), 3 Pac. 884.

*Idaho*. — *Anthony v. State*, (Idaho), 55 Pac. 884.

*Illinois*. — *Daxanbeklar v. People*, 93 Ill. App. 553.

*Iowa*. — *Palmer v. Cedar Rapids & M. R. Co.*, 113 Iowa 442, 85 N. W. 756.

*Maryland*. — *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603.

*Michigan*. — *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221.

38. *Arkansas*. — *Anderson v. State*, 34 Ark. 257.

*California*. — *People v. Elster*, (Cal.), 3 Pac. 884; *People v. Hamblin*, 68 Cal. 101, 8 Pac. 687.

*Florida*. — *Wallace v. State*, 41 Fla. 547, 26 So. 713.

*Iowa*. — *State v. Millmeier*, 102 Iowa 692, 72 N. W. 275.

*Michigan*. — *Derwin v. Parsons*, 52 Mich. 425, 18 N. W. 200, 50 Am. Rep. 262.

*New York*. — *People v. Gay*, 7 N. Y. 378; *Willson v. Eveline*, 35 App. Div. 92, 54 N. Y. Supp. 514; *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302; *Ryan v. People*, 79 N. Y. 593; *People v. Irving*, 95 N. Y. 541.

*North Dakota*. — *State v. Pano-coast*, 5 N. D. 516, 67 N. W. 1,052, 35 L. R. A. 518.

In *Van Bokkelen v. Berdell*, 130 N. Y. 141, 29 N. E. 254, the defendant upon his cross-examination was

asked if he was under indictment for perjury. This question was objected to, the objection overruled, and an exception taken. He was compelled to answer that he had been told so, but that he had not seen the papers. *Held*, that while a witness may be discredited by showing his conviction for an offense, we do not understand it to be competent to discredit him by showing that he has been indicted.

In *Bates v. State*, 60 Ark. 450, 30 S. W. 890, *Hughes, J.*, in his opinion said: "An indictment raises no legal presumption of guilt against a defendant. If it be wrong to ask such a question of a witness not himself on trial, it is, in our opinion, much more so where the defendant is the witness himself in his own behalf. None of the infamy that attaches to conviction attaches to the mere accusation. . . . The evidence given by a defendant is looked upon with suspicion and distrust, and if, in addition to this, he may be subjected to a cross-examination upon every incident of his life, and every charge of vice or crime which may have been made against him, and which have no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict upon evidence which otherwise would be deemed insufficient."

39. *Brittain v. State*, 36 Tex. Crim. App. 406, 37 S. W. 758; *Goode v. State*, 32 Tex. Crim. App. 505, 24 S. W. 102.

40. *United States*. — *Storm v. U. S.*, 94 U. S. 76.

*Connecticut*. — *State v. Ferguson*, 71 Conn. 227, 41 Atl. 769.

## V. TESTS OF CREDIBILITY.

1. **In General.** — All the circumstances surrounding the witness are to be considered by the jury in arriving at their judgment in the matter.<sup>41</sup> The witness is before them; they see and hear him; the age, apparent intelligence, candor and fairness, or the want thereof,

*Kansas.* — *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406.

*Louisiana.* — *State v. Murphy*, 45 La. Ann. 958, 13 So. 229.

*Massachusetts.* — *Com. v. Lyden*, 113 Mass. 452.

*Michigan.* — *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221.

*Nebraska.* — *Hill v. State*, 42 Neb. 503, 60 N. W. 916.

*New York.* — *Markgraf v. Klinge*, 35 Misc. 196, 71 N. Y. Supp. 590.

*Ohio.* — *Wroe v. State*, 20 Ohio 460; *Hanoff v. State*, 37 Ohio St. 178, 31 Am. Rep. 496.

*Oregon.* — *State v. Bacon*, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8.

*Utah.* — *People v. Hite*, 8 Utah 461, 33 Pac. 254.

**Extent of the Examination.** — In *Western Tpke. R. Co. v. Loomis*, 32 N. Y. 127, 88 Am. Dec. 311, an action for the recovery of toll by plaintiff against defendant, the defendant objected that he was not permitted, on the cross-examination of the principal witness, to put questions irrelevant to the issue for the sole purpose of degrading the witness and thereby destroying his credibility. *Held*, "That questions of this nature can be determined nowhere more safely or more justly than in the tribunal before which the examination is conducted. Justice to the witness demands that the court to which he appeals for present protection shall have power to shield him from indignity, unless the circumstances of the case are such that he cannot fairly invoke that protection. If the range of irrelevant inquiry be committed to the discretion of the adverse counsel, it will be no reparation of the wrong to the witness that the judgment, in which he has no concern, may be afterward reversed by an appellate tribunal. In this, as in other like cases, involving mere questions of practice, order and decorum, the right and the duty of decision are wisely committed to the

sound discretion of the court in which the trial is conducted. Unless there be a plain abuse of discretion, decisions of this nature are not subject to review on appeal."

**When Questions of This Character Are Excluded.** — "The matter sought to be examined into on cross-examination of a witness for the purpose of attacking his credibility should have a legitimate bearing upon that particular subject. Counsel should not be permitted to call upon him to expose particulars of his past life simply to attempt to bring him into reproach before the jury. The witnesses are entitled to proper protection from unnecessary and improper specific investigation of their past history." *State v. Haab*, 105 La. 230, 29 So. 725.

41. *Arizona.* — *Trimble v. Territory*, (Ariz.), 71 Pac. 932.

*Delaware.* — *Armstrong v. Little*, (Del.), 54 Atl. 742.

*Florida.* — *Lang v. State*, 42 Fla. 595, 28 So. 856.

*Georgia.* — *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329.

*Illinois.* — *Haines v. People*, 82 Ill. 430.

*Iowa.* — *Cottrell v. Piatt*, 101 Iowa 231, 70 N. W. 177.

*Nebraska.* — *Omaha & R. V. R. Co. v. Brown*, 29 Neb. 492, 46 N. W. 39.

*Vermont.* — *State v. Powers*, 72 Vt. 168, 47 Atl. 830.

*Virginia.* — *Horton v. Com.*, 99 Va. 848, 38 S. E. 184.

*Wisconsin.* — *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

In *Lee v. State*, 74 Wis. 45, 41 N. W. 960, the court, after telling the jury that the interest of the defendant in the result of the prosecution should be considered in determining the credibility of his testimony, added: "Where the witnesses appear to be equally credible in every other respect, the one who appears to have the greater interest in the

are matters for consideration as affecting his or her credibility.<sup>42</sup>

**2. Memory, Power of Observation.** — Many questions not relevant to the cause in issue are allowed solely for the purpose of testing the reliability of the witness.<sup>43</sup> They should consist of those questions which would aid the jury in forming a standard of reliability and credence by testing the memory of the witness,<sup>44</sup> his habits and

result of the case is to have the less weight of the two." *Held*, error. This rule leaves out any consideration of surrounding circumstances, or of the effect of other testimony corroborative of the testimony of one or the other witness.

**42. Delaware.** — *Ball v. Kane*, 1 Pen. 90, 39 Atl. 778.

**Florida.** — *Glover v. State*, 22 Fla. 493.

**Georgia.** — *Jeter v. Haviland*, 24 Ga. 252; *Whitten v. State*, 47 Ga. 297.

**Indiana.** — *Rogers v. Rogers*, 46 Ind. 1; *Young v. Gentis*, 7 Ind. App. 199, 32 N. E. 796; *Lake Shore & M. S. R. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476.

**Iowa.** — *Cottrell v. Piatt*, 109 Iowa 231, 70 N. W. 177.

**Minnesota.** — *State v. King*, (Minn.), 92 N. W. 965.

**Missouri.** — *State v. Adair*, 160 Mo. 391, 61 S. W. 187.

**Nebraska.** — *Chezem v. State*, 56 Neb. 496, 76 N. W. 1,056.

**Texas.** — *McGrath v. State*, 35 Tex. Crim. App. 413, 34 S. W. 127.

**Virginia.** — *Horton v. Com.*, 99 Va. 848, 38 S. E. 184.

**Wisconsin.** — *Shekey v. Eldredge*, 71 Wis. 538, 37 N. W. 820.

In *Lentz v. Carnegie Bros. & Co.*, 145 Pa. St. 612, 27 Am. St. Rep. 717, where the witness had put a value upon the plaintiff's farm, Williams, J., held that "The defendants had a right to test his knowledge and his fairness as a witness, upon cross-examination. For this purpose it was proper to ask him if he did not know of sales of farm lands in the same vicinity, at a much less price than he had put upon the farm of the plaintiff. If he did know of such sales, but disregarded them in fixing the price of the plaintiff's land, that circumstance was calculated to affect his credibility unless it was explained to the satisfaction of the jury."

**43. California.** — *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859.

**Connecticut.** — *State v. Ferguson*, 71 Conn. 227, 41 Atl. 769.

**Louisiana.** — *State v. Brown*, 4 La. Ann. 505.

**Maryland.** — *Somerset Co. Com'rs v. Minderlin*, 67 Md. 566, 11 Atl. 57.

**Massachusetts.** — *Lewis v. Boston G. Co.*, 165 Mass. 411, 43 N. E. 178; *Com. v. Flynn*, 165 Mass. 153, 42 N. E. 562.

**Michigan.** — *Hart v. Walker*, 100 Mich. 406, 59 N. W. 174.

**New York.** — *People v. Augsbury*, 97 N. Y. 501; *Phelps v. Court of O. & T.*, 83 N. Y. 436.

**Ohio.** — *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496.

**Wisconsin.** — *Kellogg v. Nelson*, 5 Wis. 125.

**The Limitation of the Rule.** — In *Wallace v. State*, 41 Fla. 547, 26 So. 713, Carter, J., stated: "The court should disallow all inquiries into collateral matters which do not tend to affect credibility. The inquiry must in general, though not necessarily always, relate to transactions comparatively recent, and the transaction inquired about must be one which bears directly upon the present character or credit of the witness. Inquiry into collateral matters should not be permitted unless there is reason to believe it may tend to promote the ends of justice, and it seems essential to the true estimation of the witness' testimony by the jury. The court should promptly suppress all inquiry into matters not relevant to credit, and should not permit a disparaging course of examination, which seems unjust to the witness, and uncalled for by the circumstances of the case."

**44. Alabama.** — *Boulden v. State*, 102 Ala. 78, 15 So. 341.

**California.** — *Davis v. California P. Wks.*, 84 Cal. 617, 24 Pac. 387; *People v. Goodwin*, 132 Cal. 368, 64

power of observation,<sup>45</sup> as well as his accuracy of statement.<sup>46</sup> The extent of this examination is largely within the discretion of the court,<sup>47</sup> and unless there has been a plain abuse of sound discretion,

Pac. 561; *People v. Rader*, 136 Cal. 253, 68 Pac. 707.

*Connecticut*.—*State v. Duffey*, 57 Conn. 525, 18 Atl. 791.

*Indiana*.—*Hyland v. Milner*, 99 Ind. 308.

*New York*.—*Parmelee v. People*, 8 Hun 623; *Leonard v. Brooklyn Heights R. Co.*, 57 App. Div. 125, 67 N. Y. Supp. 985.

*South Carolina*.—*Sloan v. Courtenay*, 54 S. C. 314, 32 S. E. 431.

*Texas*.—*Cunningham v. Austin & N. W. R. Co.*, 88 Tex. 534, 31 S. W. 629.

45. *California*.—*Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846; *People v. Smith*, 134 Cal. 453, 66 Pac. 669.

*Connecticut*.—*Hartford (City) v. Champion*, 58 Conn. 268, 20 Atl. 471.

46. *Alabama*.—*Phoenix Ins. Co. v. Copeland*, 86 Ala. 551, 6 So. 143, 4 L. R. A. 848; *Southern R. Co. v. Brantley*, 132 Ala. 655, 32 So. 300.

*California*.—*Taggart v. Bosch*, (Cal.), 48 Pac. 1,092; *Davis v. California P. Wks.*, 84 Cal. 617, 24 Pac. 387.

*Kentucky*.—*O'Daniel v. Smith*, 23 Ky. L. Rep. 1,822, 66 S. W. 284.

*Nebraska*.—*Schraudt v. Young*, 62 Neb. 254, 86 N. W. 1,085.

*New Hampshire*.—*University of Ill. v. Spaulding*, 71 N. H. 163, 51 Atl. 731.

*Oregon*.—*State v. Savage*, 36 Or. 191, 60 Pac. 610.

*Vermont*.—*Stevens v. Beach*, 12 Vt. 585, 36 Am. Dec. 359.

In *New Gloucester v. Bridgham*, 28 Me. 60, an exception was taken to the permission, by the court, on the examination of a witness, introduced by the defendant, to inquire why he did certain acts which he had testified to on his examination in chief. *Whitman, C. J.*, in his opinion said: "Such inquiries may be allowed oftentimes, although they may have no direct tendency to support or disprove the issue, in order to test the accuracy of the recollection of an adversary's witness, or to affect his credibility. In giving his reasons for doing the act, he might render it

incredible that he should have done it."

47. *Alabama*.—*Noblin v. State*, 100 Ala. 13, 14 So. 767; *Southern R. Co. v. Brantley*, 132 Ala. 655, 32 So. 300; *Tobias v. Treist*, 103 Ala. 664, 15 So. 914.

*California*.—*People v. Rader*, 136 Cal. 253, 68 Pac. 707.

*Indiana*.—*Hinchecliff v. Koontz*, 121 Ind. 422, 23 N. E. 271, 10 Am. St. Rep. 403.

*Louisiana*.—*State v. Brown*, 4 La. Ann. 505; *State v. Kane*, 36 La. Ann. 153.

*New York*.—*Greton v. Smith*, 33 N. Y. 245; *State v. Casey*, 72 N. Y. 393; *Markgraf v. Klinge*, 35 Misc. 196, 71 N. Y. Supp. 590; *People v. Fleming*, 37 N. Y. St. 655, 14 N. Y. Supp. 200.

*Vermont*.—*State v. Plant*, 67 Vt. 454, 32 Atl. 237, 48 Am. St. Rep. 821; *State v. Bean*, 74 Vt. 111, 52 Atl. 269.

*Washington*.—*Shoemaker v. Bryant L. & S. M. Co.*, 27 Wash. 637, 68 Pac. 380.

*Wisconsin*.—*Kellogg v. Nelson*, 5 Wis. 125.

In *State v. Duffey*, 57 Conn. 525, 18 Atl. 791, the defendant complained of the action of the court in allowing sundry questions of the state's attorney in his cross-examination of the defendant as to what occurred at the preliminary examination. The court held that "The questions asked were admitted solely to test the defendant's recollections in regard to what took place before the justice, as a means of ascertaining how far his recollection was right with regard to this particular matter. We cannot say that the court erred in allowing these questions for this purpose. Such a matter is largely within the discretion of the court. Of course a clear recollection of other matters that were testified to as having occurred on the trial would tend to show an accuracy of recollection with regard to the matter in question, while the want of all clear and accurate recollection of such other matters would

the decisions of the trial court will not be subject to review on appeal.<sup>48</sup>

**3. Probability of His Statements.** — The probability or improbability of the statements of the witness should be considered.<sup>49</sup> The jury should consider the correctness of the statements as compared with the usual and ordinary nature of things.<sup>50</sup> There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made,<sup>51</sup> or so unreasonable that the jury will be justified in rejecting them as untrue.<sup>52</sup>

**4. Manner of Testifying.** — The jury should consider the manner, appearance and conduct of the witness upon the stand as affecting the credence to be placed upon the testimony given by him.<sup>53</sup>

detract from the weight of the defendant's testimony upon that matter."

48. *State v. King*, (Minn.), 92 N. W. 965; *Western Tpke. Co. v. Loomis*, 32 N. Y. 127, 88 Am. Dec. 311.

In *Langley v. Wadsworth*, 99 N. Y. 61, 1 N. E. 106, Danforth, J., stated in his opinion that "So far as the cross-examination of a witness relates either to facts in issue or relevant facts, it may be pursued by counsel as a matter of right; but when its object is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and unless abused, its exercise is not the subject of review."

49. *United States*. — *Quock Ting v. U. S.*, 140 U. S. 417; *Tracy v. Phelps (Town)*, 22 Fed. 634; *Sharon v. Hill*, 26 Fed. 337; *Au v. New York L. E. & W. R. Co.*, 29 Fed. 72; *U. S. v. Kenney*, 90 Fed. 257.

*California*. — *Blankman v. Vallejo*, 15 Cal. 639.

*Georgia*. — *Duncan v. State*, 97 Ga. 180, 25 S. E. 182.

*Indiana*. — *Robertson v. Monroe*, 7 Ind. App. 470, 33 N. E. 1,002.

*Kentucky*. — *Barnard v. Com.*, 10 Ky. L. Rep. 143, 8 S. W. 444; *Neace v. Com.*, 23 Ky. L. Rep. 25, 62 S. W. 733.

*Louisiana*. — *Breard v. Mechanics T. Ins. Co.*, 29 La. Ann. 764.

*Missouri*. — *Weaver v. Benton B. & L. R. Co.*, 60 Mo. App. 207.

*Nebraska*. — *Schraudt v. Young*, 62 Neb. 254, 86 N. W. 1,085; *Johnson v. Guss*, 41 Neb. 19, 59 N. W. 520.

*North Carolina*. — *State v. Miller*, 97 N. C. 484, 2 S. E. 363.

*Pennsylvania*. — *Lautner v. Kann*, 184 Pa. St. 334, 39 Atl. 55.

*Wisconsin*. — *Welty v. Lake Superior Trans. Co.*, 100 Wis. 128, 75 N. W. 1,022.

50. *Willett v. Fister*, 85 U. S. 91; *Johnson v. U. S.*, 157 U. S. 320; *Bohl v. Carson*, 63 Fed. 26; *Macon Cons. R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 756; *Fifer v. Ritter*, 159 Ind. 8, 64 N. E. 463.

51. *Sharon v. Hill*, 26 Fed. 337; *Elwood v. Western U. Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *State v. Hull*, 45 W. Va. 767, 32 S. E. 240.

52. *Lang v. State*, 42 Fla. 495, 28 So. 856; *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *Welty v. Lake Superior Trans. Co.*, 100 Wis. 128, 75 N. W. 1,022.

53. *United States*. — *Johnson v. State*, 157 U. S. 320; *Quock Ting v. U. S.*, 140 U. S. 417.

*Arkansas*. — *Hamilton v. State*, 62 Ark. 543, 36 S. W. 1,054.

*Colorado*. — *Boykin v. People*, 22 Colo. 496, 45 Pac. 419; *Fleetwood v. Barnett*, 11 Colo. App. 77, 52 Pac. 293.

*Delaware*. — *Chielinsky v. Hoopes*, 1 Marv. 273, 40 Atl. 1,127; *Ball v. Kane*, 1 Pen. 90, 39 Atl. 778; *Armstrong v. Little*, (Del.), 54 Atl. 742.

*Florida*. — *Lang v. State*, 42 Fla. 595, 28 So. 856.

*Illinois*. — *Ammerman v. Teeter*, 49 Ill. 400; *Bowers v. State*, 74 Ill. 418; *Stampofski v. Steffens*, 79 Ill. 303.

*Kentucky*. — *Barnard v. Com.*, 10 Ky. L. Rep. 143, 8 S. W. 444.

*Missouri*. — *State v. Hilsabeck*, 132 Mo. 348, 34 S. W. 38; *State v. Adair*,

**5. Opportunity.** — The jury may look to the witness' opportunities for observing and knowing the facts he testifies about, in determining his credibility.<sup>54</sup>

**Particular Attention.** — The witness that shows by his testimony that he was interested in the event and that his mind was directed

160 Mo. 391, 61 S. W. 187; *Kirchner v. Collins*, 152 Mo. 394, 53 S. W. 1,081.

*Nebraska.* — *Maxfield v. State*, 54 N. 44, 74 N. W. 401; *Chezem v. State*, 56 Neb. 496, 76 N. W. 1,056.

*New Jersey.* — *Snyder v. Harris*, 61 J. J. Eq. 480, 48 Atl. 329; *McLean v. Erie R. Co.*, (N. J.), 54 Atl. 238.

*New Mexico.* — *Territory v. Leyba*, (N. M.), 47 Pac. 718.

*New York.* — *People v. Dickerson*, 58 App. Div. 302, 68 N. Y. Supp. 715.

*North Carolina.* — *State v. Miller*, 97 N. C. 484, 2 S. E. 363; *Glenn v. Farmers' Bank*, 70 N. C. 191.

*Texas.* — *Roberson v. State*, (Tex. Crim. App.), 49 S. W. 398.

In *U. S. v. Ybanez*, 53 Fed. 536, Judge Maxey said: "You should consider the manner and bearing of the witnesses in testifying. Do they show a zeal in stating facts favorable to one side, and reluctance in disclosing facts which would benefit the other? Do they testify in that frank and candid, straightforward way which a witness should do, under the solemnity of an oath? Or do they evade, or equivocate? . . . Under these rules you may give to the testimony of the witnesses such weight as in your judgment it should receive."

In *Fifer v. Ritter*, 159 Ind. 8, 61 N. E. 463, Judge Hadley in his opinion said: "Will any one say that a juror may discharge his duty by closing his eyes to the manner, conduct and appearance of witnesses while delivering their testimony, and giving to the naked words of each witness full and equal probative force? The competency of evidence is one thing, and its weight another. Competency is purely a question of law for the court to declare. Its weight is a question for the jury to determine. So when a judge tells a jury that it is proper for them to consider manner and interest, etc.,

of the witnesses, as it is usually phrased, he is but ruling, as he may rightly rule, that such evidence is competent, and in searching for the fact established by the evidence, it is the duty of the jury to consider all competent evidence that may throw light upon the truth, and it is no less essential to a correct result, and quite as much to the jury's duty, to consider facts and circumstances properly before them which go to discredit a witness, or to strengthen his testimony, as it is to consider the statements made by witnesses."

**Extent of the Rule.** — In *Purdy v. State*, 140 Ill. 46, 29 N. E. 700, the jury were instructed that they may consider the demeanor of a witness while on the witness stand, and also his demeanor and conduct during the trial. *Held*, that "The jury were sworn to try the issue submitted to them according to the law and the evidence, and most assuredly the demeanor and conduct of the defendant during the progress of the trial, and while he was not a witness upon the stand, were no part of the evidence in the case." We cannot conclude otherwise than that the misdirection constituted a substantial error.

**54. United States.** — *Johnson v. U. S.*, 157 U. S. 320.

*Alabama.* — *Hitt v. Rush*, 22 Ala. 563; *Jones v. Alabama Min. R. Co.*, 107 Ala. 400, 18 So. 30.

*Delaware.* — *Ball v. Kane*, 1 Pen. 90, 39 Atl. 778; *State v. Miller*, 9 Houst. 564, 32 Atl. 137; *Armstrong v. Little*, (Del.), 54 Atl. 742.

*Georgia.* — *Jeter v. Haviland*, 24 Ga. 252; *Phillips v. Williams*, 39 Ga. 597; *Amis v. Cameron*, 55 Ga. 449; *Wilson v. State*, 69 Ga. 224; *Wilson v. Burr*, 97 Ga. 256, 22 S. E. 991.

*Illinois.* — *Chicago, B. & Q. R. Co. v. Cauffers*, 38 Ill. 424; *Brady v. Thompson*, 17 Ill. 269; *Riggins v. State*, 46 Ill. App. 196.

*Indiana.* — *Fifer v. Ritter*, 159 Ind.

particularly to the occurrence, is entitled to more credence than one whose attention was incidentally drawn thereto, and who had no interest in the event.<sup>55</sup>

**6. Motive.** — A. IN GENERAL. — The jury should always consider any motive which the witness may have to testify the way he does, the temptation he has to color his testimony.<sup>56</sup> The state of

8, 64 N. E. 463; *Colee v. State*, 75 Ind. 511; *Parker v. State*, 136 Ind. 284, 35 N. E. 1,105.

*Louisiana.* — *State v. Breckinridge*, 33 La. Ann. 310.

*Missouri.* — *State v. Adair*, 160 Mo. 391, 61 S. W. 187.

*Nebraska.* — *Omaha & V. R. Co. v. Brown*, 29 Neb. 492, 46 N. W. 39; *Johnson v. Guss*, 41 Neb. 19, 59 N. W. 520.

In *Hitt v. Rush*, 22 Ala. 563, the court said that "When the conflict of testimony is real and not merely seeming, and the witnesses are equally honest and desirous of speaking the whole truth, then as one or the other of them must have been mistaken, we must ascertain with which the mistake lies. To do this we must look to the capacity of the witnesses, their respective opportunities of knowing the facts about which they depose, and the nature of the facts deposed to, as calculated to impress themselves with more or less force upon the memory. If, upon applying these tests, we can readily see how one may be mistaken, and that the other, if the testimony be untrue, must have committed perjury, the law inclines to the more charitable conclusion that the one is mistaken rather than that the other has committed this crime."

In a Georgia case the court said that "While in cases of conflicting testimony the jury may consider the opportunities of the witness of knowing the facts about which he testifies, and his interest or want of interest in the case, yet there is no rule of law which requires the jury to believe the witness who has 'the least inducement to swear falsely and the best means of knowing the facts about which he testifies.' Such a witness may, for other reasons, be entirely unworthy of belief; and certainly it

would not then be the duty of the jury to believe him." *Hudson v. Best*, 104 Ga. 131, 30 S. E. 688.

**55.** *Jeter v. Haviland*, 24 Ga. 252; *Haun v. Rio Grande & W. R. Co.*, 22 Utah 246, 62 Pac. 908.

In *Birmingham R. & Elec. Co. v. Clay*, 108 Ala. 233, 19 So. 309, a witness was asked to "State whether or not you heard anything said by any one near you which called your attention to the fact that said intestate was in a place of danger or was about to get into a place of danger, just before you said you saw said intestate running toward the train." He had said that he saw him running toward the train. The question was objected to by plaintiff; defendant's counsel thereupon stated to the court that he expected to show that the witness heard a remark made by another person standing near, which remark tended to call witness' attention to intestate's danger, or that intestate was about to get into a place of danger, and this impressed the fact upon the mind of the witness, and it was not intended that this evidence should be used for any other purpose. *Held*, that it was important for the jury to be fully informed of all the facts tending to show whether this witness was or was not mistaken, from his inadvertence, carelessness, or want of memory. Such evidence cannot be admitted to prove the truth of the irrelevant fact stated, but merely to show an outside circumstance which naturally called the attention of the witness to a fact deposed by him, and that fixed the fact in his recollection.

**56.** *Alabama.* — *Alabama, G. & S. R. Co. v. Johnson*, 108 Ala. 233, 29 So. 771.

*Illinois.* — *Campbell v. People*, 159 Ill. 9, 42 N. E. 123, 50 Am. St. Rep. 134.



mind of the witness is not a collateral issue, in the sense that the party cross-examining him is bound by it, and motive may be shown otherwise than by the witness affected by it.<sup>57</sup>

B. PECUNIARY INTEREST. — Mercenary incentive may be taken into account in giving weight to the credence of the witness, but is not as a matter of law ground for excluding his testimony from

*Missouri.* — *State v. Hilsabeck*, 132 Mo. 348, 34 S. W. 38.

*Texas.* — *Magruder v. State*, 35 Tex. Crim. App. 214, 33 S. W. 233; *McGrath v. State*, 35 Tex. Crim. App. 113, 34 S. W. 127; *Lyon v. State*, 42 Tex. Crim. App. 506, 61 S. W. 125.

*Utah.* — *Olson v. Oregon S. L. R. Co.*, 24 Utah 460, 68 Pac. 148.

*Wisconsin.* — *Johnson v. Superior R. T. Co.*, 91 Wis. 233, 64 N. W. 753.

#### Effect of Concealment of Motive.

In *Snyder v. Harris*, 61 N. J. Eq. 480, 48 Atl. 329, the court said: "Although Mr. Beucker's testimony as to transactions with Miss McFadden cannot, for the reasons stated, be stricken from the record, it is a very different matter when this situation of affairs is suggested as affecting his credibility as a witness. He comes upon the stand in truth the claimant of substantially all of this mortgage money, without disclosing that fact until it is wrung from him at the close of his cross-examination. He is the real complainant, but puts Mr. Snyder forward as the apparent complainant in order that he (Beucker) may go upon the stand as a witness, and give testimony which he could not have given had his real relation to the case been previously disclosed. He attended every one of the several days of the hearing, appearing to be the actually interested complainant; Mr. Snyder not appearing at all. Such conduct throws serious doubts upon a story already doubtful as narrated by him."

57. *Gregg v. State*, 106 Ala. 44, 17 So. 321; *Crumpton v. State*, 52 Ark. 273, 12 S. W. 563; *People v. Anderson*, 105 Cal. 32, 38 Pac. 513; *Louisville R. Co. v. Berry*, 16 Ky. L. Rep. 722, 29 S. W. 449; *Helwig v. Lascowski*, 82 Mich. 619, 46 N. W. 1,033, 10 L. R. A. 378; *Schultz v. Third Ave. R. Co.*, 89 N. Y. 242.

In *Lamb v. Lamb*, 146 N. Y. 317, 41 N. E. 26, the court permitted the defendant to testify to a quarrel between the defendant and the plaintiff, just prior to the time when he wrote the letters making the demand for rent, which was the subject of the suit. The defendant testified that in that quarrel the plaintiff made threats against her, and said that where he as guardian had saved her cents he would make her pay out dollars in more ways than one. It was objected to on the ground that the quarrel and dispute between these parties had no relation to the guardianship of the estate. The court held: "The evidence was admissible upon the well grounded principle that it is always proper to show the feeling of the witness toward the party against whom he testifies, and for the purpose of thereby affecting the credibility of his testimony."

In a Florida case Judge Mabry said: "We do not think it was immaterial, under the circumstances of this case, to contradict the witness as to his statements about the cause of his return into Volusia county. He had a short time before accepted \$25, as he admits, to keep from testifying in another case pending in that county, and when asked in this case at whose request he returned, he sought to convey the impression that it was on account of sickness. To what extent he had been influenced, though in a legitimate way, should have been judged by the jury after a full knowledge of what was done. The influences that brought him back would have a direct bearing upon his motive or interest in returning to testify in the case, and whatever was relevant in this direction was material and direct." *Bryan v. State*, 41 Fla. 643, 26 So. 1,022.

the jury.<sup>58</sup> It is unnecessary for the court to do more (even where so much is permissible) than inform the jury that the witness is a detective,<sup>59</sup> or "spotter,"<sup>60</sup> who is interested in or employed to find evidence, and should be weighed with greater care and caution than that given by disinterested witnesses.

58. *United States*. — *Grimm v. U. S.*, 156 U. S. 604; *U. S. v. Moore*, 19 Fed. 39; *U. S. v. Slenker*, 32 Fed. 691; *Colortype Co. v. Williams*, 78 Fed. 450.

*California*. — *People v. Benson*, 52 Cal. 380.

*Kansas*. — *State v. Barber*, 2 Kan. App. 679, 43 Pac. 800; *State v. Stickney*, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284.

*Maryland*. — *Guy v. State*, (Md.), 54 Atl. 879.

*Minnesota*. — *State v. Nestavall*, 72 Minn. 415, 75 N. W. 725.

*New York*. — *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128; *Sissinch v. Bernhart*, 29 Misc. 652, 61 N. Y. Supp. 107.

59. *Delaware*. — *State v. Miller*, 9 Houst. 564, 32 Atl. 137.

*Illinois*. — *Hronek v. People*, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837.

*Massachusetts*. — *Com. v. Downing*, 4 Gray 29; *Com. v. Mason*, 145 Mass. 555.

*Nebraska*. — *Preuit v. People*, 5 Neb. 377; *Sandage v. State*, 61 Neb. 240, 85 N. W. 35, 87 Am. St. Rep. 457; *Kastner v. State*, 58 Neb. 767, 79 N. W. 713.

*Michigan*. — *People v. Rice*, 103 Mich. 350, 61 N. W. 540.

*Montana*. — *In re Welcome*, 23 Mont. 450, 59 Pac. 445.

*Contra*. — No law subjects the evidence of a detective to other rules than those applied to other witnesses. A jury should not be instructed that the testimony of a detective is to be received with great caution and distrust, by reason of the motives to secure a conviction being different from those of good citizens under unselfish influences. *State v. Bennett*, 40 S. C. 308, 18 S. E. 886.

The fact that a witness is a detective, or employed to procure evidence, is no ground to consider him

unworthy of belief. *Burns v. People*, 45 Ill. App. 70.

The defendant has no ground of exception to the refusal of the court to instruct the jury that the witness was hired to procure evidence against him. *Com. v. Trainor*, 125 Mass. 414.

The testimony of a detective, or spotter, stands as any other witness, and subject to have his testimony weighed by the jury as any other witness. The credibility of the witness being fully submitted to the jury, and they having given full credence to the testimony, the conviction will not be set aside, though resting mainly, if not entirely, on the testimony of a detective. *Wright v. State*, 7 Tex. Crim. App. 74, 32 Am. Rep. 599, citing *State v. McKean*, 36 Iowa 343, 14 Am. Rep. 530.

60. *Colortype Co. v. Williams*, 78 Fed. 450; *State v. Keys*, 4 Kan. App. 14, 45 Pac. 727; *State v. Snyder*, 8 Kan. App. 686, 57 Pac. 135; *People v. Bennett*, 107 Mich. 430, 65 N. W. 280; *People v. Whitney*, 105 Mich. 622, 63 N. W. 765.

The bill of exception in *State v. Hoxsie*, 15 R. I. 1, 22 Atl. 1,059, 2 Am. St. Rep. 838, showed that among the witnesses called by the state were witnesses who testified that they were employed at so much compensation a day in this and other cases, and that they made it their business to procure illegal sales of intoxicating liquors for the purpose of prosecuting the sellers. The defendant requested the judge to charge, in regard to these witnesses, "That the testimony of 'spotters' is to be received with great caution and distrust." The judge refused, and instructed the jury, "that they must weigh all testimony with caution, especially where there was any reason to doubt its truth, or to discredit it." *Held*, the instruction given was not error, and did all that it was necessary to do.

The fact that a witness has been promised pay to testify,<sup>61</sup> or has received money in excess of his legal fees,<sup>62</sup> or that his fare and other expenses have been paid,<sup>63</sup> is always a proper subject to be considered as bearing upon his credibility.

C. UNFRIENDLINESS. — Unfriendliness to the party against whom the witness is testifying may be shown on cross-examination and taken into account by the jury.<sup>64</sup>

D. INTEREST. — The jury have the right in both civil<sup>65</sup> and criminal<sup>66</sup> cases to consider the interest which the witness may have

61. *North Chicago St. R. Co. v. Anderson*, 176 Ill. 635, 52 N. E. 21; *People v. Butler*, 71 N. Y. Supp. 129; *White v. Houston R. Co.*, (Tex. Civ. App.), 46 S. W. 382.

62. *Green v. Metropolitan St. R. Co.*, 70 N. Y. Supp. 123.

63. In *Chicago & E. R. Co. v. Thomas*, (Ind.), 55 N. E. 861, the court allowed the fact to be brought out in cross-examination of the witness that the appellant had furnished him transportation to come to the trial, and promised to provide him with board and lodging while in attendance. The witness was under no compulsion to attend the court. The appellant was under no legal duty to furnish him transportation, or to provide him with board and lodging, but, while in most cases it is a proper thing to do, yet in all such cases it is a proper matter to place before the jury, as it may tend to affect the credibility of the witness. So also, *State v. Shew*, 8 Kan. App. 679, 57 Pac. 137.

But a witness hired to remain within the jurisdiction of the court, if the hiring be not predicated upon the character of the testimony he is to give, is not necessarily discredited. *Simon Dry Goods Co. v. Newman*, 50 La. Ann. 338, 23 So. 329.

64. *Henry v. State*, 79 Ala. 42; *Norwood v. State*, 118 Ala. 134, 24 So. 53; *Shepherd v. State*, 135 Ala. 9, 33 So. 266; *People v. Wasson*, 65 Cal. 538, 4 Pac. 55; *Smith v. State*, 143 Ind. 685, 42 N. E. 913; *Wadley v. Com.*, 98 Va. 803, 35 S. E. 452; *Kellogg v. Nelson*, 5 Wis. 125.

65. *United States v. Sonnutheil v. Moerlein Brewery Co.*, 172 U. S. 401; *U. S. v. Kenney*, 90 Fed. 257.

*Florida*. — *White v. Ross*, 35 Fla. 377, 17 So. 640.

*Illinois*. — *North Chicago St. R. Co. v. Anderson*, 176 Ill. 635, 52 N. E. 21.

*Nebraska*. — *Harvard (City) v. Crouch*, 47 Neb. 133, 66 N. W. 276; *Boyce v. Palmer*, 55 Neb. 389, 75 N. W. 849.

*New York*. — *Dean v. Metropolitan R. Co.*, 119 N. Y. 540, 23 N. E. 1,054; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 403, 10 L. R. A. 676; *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418, 31 N. E. 879, 30 Am. St. Rep. 678; *Becker v. Woarnes*, 72 App. Div. 196, 76 N. Y. Supp. 438.

In *Cox v. Missouri, K. & T. R. Co.*, 20 Tex. Civ. App. 250, 48 S. W. 745, the plaintiff while in the employ of defendant as brakeman was thrown from the train and injured, for which he sued the company in damages. Roberg, an employee of defendant, traveled several hundred miles, at the instance of defendant, in order to testify in its behalf. On cross-examination the plaintiff asked whether he would have come to testify in the case if the defendant had not asked him to do it, and the plaintiff had asked him to come. The question was not allowed. *Held*, that if the jury had believed that the witness, Roberg, by reason of his feeling toward either party, had colored his testimony in favor of the defendant, they might have been warranted in disbelieving much of his evidence, and might have inferred that the plaintiff's allegations were true. Therefore this testimony was material and the court erred in declining to permit the witness to answer the question.

66. *McCormack v. State*, 133 Ala.

in the result of the litigation.<sup>67</sup> Interest in the result of the suit creates no presumption that the witness will swear falsely, but statements should be weighed with caution as being that of a partial witness.<sup>68</sup> Within this rule may be the accused<sup>69</sup> in a criminal action, his relatives<sup>70</sup> and, with the additional rules as to corrobora-

202, 32 So. 268; *Lewis v. Lewis*, 9 Ind. 105; *People v. Herrick*, 59 Mich. 563, 26 N. W. 767; *State v. Metcalf*, 17 Mont. 417, 43 Pac. 182; *St. Louis v. State*, 8 Neb. 405, 1 N. W. 371.

67. *North Chicago St. R. Co. v. Anderson*, 176 Ill. 635, 52 N. E. 21; *Preston v. Dills*, 17 Ky. L. Rep. 862, 32 S. W. 945; *State v. Olds*, 18 Or. 440, 22 Pac. 940.

**As to Showing Facts Against Interest.**—In *Williams v. Metropolitan L. Ins. Co.*, 35 App. Div. 82, 54 N. Y. Supp. 595, the court said: "You can attack your adversary's witness by showing that his interest is hostile to yours, but in the absence of such an attack upon your own witness, you cannot of right fortify his credibility by showing that his interest was injured by the fact as he testifies to it. When he is attacked by evidence of hostile interest or feeling, the attack may be repelled along the same lines upon which it is made; but if he is not so attacked, but is simply contradicted, you cannot support him by collateral facts tending to show his truthfulness. The party calling a witness may, of course, show who he is, and his situation as to the parties and issues, and thus his means of knowledge, and can adduce circumstances relevant to the issues in his support, and it may be that these circumstances will show that his interest is adverse to his testimony; but in the absence of attack, to raise collateral issues in support of your own witness is to suspend the trial of the real issues, and is not permissible."

68. *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

69. *California*.—*People v. Cronin*, 34 Cal. 191; *People v. Morrow*, 60 Cal. 142.

*Illinois*.—*Kirkham v. People*, 170 Ill. 9, 48 N. E. 465; *Gott v. People*, 187 Ill. 249, 58 N. E. 293.

*Indiana*.—*McIntosh v. State*, 151 Ind. 251, 51 N. E. 354.

*Montana*.—*State v. Metcalf*, 17 Mont. 417, 43 Pac. 182.

*New Mexico*.—*Territory v. Leyba*, (N. M.), 47 Pac. 718.

*Nevada*.—*State v. Slingerland*, 19 Nev. 135, 7 Pac. 280.

*North Carolina*.—*State v. Hollo-way*, 117 N. C. 730, 23 S. E. 168.

*Washington*.—*State v. Carey*, 15 Wash. 549, 46 Pac. 1,050; *State v. McCann*, 16 Wash. 249, 47 Pac. 443.

*Wisconsin*.—*Emery v. State*, 101 Wis. 627, 78 N. W. 145.

*Buckley v. State*, 62 Miss. 705, Judge Campbell in his opinion held: "The jury had no right to disregard the testimony of the defendant merely because he was such, and deeply interested in the result. The statute makes the defendant a competent witness, and while it is for the jury to determine the weight to be given to his evidence, it is not allowable for the court to annul the statute in effect by admonishing the jury of the interest the defendant has in the result, and authorizing it capriciously and wantonly to disregard his evidence completely and entirely, because of such interest. . . . His own testimony may be the only shield of an innocent person. A defendant has the right to submit his testimony to the jury to be judged of by it, uninfluenced by any suggestion of its probable falsity or an authorization to the jury to throw it aside as unworthy of belief because of the strong temptation to the defendant to swear falsely. There is little danger that juries will be unduly influenced by the testimony of defendants in criminal cases. They do not need any cautioning against too ready credence to the exculpation furnished by one on trial for felony."

70. *California*.—*People v. Wong Ah Foo*, 69 Cal. 180, 10 Pac. 375.

tion, his accomplices;<sup>71</sup> the parties to the suit<sup>72</sup> in a civil action, and their employees.<sup>73</sup>

*Indiana*. — *Young v. Gentis*, 7 Ind. App. 199, 32 N. E. 796.

*Missouri*. — *State v. Strattman*, 100 Mo. 540, 13 S. W. 814; *State v. Napper*, 141 Mo. 401, 42 S. W. 957.

*Nebraska*. — *Barmby v. Wolf*, 44 Neb. 77, 62 N. W. 318.

*North Carolina*. — *State v. Collins*, 118 N. C. 1,203, 24 S. E. 118; *State v. Lee*, 121 N. C. 544, 28 S. E. 552.

*Oregon*. — *State v. Pomeroy*, 30 Or. 16, 46 Pac. 797.

In *State v. Byers*, 100 N. C. 512, 6 S. E. 420, where the prisoner and his near relations went on the stand as witnesses, the court directed the jury "to scrutinize their testimony carefully, because of their interest in the result. But notwithstanding such interest, the jury might believe all they said, or part of it, or none of it, according to the conviction produced upon their minds of its truthfulness." The court approved the charge as given.

In *State v. Lee*, 121 N. C. 544, 28 S. E. 552, it was held, "That such evidence must be taken with some degree of allowance, and should not be given the weight of evidence of disinterested witnesses, but the rule does not reject or necessarily impeach it; and if from the testimony, or from it and the other facts and circumstances in the case, the jury believe that such witnesses have sworn to the truth, then they are entitled to as full credit as any other witness."

*Contra*. — In *People v. Hertz*, 105 Cal. 660, 39 Pac. 32, the court said: "If the rule is to be extended beyond the defendant, and include the relatives of the defendant, there is no reason why it should not equally apply to the friends of the defendant. The result would be that the evidence offered in defendant's behalf in many cases would be so distrusted and suspicioned as to go to the jury handicapped out of all practical usefulness."

71. *California*. — *People v. Gib-*

*son*, 53 Cal. 601; *People v. Sternberg*, 111 Cal. 3, 11, 43 Pac. 198, 201.

*Illinois*. — *Rafferty v. People*, 72 Ill. 37.

*Indiana*. — *Lewis v. Lewis*, 9 Ind. 105.

*Kansas*. — *State v. Greenberg*, 59 Kan. 404, 53 Pac. 61.

*Michigan*. — *People v. Shaver*, 107 Mich. 562, 65 N. W. 538.

*Missouri*. — *State v. Donnelly*, 130 Mo. 642, 32 S. W. 1,124; *State v. McLain*, 159 Mo. 340, 60 S. W. 736.

*Nebraska*. — *Home F. Ins. Co. v. Decker*, 55 Neb. 346, 75 N. W. 841.

*North Carolina*. — *State v. Miller*, 97 N. C. 484, 2 S. E. 363.

In *U. S. v. Reeves*, 38 Fed. 404, the following instruction was given: "Whilst it would be unsafe in ordinary cases to convict any one upon the uncorroborated testimony of accomplices in the crime, the rule of law undoubtedly is that they are competent witnesses, and it is your duty to consider their evidence. You are to weigh it and scrutinize it with great care. You are to test its truth by inquiring into the probable motive which prompted it."

72. *White v. Ross*, 35 Fla. 377, 17 So. 640; *West Chicago R. Co. v. Dougherty*, 170 Ill. 379, 48 N. E. 1,000; *North Chicago R. Co. v. Anderson*, 176 Ill. 635, 52 N. E. 21; *State v. Carey*, 23 Ind. App. 378, 55 N. E. 261.

In *Curtice v. Crawford Co. Bank*, 110 Fed. 830, Judge Rogers said; "Nor must it be forgotten that the removal of the barrier which disqualified a party to a suit to testify at all does not add anything to his credibility, or remove any temptation previously existing to deviate from the truth. It is just as unsafe after the disqualification is removed to rely on the testimony as it was before, the only difference being that the court or jury is required to pass upon the credibility of the party."

73. *United States*. — *U. S. v. Pacific Exp. Co.*, 15 Fed. 867; *Fidelity*

## VI. EFFECT OF STATEMENTS.

**1. Contradictions.** — The jury may consider as affecting the credence of the witness the contradictions and qualifications of statements made during the examination before them.<sup>74</sup>

The opposing party may offer written or oral statements made by the witness out of court,<sup>75</sup> or contradictory statements made between

*Mut. L. Ins. Co. v. Jeffords*, 107 Fed. 402.

*Georgia*. — *Central R. & Bkg. Co. v. Maltsby*, 90 Ga. 30, 16 S. E. 953.

*Illinois*. — *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714; *Chicago v. Winters*, 65 Ill. App. 435; *Cicero & P. St. R. Co. v. Rollins*, 195 Ill. 219, 63 N. E. 98; *Kerfoot v. Chicago*, 195 Ill. 229, 63 N. E. 101.

*New York*. — *Anderson v. Standard G. L. Co.* 74 N. Y. St. 75, 40 N. Y. Supp. 671.

*Pennsylvania*. — *Guckavan v. Lehigh Tract. Co.*, 203 Pa. St. 521, 53 Atl. 351.

*Texas*. — *International R. Co. v. Johnson*, 23 Tex. Civ. App. 160, 55 S. W. 772; *Franklin L. Ins. Co. v. Villeneuve*, (Tex. Civ. App.), 68 S. W. 203.

In *Hankinson v. Lynn G. & Elec. Co.*, 175 Mass. 271, 56 N. E. 604, the court held "That it was proper to consider the fact that not only was the witness at the time of the trial in the employ of the defendant, but also that he had been taken back into its employ only two weeks before the trial, and the jury may have also believed that, from the terms in which his testimony was couched, it was evident that the witness had a particular knowledge of what the law required to exonerate the defendant from liability."

*Wastl v. Montana U. R. Co.*, 17 Mont. 213, 42 Pac. 772, *Pemberton, C. J.*, said: "We cannot, therefore, approve of an instruction which declares it to be the law, even by intimation, that the fact of a citizen's being employed to labor for a person, company or corporation, should be considered as a matter to discredit him before the courts and juries of the state." See also *Schmidt v. First*

*Nat. Bank*, 10 Colo. App. 261, 50 Pac. 733.

**74.** *Alabama*. — *Joseph v. Southwark, F. & M. Co.*, (Ala.), 10 So. 327.

*Colorado*. — *Lothrop v. Roberts*, 16 Colo. 250, 27 Pac. 698.

*Georgia*. — *Evans v. Lipscomb*, 31 Ga. 71; *Duncan v. State*, 97 Ga. 180, 25 S. E. 182.

*Iowa*. — *State v. Eifert*, 102 Iowa 188, 65 N. W. 309, 63 Am. St. Rep. 433, 38 L. R. A. 485.

*Michigan*. — *Zucker v. Karpeles*, 88 Mich. 413, 50 N. W. 373; *Culver v. Smith*, (Mich.), 91 N. W. 608.

*Nebraska*. — *George v. State*, 61 Neb. 669, 85 N. W. 840.

*New York*. — *People v. Cox*, 21 Hun 47; *Becker v. Koch*, 104 N. Y. 394, 10 N. E. 701, 85 Am. Rep. 515.

*Pennsylvania*. — *Com. v. Werntz*, 161 Pa. St. 591, 29 Atl. 272.

*Wisconsin*. — *Kenyon v. Kenyon*, 72 Wis. 234, 39 N. W. 361.

**75.** *Arkansas*. — *St. Louis I. M. & S. Co. v. Faisst*, 68 Ark. 587, 61 S. W. 374.

*Connecticut*. — *State v. Bradneck*, 69 Conn. 212, 37 Atl. 492, 43 L. R. A. 620.

*Florida*. — *Ortiz v. State*, 30 Fla. 256, 11 So. 611.

*Georgia*. — *Parke v. Foster*, 26 Ga. 465, 71 Am. Dec. 221.

*Iowa*. — *State v. Bradbury*, 92 Iowa 512, 61 N. W. 192.

*Minnesota*. — *Brace v. St. Paul C. R. Co.*, 87 Minn. 292, 91 N. W. 1,099.

*Mississippi*. — *Harris v. Sledge*, (Miss.) 21 So. 783; *Jamison v. Illinois Cent. R. Co.*, 63 Miss 33.

*New York*. — *Dudley v. Slatterlee*, 59 N. Y. St. 265, 28 N. Y. Supp. 741; *People v. Dickerson*, 58 App. Div. 202, 68 N. Y. Supp. 715; *McCoy v. Munro*, 76 App. Div. 435, 78 N. Y. Supp. 849.

the testimony given and that stated in a former trial, to affect the credibility of the witness, yet the question remains to be passed upon by the jury.<sup>76</sup>

**2. Corroboration.** — The witness whose testimony is corroborated by facts and circumstances should be regarded as having more weight than one who is not so corroborated, and such facts and circumstances are always admissible.<sup>77</sup>

*Tennessee.* — *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272.

*Texas.* — *White v. Houston R. Co.*, (Tex. Civ. App.), 46 S. W. 382.

*Vermont.* — *Manley v. Delaware & H. Co.*, 69 Vt. 116, 37 Atl. 279.

In *Plyer v. German Am. Ins. Co.*, 121 N. Y. 689, 24 N. E. 929, Peckham, giving the opinion of the court, stated: "We think that the written statements offered in evidence by the defendant were admissible only for the purpose of showing prior contradictory statements made out of court by the witnesses named, and to that extent their statements furnished ground for the contention that those witnesses who had made the statements were so far impeached as to leave their credibility a question for the jury. . . . Their only effect was upon the testimony of the witnesses who had made them, and they cast a doubt on that evidence simply because the sworn and the unsworn statements disagreed, and it was for the jury to say whether the sworn statement made in court was or was not true. It might well be that it was, and the falsity might rest with the unsworn document, or the explanation of the witnesses might be sufficient. This would be a matter for the jury to consider."

**76.** *United States.* — *Toplitz v. Hedden*, 146 U. S. 352; *U. S. v. Hall*, 44 Fed. 864, 10 L. R. A. 324.

*Indiana.* — *Lauter v. Duckworth*, 19 Ind. App. 535, 48 N. E. 864.

*Maine.* — *Dunning v. Maine Cent. R. Co.*, 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208.

*Michigan.* — *Pelton v. Schmidt*, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462; *People v. Jensen*, 66 Mich. 711, 33 N. W. 811.

*Nebraska.* — *Dixon v. State*, 46 Neb. 298, 64 N. W. 961.

*New York.* — *Oderkirk v. Fargo*, 14 N. Y. St. 9, 16 N. Y. Supp. 220; *People v. Dickerson*, 58 App. Div. 202, 64 N. Y. Supp. 715.

*Texas.* — *Exon v. State*, 33 Tex. Crim. App. 461, 26 S. W. 1,088; *Texas Pac. R. Co. v. Johnson*, 90 Tex. 304, 38 S. W. 520.

*Wisconsin.* — *Bisewski v. Booth*, 100 Wis. 283, 76 N. W. 349.

In *Tarbell v. Forbes*, 177 Mass. 238, 58 N. E. 873, the judge instructed the jury, "That they had the right to take into consideration what had been said by witnesses at another time and place in determining whether they were telling the truth or not; that inconsistent statements made elsewhere were properly admissible, not for the purpose of establishing those statements as being correct statements of fact, but for the purpose of affecting the degree of credibility to be given to the witness. It is always competent to show that a witness had elsewhere made different statements from that made on the stand; and when evidence of that fact is put before you, you are to take it into consideration in determining whether the statement made here is true." *Held*, that the instructions were correct.

**77.** *Jeter v. Haviland*, 24 Ga. 252; *Central R. & Bkg. Co. v. Attaway*, 90 Ga. 656, 16 S. E. 956; *Shove v. Shove*, 42 Ill. App. 150; *Riggins v. State*, 46 Ill. App. 196.

In *Nevill v. State*, 133 Ala. 99, 32 So. 596, a prosecution for robbery, a witness was asked if the accused had not a pistol in his possession an hour before the robbery. The defendant objected because it had reference to a time different to the identified time of the alleged robbery. The court overruled the objection, and the defendant excepted. The witness answered that G had a pistol

A witness whose credibility has been attacked may under some circumstances be allowed to show upon his cross-examination that he made similar statements to his testimony upon the stand, soon after the occurrence and before the trial,<sup>78</sup> but unless so attacked should not be allowed to prove by other credible witnesses that he told the same story, for the purpose of affecting his credibility.<sup>79</sup>

**3. Mistake.** — It is the province of the jury to determine ultimately the credit to be given to a witness who has made false state-

at the time designated in the question, and had showed it to the defendant, *Tom Nevill. Held*, "That as a circumstance tending to corroborate the state's witness, Widner, wherein he testified that Griffin used a pistol while helping the defendant to rob him, evidence that Griffin had a pistol when seen with defendant an hour or two before that occurrence was admissible." See article "CORROBORATION."

**78.** *Baltimore R. Co. v. Knee*, 83 Md. 77, 34 Atl. 252; *State v. McKinney*, 111 N. C. 683, 16 S. E. 235; *State v. Maulsby*, 130 N. C. 664, 41 S. E. 97; *Green v. State*, 97 Tenn. 50, 36 S. W. 700; *Jones v. State*, (Tex. Crim. App.), 41 S. W. 638.

In *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218, it is said: "Evidence in corroboration of a witness prior to attack on impeachment is obviously inadmissible. (*State v. Thomas*, 78 Mo. 327.) If, however, such attack be made on the character of the witness it is then admissible to prove that the witness has made statements consistent with those made as a witness. (*March v. Harrell*, 1 Jones [N. C.] 329; *French v. Merrill*, 6 N. H. 465; *Coffin v. Anderson*, 4 Blackf. [Ind.] 395; *Jackson v. Etz*, 5 Cow. [N. Y.] 314.) And it is also held that for a similar corroborative purpose evidence is admissible of what the witness swore at a former trial. (*Henderson v. Jones*, 10 Serg. & R. [Pa.] 322.)"

But in *State v. Taylor*, 134 Mo. 109, 35 S. W. 92, it is said: "But it seems the rule was stated too broadly in *State v. Grant*, 79 Mo. 113, although warranted by the authorities thus cited, of which *Henderson v. Jones*, 10 Serg. & R. (Pa.) 322,

(overruled in *Craig v. Craig*, 5 Rawle [Pa.] 91), and *Coffin v. Anderson*, 4 Blackf. (Ind.) 398, were founded directly or indirectly on *Litterell v. Raynell*, 1 Mod. 282, which long ago ceased to be authority in England. *Rex v. Parker*, 3 Doug. 242." And the court quotes with approval the rule as stated in *Greenl. Ev. § 469*: "Evidence that he has on other occasions made statements similar to what he testified in the cause is not admissible, unless when a design to misrepresent is charged upon the witness in consequence of his relation to the party or to the cause, in which case, it seems, it may be proper to show that he made a similar statement before that relation existed."

In *Atlanta K. & N. R. Co. v. Strickland*, (Ga.), 42 S. E. 864, the court said: "The error that we find in the rulings in the court below, and which is covered by several grounds of the motion for a new trial, is the admission of testimony by this witness and by others in corroboration of him, to the effect that on the day after the occurrence he said he was present and saw the homicide. This was admitted because the railroad company had claimed and had endeavored to show that the witness was not present, but had manufactured his testimony. We do not think that a witness can be 'bolstered up' in this way. The error seems to us to have been material, because we can readily conceive how such testimony would probably have a strong influence upon the minds of the jury in passing upon the credibility of the witness."

**79.** *James v. State*, 115 Ala. 83, 22 So. 565; *Rhutael v. Stephens*, 68 Iowa 627, 27 N. W. 786; *Johnson v. State*, 80 Miss. 798, 32 So. 49.



ments as to the existence of certain facts.<sup>80</sup> A witness should not be discredited upon a mere mistake that he may make—a slip of the memory, want of recollection,<sup>81</sup> some infirmity of the mind,<sup>82</sup> or the exaggeration of some fact or circumstance.<sup>83</sup>

**4. Intentional Falsehood.**—A. RULE “*FALSUS IN UNO.*”—The maxim “*Falsus in uno, falsus in omnibus*” must be taken with this qualification, that the misstatements of fact, to warrant the jury in disregarding or distrusting other evidence of the witness, must be in regard to a material fact in the issue of the cause on trial,<sup>84</sup> and it

80. *Georgia R. Co. v. Waxelbaum*, 111 Ga. 812, 25 S. E. 645; *Rope v. Dodson*, 58 Ill. 365; *Gerardo v. Brush*, 120 Mich. 405, 79 N. W. 646; *Cook v. Standard Oil Co.*, 75 N. Y. St. 610; 41 N. Y. Supp. 152.

81. *United States.*—The *S. S. Oder*, 8 Fed. 172; *Sharon v. Hill*, 26 Fed. 337; *McClaskey v. Barr*, 54 Fed. 781; *Jacobsen v. Dalles P. & A. Nav. Co.*, 106 Fed. 428.

*Georgia.*—*Georgia R. Co. v. Waxelbaum*, 111 Ga. 812, 35 S. E. 645.

*Illinois.*—*Spencer v. Dougherty*, 23 Ill. App. 399.

*Iowa.*—*State v. McDevitt*, 69 Iowa 549, 29 N. W. 459; *Winter v. Central I. R. Co.*, 80 Iowa 443, 45 N. W. 737.

*Kentucky.*—*Davis v. Meaux*, 15 Ky. L. Rep. 308, 22 S. W. 324.

*New York.*—*Deering v. Metcalf*, 74 N. Y. 501.

*New Mexico.*—*Pacific Gold Co. v. Skillcorn*, 8 N. M. 8, 41 Pac. 533.

*Pennsylvania.*—*Fullam v. Rose*, 160 Pa. St. 47, 28 Atl. 497.

In *U. S. v. Hall*, 44 Fed. 864, 10 L. R. A. 324, *Speer, J.*, in charging the jury said: “Upon the reliability of the statements of the witness Peacock it is proper to remind you that the defense relies upon what they insist are contradictions between the testimony on a former trial and his testimony on this trial. If you believe from the evidence that there are important or material and unexplained contradictions between the testimony of Mr. Peacock on the former trial and his testimony on this trial, it would tend to throw suspicion on the reliability of his testimony; but if you find from the evidence that the contradictions were immaterial, and such as a conscientious man might

well make—for instance, an error on the former trial about a number or a date, which the witness positively corrects on this trial—such variation, instead of reflecting upon the witness, is rather a circumstance in his favor, as possibly tending to show that he had not prepared with accuracy a fictitious statement to mislead the court. At best the human memory is fallible, and courts and juries can only demand that the material facts be accurately remembered and correctly given in evidence.”

82. In *Davis v. Meaux*, 15 Ky. L. Rep. 308, 22 So. 324, the court held that “The fact that one of the witnesses for the appellant testifies that he is 117 years old does not affect his credibility as to the facts that he detailed, nor does the discrepancy of the other witnesses as to the dates affect their credibility, for it is to be remembered that they are old slaves, who know but little about dates, time or numbers, but who can remember events with accuracy.”

83. *Heddl v. City Elec. R. Co.*, 112 Mich. 547, 70 N. W. 1,096; *Chicago C. R. Co. v. Allen*, 169 Ill. 287, 48 N. E. 414; *People v. Winters*, 125 Cal. 325, 57 Pac. 1,067.

84. *United States.*—*Northern Pacific R. Co. v. Hayes*, 87 Fed. 129.

*California.*—*People v. Plyer*, 121 Cal. 160, 53 Pac. 553; *People v. Sprague*, 53 Cal. 491.

*Colorado.*—*Minick v. People*, 8 Colo. 440, 9 Pac. 4.

*Georgia.*—*Pierce v. State*, 53 Ga. 365.

*Illinois.*—*Rope v. Dodson*, 58 Ill. 360; *McClure v. Williams*, 65 Ill. 390; *Chicago v. Smith*, 48 Ill. 107; *U. S. Exp. Co. v. Hutchins*, 58 Ill. 44; Chi-

must be willfully and intentionally made.<sup>85</sup>

cago C. R. Co. v. Allen, 169 Ill. 287, 48 N. E. 414; Mathews v. Granger, 196 Ill. 164, 63 N. E. 658; Swan v. People, 98 Ill. 610.

*Michigan.* — Traser v. Haggerty, 86 Mich. 521, 49 N. W. 616; Barney v. Seliwenk, 68 Mich. 298.

*Minnesota.* — State v. Henderson, 72 Minn. 74, 74 N. W. 1,014.

*Nebraska.* — Omaha & R. V. R. Co. v. Kräyenbuhl, 48 Neb. 553, 67 N. W. 447; McCormick H. Co. v. Seeman, 49 Neb. 312, 68 N. W. 482.

*New York.* — Wilkins v. Earl, 44 N. Y. 172, 4 Am. Rep. 655; People v. Moett, 58 How. Pr. 467; Boyd v. Gorman, 29 App. Div. 428, 51 N. Y. Supp. 1,083.

*South Dakota.* — State v. Sexton, 10 S. D. 127, 72 N. W. 84.

*West Virginia.* — State v. Thompson, 21 W. Va. 741.

In the Santissima Trinidad, 20 U. S. 283, Justice Story said: "If the circumstances respecting which the testimony is discordant be immaterial, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or as being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood, and courts of justice under such circumstances are bound upon principles of law to apply the maxim, '*falsus in uno, falsus in omnibus.*' What ground of judicial belief can there be left when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?"

In Mack v. State, 48 Wis. 271, 4 N. W. 449, it is said: "The old rule,

'*falsus in uno, falsus in omnibus*,' was apparently founded upon the other rule, that the person who had been indicted and convicted of wilful perjury was not a competent witness in any case, and the courts in analogy to this rule were inclined to hold that when it appeared in the course of a trial that a witness had been guilty of perjury, his testimony ought to be excluded in the same manner as though he had been indicted and convicted of such perjury. The rule that a person convicted of perjury is not a competent witness, having been abolished by statute, and his competency restored, his credibility is necessarily a question for the jury, and it would seem to follow that the witness who may have made false statements under oath, of which he has not been formally convicted, would not become thereby an incompetent witness for all purposes, any more than the witness who had been convicted of perjury, and his credibility must also be left to the jury, under all the circumstances connected with his testimony."

85. *United States.* — Mann v. Arkansas Val. L. & C. Co., 24 Fed. 261.

*Alabama.* — Prater v. State, 107 Ala. 26, 18 So. 238; Edmonson v. Aniston L. Co., 128 Ala. 589, 29 So. 596.

*California.* — People v. Flynn, 73 Cal. 511, 15 Pac. 102; People v. Lon Yeck, 123 Cal. 246, 55 Pac. 984; People v. Luchetti, 119 Cal. 501, 51 Pac. 707; People v. Arlington, 131 Cal. 231, 63 Pac. 347.

*Colorado.* — Jones v. People, 2 Colo. 351; Ward v. Ward, 25 Colo. 33, 52 Pac. 1,105.

*Florida.* — Gantling v. State, 40 Fla. 237, 23 So. 857.

*Georgia.* — Pierce v. State, 53 Ga. 365; Plummer v. State, 111 Ga. 839, 36 S. E. 233.

*Illinois.* — Hoge v. People, 117 Ill. 35, 6 N. E. 796; Waters v. People, 172 Ill. 367, 50 N. E. 148.

*Mississippi.* — People v. State, (Miss.), 33 So. 298.

*Missouri.* — Hartpence v. Rogers,

The jury is not warranted merely because of a willful false statement of a material fact to disregard all the testimony, if the other facts testified to are corroborated by credible evidence.<sup>86</sup>

B. SUPPRESSION OF FACTS. — The intentional suppression of facts pertinent to the case is regarded in the same light as the false statements of facts of like bearing, and the credibility of the witness is affected in the same manner by false testimony of each class.<sup>87</sup>

C. ADMISSION OF UNTRUTHFULNESS. — Testimony of a witness who admits during his examination that he is not credible is not entitled to consideration by the jury.<sup>88</sup>

143 Mo. 623, 45 S. W. 650; *State v. Miller*, 159 Mo. 113, 60 S. W. 67.

*Montana*. — *Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648.

*Nebraska*. — *Stoppert v. Nierle*, 45 Neb. 105, 63 N. W. 382.

*New Hampshire*. — *Senter v. Carr*, 15 N. H. 351.

*New Mexico*. — *Faulkner v. Territory*, 6 N. M. 404, 30 Pac. 905.

*New York*. — *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655; *People v. Petmecky*, 99 N. Y. 415, 2 N. E. 145; *People v. Chapleau*, 121 N. Y. 266, 24 N. E. 469; *Cibulski v. Hutton*, 47 App. Div. 107, 62 N. Y. Supp. 166.

*North Dakota*. — *McPherrin v. Jones*, 5 N. D. 261, 65 N. W. 685.

*South Dakota*. — *Hurlburt v. Leper*, 12 S. D. 321, 81 N. W. 631.

*Washington*. — *State v. Freiderich*, 4 Wash. 204, 29 Pac. 1,055.

*Wisconsin*. — *Cahn v. Ladd*, 94 Wis. 134, 68 N. W. 652.

86. *United States*. — *Mann v. Arkansas Val. C. Co.*, 24 Fed. 261.

*Arizona*. — *Schultz v. Territory*, (Ariz.), 52 Pac. 352.

*Illinois*. — *Chicago & A. R. Co. v. Buttolf*, 66 Ill. 347; *Maulonya v. Reilly*, 184 Ill. 183, 56 N. E. 425.

*Iowa*. — *Blotcky v. Caplan*, 91 Iowa 352, 59 N. W. 204.

*Kansas*. — *Barney v. Dudley*, 40 Kan. Supp. 247, 19 Pac. 550.

*Michigan*. — *Hillman v. Schwenk*, 68 Mich. 293, 36 N. W. 77.

*Wisconsin*. — *Allen v. Murray*, 87 Wis. 41, 57 N. W. 979; *Bratt v. Swift*, 99 Wis. 579, 75 N. W. 411.

87. *Lee v. Cresco (Town)*, 47 Iowa 499.

88. *Kennedy v. McQuaid*, 56 Minn 450, 58 N. W. 35.

In *Williams v. Bishop*, (Colo.), 68 Pac. 1,063, a witness had testified that the transaction between M. B. Monroe and E. L. Blake was a sale, and that the deed conveyed an absolute title. In the course of his cross-examination by plaintiff's counsel he was asked this question: "Isn't it a fact that your effort to testify, contrary to the fact, that that deed was a mortgage, is for the purpose of showing that some one else owned this property besides your wife, in order to avoid a judgment against her? To this he answered: "I would not say that; I am a pretty good liar myself." The court held that: "The testimony of a witness who, while testifying, boasts that he is a liar, is entitled to no consideration, and will receive none here."

## CREDITOR'S BILL.—See Fraudulent Conveyances.

# CRIMINAL CONVERSATION.

BY W. H. KILER.

## I. PROOF OF MARRIAGE, 782

1. *Must Be Proved by Direct Evidence*, 782
2. *Cannot Be Proved by Cohabitation, Reputation, etc.*, 783
3. *Confession of Defendant as to Marriage*, 784

## II. PROOF OF ADULTERY, 784

1. *Direct Evidence Not Necessary to Prove*, 784
2. *What Circumstances Must Be Shown*, 785
3. *Resemblance of Child*, 785
4. *Time When Act Was Committed*, 786
5. *Correspondence Between Plaintiff's Wife and Defendant*, 786

## III. COMPETENCY OF WITNESSES, 786

1. *The Plaintiff*, 786
2. *The Plaintiff's Wife*, 787
3. *The Defendant*, 788

## IV. MATTERS PERTAINING TO THE DEFENSE, 788

1. *The Wife's Consent*, 788
2. *Violence Will Not Bar Action*, 789
3. *Separation of Husband and Wife Not a Bar*, 789
4. *Decree of Divorce May Be a Bar*, 790
5. *Conduct of the Parties May Be a Bar*, 791
  - A. *Consent or Connivance of Husband*, 791
    - a. *To Particular Acts*, 791
    - b. *Permitting Wife to Live as a Prostitute*, 791
6. *Conduct Prior to the Wrong*, 792
  - A. *Of the Husband*, 792
    - a. *Recrimination*, 792
    - b. *Negligence as to Wife's Conduct*, 792
  - B. *Of the Wife*, 793
    - a. *Unchastity*, 793
7. *Conduct Subsequent to the Wrong*, 793
  - A. *Condonation*, 793
  - B. *Collusion of Husband and Wife in Bringing Action*, 793
  - C. *Permitting Wife to Remain With the Defendant After the Seduction*, 793
8. *Defendant's Ignorance of the Marriage Not a Bar*, 794

- 9. *Previous Suit Not a Bar*, 794
  - A. *Against Same Defendant*, 794
  - B. *Against Another Defendant*, 794
- 10. *Death of Parties May Be a Bar*, 794

## V. WHAT MAY BE SHOWN TO AFFECT THE AMOUNT OF DAMAGES, 795

- 1. *Character and Conduct of the Parties*, 795
  - A. *The Plaintiff*, 795
    - a. *Conduct as a Husband*, 795
    - b. *Adultery*, 795
    - c. *Negligence as to Wife's Conduct*, 795
    - d. *Condonation*, 795
    - e. *Mental Suffering*, 796
  - B. *Wife*, 796
    - a. *Conduct and Reputation for Chastity*, 796
    - b. *As to Defendant's Evidence of Wife's Unchastity*, 796
    - c. *Reputation for Chastity Before Marriage*, 796
    - d. *Evidence of Subsequent Acts*, 797
    - e. *Evidence Proving Good Character Admissible in Rebuttal*, 797
    - f. *Death of Wife*, 797
  - C. *Defendant*, 797
    - a. *General Character*, 797
    - b. *Conduct*, 797
    - c. *Reputation for Unchastity*, 797
    - d. *Separation of Husband and Wife*, 797
    - e. *Defendant's Liability to Criminal Prosecution*, 798
- 2. *Circumstances Affecting the Wrong*, 798
  - A. *Act Done by Force*, 798
  - B. *Where Wife Consents*, 798
- 3. *Affection and Domestic Happiness of Husband and Wife*, 798
- 4. *Pecuniary Condition of the Parties*, 800
  - A. *Defendant*, 800
  - B. *Plaintiff*, 800
- 5. *Social Rank of the Parties*, 800

## CROSS-REFERENCES.

Adultery;  
 Damages; Divorce;  
 Husband and Wife;  
 Marriage;  
 Seduction.

## I. PROOF OF MARRIAGE.

**1. Must Be Proved by Direct Evidence.** — Marriage must be proved by direct evidence,<sup>1</sup> viz., an *actual marriage* must be proved.<sup>2</sup>

**1. Direct Evidence.** — Marriage may be proved, either by evidence of the contract which constitutes it, or by the evidence of the status, or natural condition in life, of which that contract is the foundation. Abb. Tr. Ev., p. 79-80.

As to proof of marriage generally, see articles "ADULTERY;" "BIGAMY;" "HUSBAND AND WIFE."

**2. Actual Marriage.** — The common law remedy for criminal conversation exists for legal husbands only, and to support such an action the plaintiff must therefore prove an actual marriage.

*England.* — Catherwood v. Caslon, 13 Mees. & W. 261; Burt v. Barlow, 1 Doug. 171; Morris v. Miller, 4 Burr. 2,057.

*Canada.* — Campbell v. Carr, 6 U. C. Q. B. (O. S.) 482.

*United States.* — Hallett v. Collins, 10 How. 174.

*Alabama.* — State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79; Potier v. Barclay, 15 Ala. 439.

*California.* — Graham v. Bennet, 2 Cal. 503; Case v. Case, 17 Cal. 598; People v. Anderson, 26 Cal. 130.

*Florida.* — Burns v. Burns, 13 Fla. 369.

*Illinois.* — Keppler v. Elser, 23 Ill. App. 643.

*Kentucky.* — Dumaesby v. Fishly, 3 A. K. Marsh. 368; Kibby v. Rucker, 1 A. K. Marsh. 391.

*Louisiana.* — Holmes v. Holmes, 6 La. 471; Patten v. Philadelphia, 1 La. Ann. 98.

*Maryland.* — Cheseldine v. Brewer, 1 H. & McH. 152.

*Michigan.* — Hutchins v. Kimmell, 31 Mich. 126; Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485.

*New Hampshire.* — Londonderry v. Chester, 2 N. H. 268; Keyes v. Keyes, 22 N. H. 553; State v. Winkley, 14 N. H. 480.

*New Jersey.* — Pearson v. Howey, 11 N. J. L. 12.

*New York.* — Dann v. Kingdom, 1 Thomp. & C. 492; Fenton v. Reed, 4 Johns. 52, 4 Am. Dec. 244; Starr v.

Peck, 1 Hill 270; Rose v. Clark, 8 Paige 574; *In re* Taylor, 9 Paige 611; Clayton v. Wardell, 4 N. Y. 230; Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609; O'Gara v. Eisenlohr, 38 N. Y. 296.

*North Carolina.* — State v. Patterson, 24 N. C. 346, 38 Am. Dec. 699.

*Ohio.* — Carmichael v. State, 12 Ohio St. 553; Duncan v. Duncan, 10 Ohio St. 181.

*Oregon.* — Jacobsen v. Siddal, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360.

*Pennsylvania.* — Hantz v. Sealy, 6 Binn. 405; Com. v. Stump, 53 Pa. St. 132, 91 Am. Dec. 198.

*Tennessee.* — Bashaw v. State, 1 Yerg. 177; Grisham v. State, 2 Yerg. 589.

*Vermont.* — Newbury v. Brunswick, 2 Vt. 151, 19 Am. Dec. 703; State v. Rood, 12 Vt. 396; Northfield v. Vershire, 33 Vt. 110; State v. Annice, N. Chip. 9. Add. on Torts; 2 Greenl. Ev., § 461; 1 Bish. Mar. & Div., § 442.

The plaintiff in an action for criminal conversation is bound to prove a marriage valid in all respects, and it is not sufficient *prima facie* evidence on his part to show that he and his alleged wife went through a religious ceremony, with the *bona fide* intention of thereby contracting a valid marriage, and afterwards lived together as man and wife in the belief that they had thereby contracted a valid marriage, if in law such marriage was not valid. Catherwood v. Caslon, 13 Mees. & W. 261.

**Proof by Marriage Register, Certificate, etc.** — The marriage register required to be kept by the provisions of § 2,528, Rev. Code of 1860, is sufficient to establish a marriage, without other evidence showing that the person who officiated was authorized to solemnize marriage. Verholf v. Honwenlegen, 21 Iowa 429.

A certificate from the minister of a church in the kingdom of Wurtemberg that on the register of his church there is recorded the mar-

**2. Cannot Be Proved By Cohabitation, Reputation, etc.** — Cohabitation, reputation or other circumstances from which it may be inferred only, do not amount to evidence of an actual marriage.<sup>3</sup>

riage of K. and B., together with the certificate of a judge of the High Court that the certificate of the minister is genuine and entitled to credit, is, when the parties referred to in the minister's certificate have been identified as the plaintiff and his wife, *prima facie* evidence of marriage. *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164.

The plaintiff offered in evidence of marriage the certificate of a justice of the peace proved to be dead, setting forth that the justice had, on a certain date, united the plaintiff and S. in the bonds of matrimony. The certificate did not state that the justice knew the parties, or that they were identified to him, or that they were of sufficient age to marry, and there was no attesting witness. It was held that the certificate of the justice did not comply with the statutory requirements and was not proof of the marriage. *Dann v. Kingdom*, 1 Thomp. & C. (N. Y.) 492.

**Proof by Witnesses.** — Record evidence is not indispensable to prove a marriage, and the fact may be established by witnesses having knowledge thereof. *Kilburn v. Mullen*, 22 Iowa 498; *State v. Williams*, 20 Iowa 98; *State v. Wilson*, 22 Iowa 364; *Jacobsen v. Siddal*, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360.

The plaintiff or his wife is a competent witness to prove the marriage. *Jacobsen v. Siddal*, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360. *Contra*. *Dann v. Kingdom*, 1 Thomp. & C. (N. Y.) 492.

In *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164, the chief assignment of error was as to the proof of the marriage. Such proof consisted of a certificate from a minister in the kingdom of Wurtemberg, a certificate of the judge of the high court of the kingdom, and one from the American consul. All the certificates were objected to when offered, on the ground: First, because they were not accompanied by any proof of the foreign law regulating mar-

riage in Wurtemberg; second, because it is not sufficient that a ceremony was performed purporting to be a marriage, unless it is also shown that such ceremony was recognized by, and in accordance with, the law of the country where it took place. *Held*, by the court per Cooley, J., "Had the supposed marriage taken place in this state, evidence that a ceremony was performed ostensibly in celebration of it, with the apparent consent and co-operation of the parties, would have been evidence of a marriage, even though it has fallen short of showing that the statutory regulations had been complied with, or had affirmatively shown that they were not. Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligation. This has become the settled doctrine of the American courts, the few cases of dissent or apparent dissent being borne down by a great weight of authority in favor of the rule just stated. . . . In the case before us the question is not whether the foreign ceremony of marriage, followed by cohabitation, makes out beyond dispute a valid marriage, but whether it does not show one *prima facie* valid, so as to call upon the party disputing its validity to point out the impediments, if any, which rendered it ineffectual. . . . Proof of the ceremony of marriage did *prima facie* establish it, and the court did not err in holding it was not necessary to prove the foreign law before putting the certificate in evidence."

3. *Morris v. Miller*, 4 Burr. 2,057; *Com. v. Belgard*, 5 Gray (Mass.) 95.

**Contra.** — In *Georgia*. — Adultery, or criminal conversation with a wife,

**3. Confession of Defendant as to Marriage.**—The confession or acknowledgment of the defendant that he knew the woman was the wife of the plaintiff may be given in evidence to prove the marriage, but it is insufficient to obviate the necessity of the strict proof of the marriage itself.<sup>4</sup>

## II. PROOF OF ADULTERY.

**1. Direct Evidence Not Necessary to Prove.**—In an action for criminal conversation, as upon applications for divorce, where the point has most frequently been raised, circumstantial evidence is frequently all that can be had, and *direct evidence is not neces-*

gives a right of action to the husband. In such cases, proof of the marriage may be made by general reputation and the parties living together as man and wife. Georgia Code 1895, § 3,869.

**4.** The confession or acknowledgment of the relation by the defendant is insufficient to prove the fact of marriage. *Keppler v. Elser*, 23 Ill. App. 643.

**In Canada.**—In trespass for criminal conversation, the plaintiff must give strict proof of his marriage. Mere casual conversations of the defendant, in which he has spoken of the woman as the plaintiff's wife, or letters from him directed to her as such, are not sufficient admissions of the marriage to obviate the necessity of the strict proof of the marriage itself. *Campbell v. Carr*, 6 U. C. Q. B. (O. S.) 482; *Ford v. Langlois*, 19 U. C. Q. B. 312.

But in *Forney v. Fallacher*, 8 Serg. & R. (Pa.) 159, 11 Am. Dec. 590, the case was taken up because of error in the rejection by the court below of evidence of declarations of the defendant that he knew Susannah Forney was married to the plaintiff, and with knowledge of that fact, seduced her affections, debauched her and lived in adultery with her and begot a child, which evidence was offered by the plaintiff as proof of his marriage. By the court, Gibson, J.: "The question is supposed to depend on the authority of *Morris v. Miller*, in which it is held that proof of actual marriage was requisite in contradistinction to proof of cohabitation, reputation, and other circumstances from which a marriage might be inferred. That case, for

everything decided in it, is good authority; for nothing is more certain than that, to support an action for criminal conversation, there must have been an actual marriage. But it is quite another thing to say that such a marriage shall be proved only by the oath of an eyewitness to the marriage ceremony. We at once feel the good sense of the rule that excludes the mere reputation of marriage, which always arises from the declarations or acts of the plaintiff himself; but how a defendant's unqualified and positive acknowledgment of a marriage in fact can be excluded on any principle or rule of evidence, I am at a loss to discover. . . . But still the mind is at a loss for a well-founded objection to the competency of the evidence; for the meaning and extent of the acknowledgment depended upon all the circumstances taken together, and were evidently proper for the consideration of the jury. The acknowledgment was after the fact of seduction, and might strictly be said to have been made to the defendant's own prejudice, and to have been so conceived by him at the time. The same view of the case is substantially taken in 2 Phil. Ev. 115, where a conclusion is drawn that an acknowledgment of the marriage by the defendant is perfectly competent, although in many cases it may, according to circumstances, be of little weight. . . . The courts, however, should give every facility consistent with justice in proving marriage. . . . To say that an action for criminal conversation could not be sustained without proving the marriage by a witness who was pres-



sary to prove the fact of adultery.<sup>5</sup>

**2. What Circumstances Must Be Shown.** — But the circumstances shown must be such as would lead the guarded discretion of a reasonable and just man to the conclusion;<sup>6</sup> as for example, that a criminal attachment existed between the wife and the defendant, and that they had an opportunity to gratify their unlawful passion.

**3. Resemblance of Child.** — Some courts allow the jury to consider the resemblance of a child claimed by the plaintiff to be the fruit of the adultery;<sup>7</sup> but it cannot be shown that the child could not have been begotten by the plaintiff.<sup>8</sup>

ent at the ceremony, would be to grant an almost unlimited license to inflict this species of injury with impunity. This is the only point submitted, and I am of the opinion that the judgment be reversed."

5. *Ramsay v. Ryerson*, 40 Fed. 739, 24 Abb. (N. C.) (N. Y.) 114.

In *Burdick v. Freman*, 120 N. Y. 420, 24 N. E. 949, the plaintiff sought to prove that the defendant and his (plaintiff's) wife had had adulterous intercourse on several occasions. He gave evidence of frequent intimate associations and of opportunities for adultery on many occasions. The defendant requested the court to instruct the jury that the evidence was insufficient to justify a finding that he had committed adultery with plaintiff's wife on any of the occasions mentioned. The court refused, and in effect charged that if any one of the occasions stood apart by itself the instruction might be proper, but that in determining the issue the jury were to consider all the evidence, and take into account all the occasions, and if they found the defendant had seduced the plaintiff's wife and alienated her affection he was liable. The instruction was held proper upon appeal.

The conduct of the defendant and the plaintiff's wife at times other than that laid in the complaint may be shown as circumstances tending to identify the defendant as the party involved at the time stated. *Dorman v. Sebre*, 21 Ky. L. Rep. 634, 52 S. W. 809.

It is not necessary that the adultery be established by disinterested eyewitnesses. *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1,006. See article "ADULTERY."

6. In an action for criminal con-

versation, the fact that the defendant and the plaintiff's wife visited a hotel late at night and remained there several hours, is a circumstance from which the jury may infer illicit intercourse. *Cornelius v. Hambay*, 150 Pa. St. 359, 24 Atl. 515; *Swedon v. Swedon*, 2 Hagg. Com. 23; *Mosser v. Mosser*, 29 Ala. 313; *State v. Marvin*, 35 N. H. 22.

The fact that the defendant introduced as his wife the plaintiff's wife, and occupied for two nights with her a bedroom containing but one bed, is sufficient evidence of adultery. *Billings v. Albright*, 66 App. Div. 239, 73 N. Y. Supp. 22.

It seems it cannot be shown that the wife's relations with defendant were common and notorious neighborhood talk. *Miller v. Lachman*, 117 Mich. 68, 75 N. W. 284.

It is error to charge that the plaintiff has the burden of establishing his case by a preponderance of the evidence that *reasonably satisfies* the mind; a mere preponderance suffices, *Ball v. Marquis*, (Iowa), 92 N. W. 691; *Seeber v. Pettit*, 200 Pa. St. 58, 49 Atl. 763.

**7. Resemblance of Child to Defendant.** — In *Stumm v. Hummel*, 39 Iowa 478, the court gave the following instruction, which was held proper on appeal: "If you believe that the child of plaintiff's wife shown to you during the trial resembles defendant, and your judgment and experience teach you that there is anything reliable in this appearance that would be safe for you to form an opinion on, you may consider it in corroborating the evidence of Mrs. Stumm."

**8. Proof of Non-Intercourse Between Husband and Wife.** — In an action for damages for criminal

**4. Time When Act Was Committed.**—The adultery need not be proved to have been committed at the precise time alleged in the complaint, if the variance is not so great as to mislead the defendant.<sup>9</sup>

**5. Correspondence Between Plaintiff's Wife and Defendant.** Correspondence between plaintiff's wife and the defendant may be introduced, which tends to show the criminal intercourse charged.<sup>10</sup>

### III. COMPETENCY OF WITNESSES.

**1. The Plaintiff.**—It is the better rule that the plaintiff is a competent witness for either party, subject to the restriction that he shall not disclose any confidential communication between himself and wife during marriage.<sup>11</sup>

conversation, the testimony of the husband and wife is inadmissible to disprove intercourse between themselves for the purpose of raising a presumption against the legitimacy of the wife's child. *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260.

In an action for criminal conversation, the plaintiff's right of action depends solely upon the defendant's carnal intercourse with the wife, and not upon the plaintiff's impotence or capacity; and the question as to whether an afterborn child was begotten by the husband or the defendant, or as to whether there had been any matrimonial intercourse between the husband and his wife, is immaterial. *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442.

**9. Smith v. Meyers**, 52 Neb. 70, 71 N. W. 1,006.

**10. Letters as Evidence.**—The plaintiff in a criminal conversation case may introduce in evidence letters written by his wife to the defendant, and received by him, under circumstances which refute any presumption of collusion between the wife and her husband, and which tend to show the alienation of her affections and the criminal intimacy charged. *Dalton v. Dregge*, 99 Mich. 250, 58 N. W. 57.

**11. The Plaintiff as a Witness.** *Tilton v. Beecher*, 59 N. Y. 176, 17 Am. Rep. 337.

In this case, tried before the city court of Brooklyn in 1874, the plaintiff offered himself as a witness on his own behalf, but was objected to

by the defendant on the ground that in the act of May 10, 1867, which enables husband and wife or either of them to be a witness, for or against the other, it is provided that nothing done in the act "shall render any husband or wife competent or compellable to give evidence for or against each other . . . in any action or proceeding for or on account of criminal conversation." For the plaintiff it was argued that he was not called to testify against his wife because she was not a party, and the court ruled that the plaintiff was competent to be sworn and to testify in his own behalf, but that as to the principal question at issue he was not competent to testify in respect to any confidential communication. 11 Abb. L. J. 96, 2 Cent. L. J. 102; Abb. Tr. Ev., p. 684.

He was incompetent at common law, on grounds of public policy, independent of his incompetency as a party. *King v. Luffe*, 8 East 193; *Dennison v. Page*, 29 Pa. St. 420, 72 Am. Dec. 644; *Ratcliffe v. Wales*, 1 Hill (N. Y.) 63. And in those states where the statute only removes the incompetency of parties, it is the better view that the husband is still incompetent in his own favor in this class of actions. *Manchester v. Manchester*, 24 Vt. 649; *Dwelly v. Dwelly*, 46 Me. 377; *Hasbrouck v. Vandervoort*, 9 N. Y. 153. On the injustice of admitting one where the other cannot be admitted, see *Baylis v. Baylis*, L. R. 1 Pr. & D. 395; *Conradi v. Conradi*, L. R. 1 Pr. & D. 514; *Harding v. Harding*, 4 Sw. &

**2. The Plaintiff's Wife.**—The plaintiff's wife is not a competent witness for him.<sup>12</sup> In New York she is now competent for defendant, with the same restrictions regarding confidential communications.<sup>13</sup> The wife's confessions are not evidence against the defendant.<sup>14</sup>

Tr. 145; *Blackborne v. Blackborne*, L. R. 1 Pr. & D. 563; *Mordaunt v. Mordaunt*, L. R. 2 Pr. & D. 109, 124.

The time when the husband gained knowledge of wife's infidelity may be shown by testimony of conversations between them. *Long v. Booe*, 106 Ala. 570, 17 So. 716.

12. *Hicks v. Bradner*, 2 Abb. Ct. App. Dec. 362; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539. Unless after divorce. *Ratcliffe v. Wales*, 1 Hill (N. Y.) 63; *Dickerman v. Graves*, 6 Cush. (60 Mass.) 308, 53 Am. Dec. 41.

In an action by a husband to recover damages for alleged criminal conversation between the defendant and the plaintiff's wife, where no divorce has been obtained, the wife is incompetent to testify as a witness to any fact in the case. Hence, she is not a competent witness for the plaintiff to prove the criminal intercourse of the defendant with her, alleged in the complaint. The code of procedure does not apply to such a case, for the reason that the wife is not a party to the action. *Carpenter v. White*, 46 Barb. (N. Y.) 291; *Hicks v. Bradner*, 2 Abb. App. Dec. (N. Y.) 362; *Mathews v. Yerex*, 48 Mich. 361, 12 N. W. 489; *Reynolds v. Schaffer*, 91 Mich. 494, 52 N. W. 15, 30 Am. St. Rep. 492; *Hauselman v. Dovel*, 102 Mich. 505, 60 N. W. 978, 47 Am. St. Rep. 557.

*Contra.*—*Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1,006; *Speck v. Gray*, 14 Wash. 589, 45 Pac. 143.

**Declarations of Wife.**—It is well settled that the declarations of the wife, whether oral or written, unless authorized by the defendant, or expressly or impliedly assented to by him, are not admissible in evidence to prove the charge against him, or to show her fondness for him, in an action for criminal conversation. *McVey v. Blair*, 7 Ind. 590; *Harris v. Rupel*, 14 Ind. 209; *Underwood v. Linton*, 54 Ind. 468; *Dance v. McBride*, 43 Iowa 624; *Preston v.*

*Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430. But her declarations before the seduction, tending to show affection for her husband, are admissible it seems. *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430. And as the wife's declarations are inadmissible against the paramour, they are also inadmissible in his favor. *Harris v. Rupel*, 14 Ind. 209.

Where a child is alleged to have been the fruit of the adulterous intercourse, the declarations and testimony of the husband and wife are inadmissible to disprove intercourse between them for the purpose of rebutting the legal presumption of the legitimacy of such child. *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260.

*Contra.*—In Nebraska, the plaintiff's wife is a competent witness for him. *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1,006.

The wife's death may be shown to explain why she is not called as a witness by plaintiff. *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1,073.

**13. New York Rule.**—In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy, except that she cannot, without plaintiff's consent, disclose any confidential communication had or made between herself and plaintiff. And that declarations or admissions of the wife cannot be received to prove an act by her which the law does not authorize a married woman to perform. New York Code Civ. Proc., § 828; *Kelly v. Drew*, 12 Allen (Mass.) 107, 90 Am. Dec. 138; New York Code Civ. Proc., § 831.

**14. Wife's Confession.**—In a suit for criminal conversation, the confessions of the wife are not evidence against the defendant. *McVey v. Blair*, 7 Ind. 590; *Harris v. Rupel*, 14 Ind. 209.

On a trial of a suit for criminal

**After Divorce.** — It is held in some states that the plaintiff's divorced wife is a competent witness for her former husband to prove the criminal conversation.<sup>15</sup>

**3. The Defendant.** — The defendant is a competent witness for the plaintiff, except that in those jurisdictions where adultery is a crime he is examined subject to his privilege from criminating himself.<sup>16</sup> He is competent as a witness on his own behalf, usually with the effect of waiving his privilege on cross-examination.<sup>17</sup>

#### IV. MATTERS PERTAINING TO THE DEFENSE.

**1. The Wife's Consent.** — The wife's consent, although it may be shown in mitigation, as hereinafter stated, cannot be shown as a bar to the husband's right of action against the seducer.<sup>18</sup>

conversation, the plaintiff offered in evidence a certain paper written by his wife tending to show the alleged criminal intercourse, but which was not sent to, or ever in the possession of, the defendant. The plaintiff testified in relation to the paper, that he came home on a certain occasion and found his wife writing it, and told her he would take charge of it, and did so, and had it in his possession ever since. The paper was offered in evidence attached to a deposition of the plaintiff's wife, who had since obtained a divorce from him. It was held that the paper was inadmissible in evidence. *Underwood v. Linton*, 54 Ind. 468.

The fact of seduction cannot be proved by extra judicial statement of wife. *Ball v. Marquis*, (Iowa), 92 N. W. 691.

##### 15. Competent After Divorce.

In an action on the case, brought by a husband for criminal conversation with his wife, the latter, after a divorce from the bonds of matrimony, is a competent witness for the plaintiff, to prove the charges in the declaration. *Dickerman v. Graves*, 6 Cush. (Mass.) 308, 53 Am. Dec. 41; *Ratliffe v. Wales*, 1 Hill (N. Y.) 63; *Hester v. Hester*, 15 N. C. 228; *Wottrich v. Freeman*, 71 N. Y. 601; *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *Stanton v. Willson*, 3 Day (Conn.) 37, 3 Am. Dec. 255; *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255; *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1,073; *Seiber v. Pettit*, 200 Pa. St. 58, 49 Atl. 763.

*Contra.* — *Monroe v. Twisleton*, Peaks Add. Cas. 219; *Doker v. Hasler*, Ry. & M. 198; *Barnes v. Carnack*, 1 Barb. (N. Y.) 392; *State v. Jolly*, 20 N. C. 110, 32 Am. Dec. 656; *State v. Phelps*, 2 Tyler (Vt.) 374; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Waddams v. Humphrey*, 22 Ill. 661; 1 Greenl. Ev., § § 337-338; 1 Phill. Ev., p. 83.

16. Defendant is privileged to refuse to answer questions which might incriminate himself. *Cates v. Hardacre*, 3 Taunt. 424; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; *Fellows v. Wilson*, 31 Barb. (N. Y.) 162; *Macbride v. Macbride*, 4 Esp. 242; *Parkhurst v. Lawton*, 2 Swan. 194.

17. *Boardman v. Boardman*, L. R. 1 Pr. & D. 233; *Tappan v. Butler*, 7 Bosw. (N. Y.) 480.

18. In *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442, it is held by Harrison, J.: "The foundation of the husband's right of action is the wrong done him by the defendant in violating his personal rights. The husband has the right to the conjugal fellowship of his wife, to her society, her aid, her fidelity in every conjugal relation. Any act of another by which he is deprived of this right constitutes a personal wrong, for which the law gives him a redress in damages. Her sexual intercourse with another is an invasion of his rights, and it is immaterial whether this invasion is accomplished by force or by the consent of the wife. As the right belongs to the husband, it

**2. Violence Will Not Bar Action.** — Where it is shown that the act was done by force, and that a criminal action will lie, it is no defense, and an action for criminal conversation is not barred.<sup>19</sup>

**3. Separation of Husband and Wife Not a Bar.** — It is the better rule that where the husband and wife are living apart under articles of separation or by parol agreement, the fact of separation is no bar to the action.<sup>20</sup> The rule is otherwise in England, Canada and

is no defense to his action for redress that its violation was by the consent or procurement of the wife, for she is not competent to give such consent. And it is not necessary that the husband should show that it was by force or against her will. The original form of this action was *trespass vi et armis* (3 Blackst. Com. 139), even though the act was with the consent of the wife, for the reason, as was said by Holt, C. J., in *Rigaut v. Gallisard*, 7 Mod. 78, that 'the law will not allow her a consent in such case to the prejudice of her husband, because of the interest he has in her,' but under this form of action it was not necessary to make any proof of force, as that was implied by the law (1 Chitty's Pleading 140). Although seduction is ordinarily the means by which the adulterous intercourse is brought about, yet the action may be maintained without making proof of the seduction. The wrong to the husband consists in the carnal intercourse with his wife by another, and it is immaterial whether this intercourse is accomplished by persuasion or by force. (*Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260)."

Nor are the rights of the plaintiff affected in such cases, whether the act was done by the consent of the wife or was accomplished forcibly and against her will, except in aggravation or mitigation of the injury. "The common law, in giving the remedy, instead of making the husband's right of action depend upon his wife having consented to her defilement, has invariably, whatever the truth might be, decisively assumed that she did not assent, but was overcome by force, and the action has been sustained just the same, whether, as a matter of fact, her will

consented or she was outraged by actual violence." *Jacobsen v. Siddal*, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360; *Bac. Abr. "Mar. & Div."* 551, 553; 1 Chitty Plead. (16th Am. ed.) 140, 141, 150, 151, 188; 2 Hill Torts 507; *Forsythe v. State*, 6 Ohio 20; *Wales v. Miner*, 89 Ind. 118.

19. "And there seems to be no basis in justice or policy for the position that if the personal wrong is accompanied by circumstances of such atrocity as to elevate it to the public offense of rape, the private remedy is either taken away or suspended." *Graves, J., in Egbert v. Greenwalt*, 44 Mich. 246, 6 N. W. 654, 38 Am. Rep. 260; *Jacobsen v. Siddal*, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360; *Cooley on Torts*, 86, 90.

In *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442, it is said by Harrison, J.: "The wrong to the husband consists in the carnal intercourse with his wife by another, and it is immaterial whether this intercourse is accomplished by persuasion or by force." *Wales v. Miner*, 89 Ind. 118; *Moore v. Hammons*, 119 Ind. 510, 21 N. E. 1,111; *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307.

20. In *Michael v. Dunkle*, 84 Ind. 544, 43 Am. Rep. 100, Wood, C. J., said: "The evidence shows or tends strongly to show, without conflict, that before the criminal intercourse occurred the appellee and wife had finally separated, that they did not afterward live together, and that before the commencement of this action she obtained a divorce from him; and upon these facts it is insisted that the appellee was not entitled to recover. We think otherwise. The woman was still the appellee's wife, and notwithstanding the differences which had led to the separation, which it seems was caused by his cruelty, there might have been a reconciliation between them; and in-

Pennsylvania.<sup>21</sup>

**4. Decree of Divorce May Be a Bar.** — Where the defendant shows that the wife has secured a decree of divorce from the plaintiff after the injuries complained of, and before the action brought for criminal conversation, it is no bar to the action.<sup>22</sup> Nor is it a good defense that a decree of divorce has been granted to the plaintiff subsequent

deed there is evidence that the appellee was seeking to bring this about at the time when the offenses of the appellant were committed and discovered. After this discovery, it is not strange that the appellee permitted his wife, without resistance, to obtain a divorce; but he did not thereby waive or lose his right to redress for the injury done. It would not be in the interests of good order and the public morals to permit the seducer of a wife to set up a disagreement, or even a separation, between her and the husband, as a complete defense to an action by the latter for the wrong."

In *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607, Smith, J., said: "If the husband, by his conduct, compels the separation from him of his wife, he may, as to her, have lost his legal right to the solace and comfort of her society, but not as to all the world. His consent is not thereby extended to other men for sexual commerce with her. Although separated from her husband, and by his fault, she remains his wife until divorced, and for her support he is liable. Her enforced separation does not release him from his marital duties. There is always the hope of reconciliation. The proper nurture, training and instruction of children require the united labor and affection of both parents. Their mutual comfort and support, and the good of society, require that they should live together in one family. The policy of the law encourages them, if living apart, to come together again. Reconciliation would or should be followed by purity in their marriage relation and happiness in their home. If, while separated, she is debauched, the hope of reconciliation is thereby greatly diminished, and may be wholly extinguished." See also *Browning v. Jones*, 52 Ill. App. 597.

**21.** *Fry v. Derstler*, 2 Yeates (Pa.) 278.

**England.** — A husband separated from his wife by articles cannot maintain an action for criminal conversation after the separation. *Bartelot v. Hawker*, 1 Peake N. P. (ed. 1795) 7.

In *Weedon v. Timbrell*, 5 T. R. 357, it was held that the gist of the action was the loss of the comfort and society of the plaintiff's wife, and that, therefore, an action could not be brought for the criminal conversation, after a separation between the husband and wife. (The action of criminal conversation was abolished in England by the Divorce Act of 1857, 20 and 21 Vict., c. 85, § 59, and a substitute remedy given.) *Chambers v. Caulfield*, 6 East 244; *Wilton v. Webster*, 7 Car. & P. 198.

**In Canada.** — In an action for criminal conversation the defendant pleaded: First, that the plaintiff had been guilty of adultery with one L., and had continually treated his wife with intolerable cruelty, and had frequently used severe personal violence toward her, and finally put her away from him by force, and threatened to put her to death if she ever returned to him, so that she was in danger of her life, and did live apart from him permanently. Second, that plaintiff's wife had, while living apart from him, obtained an order for protection under the statute, after due notice to the plaintiff of her application therefor, which order was duly registered and is in full force. It was held on demurrer that the pleas showed a good defense. *Patterson v. McGregor*, 28 U. C. Q. B. 280.

**22.** *Michael v. Dunkle*, 84 Ind. 544, 43 Am. Rep. 100; *Wood v. Mathews*, 47 Iowa 409; *Dickerman v. Graves*, 6 Cush. (Mass.) 308, 53 Am. Dec. 41; *Sherwood v. Titman*, 55 Pa. St. 77.

to the criminal conversation, and before the action brought.<sup>23</sup> But if the husband was in possession of facts which would have been a complete defense to the suit by his wife for divorce, and made no defense thereto, the decree may be set up as conclusive against their existence, and a subsequent action for criminal conversation grounded upon them is barred.<sup>24</sup>

**5. Conduct of the Parties May Be a Bar.** — A. CONSENT OR CONIVANCE OF HUSBAND. — a. *To Particular Acts.* — Where it is shown that the husband consented or connived at his wife's adultery, it is a complete defense to the action.<sup>25</sup>

b. *Permitting Wife to Live as a Prostitute.* — If the wife is suffered to live as a prostitute with the privity of her husband, and a

**23.** *Ratcliffe v. Wales*, 1 Hill (N. Y.) 63; *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 39 Atl. 731; *Wales v. Miner*, 89 Ind. 118.

**24.** *Gleason v. Knapp*, 56 Mich. 291, 22 N. W. 865, 56 Am. Rep. 388, where the wife had obtained a decree of divorce for cruelty, the husband making no defense, but subsequently bringing an action for criminal conversation, alleging the act as known before the divorce suit, it was held that the fact of criminal conversation would have been a perfect defense to the suit for divorce, so that the decree was therefore conclusive against its existence, and a complete bar to the civil action. *Wales v. Miner*, 89 Ind. 118.

**25.** *England.* — *Duberley v. Gunning*, 4 T. R. 651; *Howard v. Burtonwood*, 1 Selw. N. P. 9.

*Connecticut.* — *Norton v. Warner*, 9 Conn. 172.

*Delaware.* — *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 30 Atl. 731.

*Illinois.* — *Lowe v. Massey*, 62 Ill. 47; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539.

*Iowa.* — *Morning v. Long*, 109 Iowa 288, 80 N. W. 390.

*New York.* — *Schorn v. Berry*, 63 Hun 110, 17 N. Y. Supp. 572; *Smith v. Masten*, 15 Wend. 270.

*Pennsylvania.* — *Silvernale v. Westerman*, 11 Luz. Leg. Reg. 5.

**Limitation of Rule.** — But the plaintiff will be entitled to recover, unless he has, in some degree, been a party to his own dishonor, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by

assenting to the particular act of adultery with the defendant. *Winter v. Henn*, 4 Car. & P. 494, 19 Eng. C. L. 491.

In *Bunnell v. Greathead*, 49 Barb. (N. Y.) 106, it was shown that the plaintiff saw his wife leave the house, meet the defendant, go to an out-house with him, and there submit to seduction by him. The plaintiff crawled to a place where he could see the act done and made no effort to prevent it. The appellate court on its own motion remanded the cause for a new trial, with the instruction to the trial court that if the husband consented to his wife's seduction, the action was barred; if he was guilty of negligence or loose or improper conduct not amounting to consent, it went in reduction of damages; if he had it in his power to prevent the debauchment of his wife and neglected to interpose, he could recover only the actual pecuniary damages that he sustained.

It is not a bar to plaintiff's action that he allowed defendant to remain in his house after a suspicion of his wife's infidelity had been intimated to him. *Foley v. Peterborough*, 4 Doug. 294, 26 Eng. C. L. 363.

If the husband consents to his wife's adultery, it is a bar to the action, whether the consent he granted was by giving a general license to his wife to conduct herself generally as she pleased with men, or by assenting to the particular act of adultery charged. *Schorn v. Berry*, 63 Hun 110, 17 N. Y. Supp. 572.

Plaintiff does not have burden of

man is thereby brought into criminal conversation with her, this goes in bar to the action, for it is *damnum absque injuria*.<sup>26</sup>

**6. Conduct Prior to the Wrong.** — A. OF HUSBAND. — a. *Recrimination*. — The misconduct of the husband, his unfaithfulness, cruelty and recrimination generally, do not constitute a defense in an action for criminal conversation.<sup>27</sup>

b. *Negligence as to Wife's Conduct*. — Where a husband had no suspicion of his wife's infidelity it is no defense to show that he was careless in allowing her the opportunities for crime.<sup>28</sup> And when he suspects her, he may, in order to obtain proof of her unchastity, leave open the opportunities which he finds, so long as he does not

negating consent or connivance. But the subsequent relations between husband and wife may be shown to establish connivance. *Morning v. Long*, 109 Iowa 288, 80 N. W. 390.

**26. Permitting Wife to Live as Prostitute.** — In *Sanborn v. Neilson*, 4 N. H. 501, it is held: "If the wife is suffered to live as a prostitute with the privity of her husband, and a man is thereby drawn into criminal conversation with her, this goes in bar of the action because the damage is without an injury. But if it be without the privity of the husband it will go only to the damages, let her be ever so profligate. . . . To constitute a defense of this kind it must be shown that the wife was permitted, by the husband, to live openly and publicly in a state of common prostitution, in such manner that his assent to her being a common prostitute may be reasonably presumed. This, and nothing short of this, is an answer to the action."

"The husband's having suffered the wife to maintain immoral connection with others is as truly a bar to the action as if he had permitted the present defendant to be connected with her." *Hodges v. Windham*, Peake N. P. 39; *Smith v. Allison*, Bull. N. P. 27a; *Cook v. Wood*, 30 Ga. 891, 76 Am. Dec. 677.

**Consent of Plaintiff Must Be Shown.** — In *Sherwood v. Titman*, 55 Pa. St. 77, the court instructed the jury as follows: "If plaintiff's wife was a common prostitute, and her prostitution was with the knowledge and assent of her husband, he cannot recover, but until his assent is shown, either by knowledge and acquiescence or otherwise, he cannot be regarded

as having abandoned his marital rights."

**27.** *Duberly v. Gunning*, 4 T. R. 651; *Calcroft v. Harborough*, 4 Car. & P. 499, 19 Eng. C. L. 494; *Sanborn v. Neilson*, 4 N. H. 501; *Cross v. Grant*, 62 N. H. 675, 13 Am. St. Rep. 607; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Harrison v. Price*, 22 Ind. 165; *Silvernale v. Westerman*, 1 Luz. Leg. Reg. (Pa.) 5; *Shattuck v. Hammond*, 46 Vt. 466, 14 Am. Rep. 631. But see opinion in *Patterson v. McGregor*, 28 U. C. Q. B. 280; *supra* under note 21.

**The Early Doctrine.** — *Wyndham v. Wycombe*, 4 Esp. 16. In this case the plaintiff attached himself to a woman esteemed of loose principles, appeared with her constantly in public, particularly when he would be seen by his wife, and manifested an open affection for her. It was held that his conduct was such that he could bring no action for criminal conversation with his wife. This case was held not to be the law by Lord Alvanley in *Bromley v. Wallace*, 4 Esp. N. P. 237, when he held that notwithstanding the ruling of Lord Kenyon in *Wyndham v. Wycombe*, 4 Esp. 16, he was of a different opinion and ruled accordingly that the misconduct, neglect and infidelity of the husband were no defense in an action for criminal connection.

**28. Negligence as to Wife's Conduct.** — In *Stumm v. Hummel*, 39 Iowa 478, the court held: "Certainly if the plaintiff confided in his wife and defendant, as husbands ordinarily do in virtuous women and in their neighbors, thus permitting opportunities of crime, he cannot be



invite the wrong.<sup>29</sup>

B. OF THE WIFE. — a. *Unchastity*. — Where it is shown in defense that the wife of the plaintiff had been guilty of adultery with other persons than the defendant, prior to the act complained of, it is held to be no bar to the husband's right of recovery,<sup>30</sup> unless such acts were committed with the knowledge and consent of the husband, and under circumstances from which a general license to the wife to so conduct herself would be inferred.<sup>31</sup>

7. *Conduct Subsequent to the Wrong*. — A. *CONDONATION*. — Co-habitation of husband with the erring wife, after knowledge of the adultery, constitutes no defense to an action against the seducer for damages.<sup>32</sup> And evidence of such condonation is not sufficient to show the consent or connivance of the husband to the adultery.<sup>33</sup>

B. *COLLUSION OF HUSBAND AND WIFE IN BRINGING ACTION*. The right of action is not barred by showing that the action was brought by collusion between the plaintiff and his divorced wife.<sup>34</sup>

C. *PERMITTING WIFE TO REMAIN WITH DEFENDANT AFTER THE*

charged with collusion in the absence of knowledge, or as aiding, encouraging or prompting intimacy, unless the circumstances would warrant presumption of his assent thereto. Knowledge of and assent to the crime is necessary to make him a partaker in guilt and a sharer in its consequences."

29. *Puth v. Zimbleman*, 99 Iowa 641, 68 N. W. 895; *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1,073.

30. *Wife's Unchastity Not a Bar*. *Sanborn v. Neilson*, 4 N. H. 501; *Conway v. Nicol*, 34 Iowa 533; *Harrison v. Price*, 22 Ind. 165; *Foulks v. Archer*, 31 N. J. L. 58. An answer is insufficient in bar, which alleges that before the criminal conversation alleged in the complaint, the plaintiff's wife was guilty of adultery with divers persons, with the knowledge of the plaintiff, and that the plaintiff after so knowing continued to cohabit with her more than two years immediately preceding the commission of the defendant's alleged offense. *Clouser v. Clapper*, 59 Ind. 548.

31. See *supra*, note 25.

32. *Verholf v. Van Howenlegen*, 21 Iowa 429; *Stumm v. Hummel*, 39 Iowa 478; *Sikes v. Tippins*, 85 Ga. 231, 11 S. E. 662; *Clouser v. Clapper*, 59 Ind. 548; *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1,006; *Sanborn v. Neilson*, 4 N. H. 501.

*Condonation*. — Nor will a new trial be granted where the plaintiff, after verdict in his favor, from motives of compassion and consideration for their child takes back his wife to live with him. *McMillan v. Jelly*, 17 U. C. C. P. 702.

33. *Condonation as Evidence of Connivance*. — In *Stumm v. Hummel*, 39 Iowa 478, a proffered instruction to the effect that, if the plaintiff, after full knowledge of his wife's infidelity, continued to live with her upon the same terms as before the crime, the fact would be evidence to show that the plaintiff connived at it, was held to have been properly refused; and that one to the effect that the plaintiff's forgiveness of his wife and continuance of the marital relation did not necessarily have the effect to establish connivance or assent, was properly given. The court said: "The law will not hold a party remediless for an injury of this kind, because through the exercise of Christian virtue, the influence of family interest, or even in the want of what may be regarded as true manly spirit, he forgives an erring wife and trusts in her reformation and promise of future good conduct and virtue."

34. *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539, *Laurence, J.*: "Neither did the court err in refusing to instruct the jury that they

**SEDUCTION.** — The fact that the plaintiff subsequently agrees with the defendant that his wife shall remain with him as his housekeeper does not extinguish his original cause of action.<sup>35</sup>

**8. Defendant's Ignorance of the Marriage Not a Bar.** — The defendant's ignorance of the marriage of the woman he has seduced is held to be no defense.<sup>36</sup>

**9. Previous Suit Not a Bar.** — A. AGAINST SAME DEFENDANT. It is no bar to an action for criminal conversation with the plaintiff's wife that the plaintiff had previously recovered a judgment against the same defendant for enticing away the former's wife.<sup>37</sup>

B. AGAINST ANOTHER DEFENDANT. — Nor is it a bar when it is shown that the plaintiff had previously brought an action of the same kind against another defendant, and obtained a verdict therein, although the cause of action in both suits accrued during the same period.<sup>38</sup>

C. DEATH OF PARTIES MAY BE A BAR. — Where the death of the plaintiff or the defendant is shown it is a bar to an action for criminal conversation,<sup>39</sup> but the death of the wife does not affect the hus-

must find for the defendant if they believed the plaintiff colluded with his former wife for the purpose of bringing the action.

If the offense of the defendant has been the result of collusion between the plaintiff and his wife, or of connivance on the part of the plaintiff, it would have been a bar to the action; but that idea is not expressed by the instruction, which speaks merely of colluding to bring this suit."

**35.** *Brown v. Spaulding*, 63 N. H. 622, 4 Atl. 394.

**36.** *Wales v. Miner*, 89 Ind. 118.

In *Colcraft v. Harborough*, 4 Car. & P. 499, 19 Eng. C. L. 494, it was held that it was not a matter of defense, but only in mitigation of damages, that the plaintiff having married an actress, concealed the marriage from her mother, and very seldom saw his wife, but suffered his wife to remain living with her mother as if she were a single woman, and allowed her to continue her theatrical performances in her maiden name.

**37.** In *Schnell v. Blohm*, 40 Hun (N. Y.) 378, the defendant enticed away the plaintiff's wife, and the plaintiff brought an action for the tort, and recovered judgment, which was paid. The wife afterwards procured a divorce in Iowa, and the de-

fendant married her there, and the plaintiff subsequently brought an action for criminal conversation. It was held that the former action and judgment therein did not prevent the plaintiff maintaining this action.

**38.** *Gregon v. M'Taggart*, 1 Campb. (Eng.) 415.

**39. Abatement of Action Upon Death of Defendant.** — *Clarke v. McClelland*, 9 Pa. St. 128; *Garrison v. Burden*, 40 Ala. 513.

**Exception to Rule.** — In *Cox v. Whitfield*, 18 Ala. 738, it was held that where the defendant in an action for criminal conversation sues out a writ of error to reverse the judgment rendered against him, and dies before error assigned, the action does not abate, and may be revived in the appellate court in the name of his personal representative. *Chilton, J.*, delivering the opinion of the court, said: "We readily grant that had C. died before final action in the court below, the cause would have abated by reason of his death. But a final judgment was rendered against him. The action here terminated, and it is very certain that his death, after the rendition of such judgment, did not annul it, but, on the contrary, it is conceded by the counsel that it could be enforced against the estate of the decedent, and that a *scire facies* would lie to revive it against

band's right of recovery.<sup>40</sup>

## V. WHAT MAY BE SHOWN TO AFFECT THE AMOUNT OF DAMAGES.

### 1. Character and Conduct of the Parties. — A. THE PLAINTIFF.

a. *Conduct as a Husband.* — The plaintiff's general character cannot be shown, as it is not in issue,<sup>41</sup> but his conduct as a husband may be shown.<sup>42</sup>

b. *Adultery.* — The plaintiff's criminal conversation with other women at any time after marriage and before trial may be shown in mitigation of damages.<sup>43</sup>

c. *Negligence as to Wife's Conduct.* — The plaintiff's gross negligence with respect to his wife's conduct with defendant or other men may be shown in mitigation.<sup>44</sup>

d. *Condonation.* — The husband's condonation of the wife's offense may be shown in mitigation.<sup>45</sup>

his personal representative. Now our law would be singularly defective if a final but erroneous judgment could only be reversed by the defendant while living, thus making his death operate as a release of all errors. It would be difficult to find a reason which would give to the party himself a right to have an erroneous judgment corrected and which would deny such right to his personal representative. But such, we are persuaded, is not the law."

40. *Cox v. Whitfield*, 18 Ala. 738; *Garrison v. Burden*, 40 Ala. 513; *Wilton v. Webster*, 7 Car. & P. 198, 32 Eng. C. L. 491.

In *Yundt v. Hartrunft*, 41 Ill. 9, it is held that: "Where a defendant has debauched the wife of the plaintiff, the right of action of the latter is complete, and a recovery by him is not defeated by her death before action brought. The right of recovery becomes complete at the time the injury was inflicted, and the right to recover damages commensurate with the injury, having then vested, is not divested by the death of the wife. Had either the plaintiff or the defendant died, then the suit could not have been sustained by or against their representatives; but neither reason nor authority sustains the proposition that the right of action abates at the death of wife."

#### 41. Plaintiff's General Character.

*Cox v. Pruitt*, 25 Ind. 90; *Trial of Swensden*, 14 How. St. Tr. 589, 590; *Zizer v. Merkel*, 24 Pa. St. 408; *Maguinay v. Saudek*, 5 Sneed (Tenn.) 146; *Norton v. Warner*, 9 Conn. 172.

42. *Evidence of Plaintiff's Cruelty* to, or want of affection for, his wife, is admissible in mitigation of damages in an action for criminal conversation. *Winter v. Wroot*, 1 Mo. & R. (Eng.) 404; *Dance v. McBride*, 43 Iowa 624; *Coleman v. White*, 43 Ind. 429; *Palmer v. Crook*, 7 Gray (Mass.) 418.

43. *Plaintiff's Adultery.* — *Shattuck v. Hammond*, 46 Vt. 466, 14 Am. Rep. 631; *Narracott v. Narracott*, 3 Sw. & Tr. (Eng.) 408; *Smith v. Masten*, 15 Wend. (N. Y.) 270; *Foot v. Tracy*, 1 Johns. (N. Y.) 46; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Bromley v. Wallace*, 4 Esp. (Eng.) 17.

44. *Negligence as to Wife's Conduct.* — *Duberley v. Gunning*, 4 T. R. (Eng.) 651; *Bunnell v. Greathead*, 49 Barb. (N. Y.) 106; *Lowe v. Massey*, 62 Ill. 47; *Smith v. Masten*, 15 Wend. (N. Y.) 270; *Colcraft v. Harborough*, 4 Car. & P. 499, 19 Eng. C. L. 494.

45. *Condonation.* — *State v. Marvin*, 35 N. H. 22. Some English cases hold condonation a bar. *Aiken v. Macree*, 2 Shaw's Dig. 842, Pl. 706; *Norris v. Norris*, 30 L. J. Mit.

e. *Mental Suffering*. — Evidence of plaintiff's mental suffering is relevant on the question of damages.<sup>46</sup>

B. WIFE. — a. *Conduct and Reputation for Chastity*. — The wife's character and conduct are material in determining the amount of damages; therefore the defendant may show her reputation for chastity,<sup>47</sup> and may introduce evidence showing particular acts of adultery,<sup>48</sup> and the fact that her husband had accused her of intimacy with other men than the defendant.<sup>49</sup>

b. *As to Defendant's Evidence of Wife's Unchastity*. — The evidence introduced by the defendant as to the reputation of the wife for chastity must be confined to some recent time, and to a definite place, to be material to the issue, and must not be as to her reputation several years before the act complained of.<sup>50</sup>

c. *Reputation for Chastity Before Marriage*. — The wife's reputation for chastity before her marriage to the plaintiff may be shown,

Cas. (Eng.) 111; *Adams v. Adams*, L. R. 1 Pr. & D. (Eng.) 333.

*Contra*. — *Foley v. Lord Peterborough*, 4 Dougl. (Eng.) 294, 26 Eng. C. L. 363.

Husband's forgiveness of wife and his continuing to live with her may be shown as affecting damage. *Morning v. Long*, 109 Iowa 288, 80 N. W. 390.

46. *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 39 Atl. 731.

47. *Wife's Unchastity*.

*England*. — *Gregson v. M'Taggart*, 1 Campb. 415; *Elsara v. Faucett*, 2 Esp. 562; *Verry v. Watkins*, 7 Car. & P. 308.

*Connecticut*. — *Mott v. Goddard*, 1 Root 472; *Davenport v. Russell*, 5 Day 145.

*Georgia*. — *Camp v. The State*, 3 Kelly 417.

*Illinois*. — *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539.

*Indiana*. — *Clouser v. Clapper*, 59 Ind. 548.

*Iowa*. — *Conway v. Nicol*, 34 Iowa 533; *Smith v. Milburn*, 17 Iowa 30.

*New York*. — *Harter v. Criil*, 33 Barb. 283; *Hogan v. Cregan*, 6 Rob. 138.

*South Carolina*. — *Torre v. Summers*, 2 Nott & Mc. 267, 10 Am. Dec. 597.

*Tennessee*. — *Thompson v. Glendinning*, 1 Head. 87.

*Wisconsin*. — *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1,073.

48. *Particular Acts of Adultery May Be Shown*. — *Torre v. Summers*,

2 Nott & McC. (S. C.) 267, 10 Am. Dec. 597; *Harter v. Criil*, 33 Barb. (N. Y.) 283; *Clouser v. Clapper*, 59 Ind. 548; *Winter v. Henn*, 4 Car. & P. 494, 19 Eng. C. L. 491; *Rea v. Tucker*, 51 Ill. 110, 99 Am. Dec. 539; *Harrison v. Price*, 22 Ind. 165.

In an action for criminal conversation, evidence of acts showing want of chastity in plaintiff's wife before marriage can be considered by the jury in mitigation of damages. And in this connection it is proper for the jury to consider evidence tending to show that her misconduct was confined to a single individual, and that individual the defendant. *Conway v. Nicol*, 34 Iowa 533.

A Witness May Testify that he had criminal conversation with the wife, previous to her seduction by the defendant, when the witness himself does not object to giving such testimony. *Torre v. Summers*, 2 Nott & McC. (S. C.) 267, 10 Am. Dec. 597.

49. Husband's belief and charges that his wife had been intimate with men other than the defendant may be shown in mitigation of damages. *Dorman v. Sabree*, 21 Ky. L. Rep. 634, 52 S. W. 809.

50. In *Vaughn v. Clarkson*, (R. I.), 34 Atl. 989, it was held proper to have disallowed testimony of the plaintiff's wife's reputation for chastity in England, five years before the commission of the injury complained of.

except where her lewdness was with the defendant alone.<sup>51</sup>

d. *Evidence of Subsequent Acts.* — Evidence of subsequent misconduct on the part of the wife is inadmissible.<sup>52</sup> The plaintiff cannot show that the wife committed suicide.<sup>53</sup>

e. *Evidence Proving Good Character Admissible in Rebuttal.* When the wife's character is attacked by evidence of unchastity, the husband may present evidence in rebuttal to show her general reputation for chastity.<sup>54</sup>

f. *Death of Wife.* — The wife's death may be shown as affecting damages, the husband being entitled to recover for loss of society only up to her death.<sup>55</sup>

C. DEFENDANT. — a. *General Character.* — The defendant's character is not in issue,<sup>56</sup> hence evidence of his good character is not admissible,<sup>57</sup> in the absence of evidence directly attacking it.<sup>58</sup>

b. *Conduct.* — In aggravation of damages it may be shown that the particular acts charged were the continuation of liaison begun in another county.<sup>59</sup>

c. *Reputation for Unchastity.* — The plaintiff cannot show the defendant's reputation for unchastity.<sup>60</sup>

d. *Separation of Husband and Wife.* — The fact that the plaintiff had separated from his wife and charged her with misconduct before the alleged intercourse may be shown in mitigation of damages.<sup>61</sup> The fact that the plaintiff has secured a divorce may be considered

51. *Before Marriage.* — Evidence of unchastity of wife before marriage, except where it appears her lewdness was with defendant alone, may be shown. *Sanborn v. Neilson*, 4 N. H. 501; *Conway v. Nicol*, 34 Iowa 533; *Stumm v. Hummel*, 39 Iowa 478; *Clouser v. Clapper*, 50 Ind. 548; *Foulks v. Archer*, 31 N. J. L. 58.

52. *Evidence of Subsequent Acts Inadmissible.* — Evidence of misconduct in the woman subsequent to her connection with the defendant is not admissible. *Elsara v. Faucett*, 2 Esp. N. P. (Eng.) 562.

53. *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1,073.

54. *Proof of Good Character for Chastity.* — When Admissible. Where, in an action by the husband for criminal conversation, the character of the wife for chastity is attacked by evidence of acts of adultery, it is proper to admit proof in rebuttal to show her general reputation for chastity. *Browning v. Jones*, 52 Ill. App. 597.

But the plaintiff cannot give evi-

dence of good character of his wife previous to the alleged adultery with the defendant, when no evidence had been produced by the other side impeaching her previous general character or her conduct with any other person than the defendant. *Pratt v. Andrews*, 4 N. Y. 493.

55. *Lee v. Hammond*, 114 Wis. 550, 90 N. W. 1,073.

56. *Defendant's Character Not in Issue.* — *Cox v. Pruitt*, 25 Ind. 90.

57. *Trial of Swensdon*, 14 How. St. Tr. 589; *Zizer v. Merkel*, 24 Pa. St. 408; *Maguinay v. Saudek*, 5 Sneed (Tenn.) 146; *Delvee v. Boardman*, 20 Iowa 446; *Herring v. Jester*, 2 *Houst. (Del.)* 66.

He cannot show, for instance, that his general character is that of a modest, retiring man. *McRae v. Lilly*, 23 N. C. 118.

58. *Cox v. Pruitt*, 25 Ind. 90.

59. *Long v. Booe*, 106 Ala. 170, 17 So. 716.

60. *Crose v. Rutledge*, 81 Ill. 266.

61. *Winter v. Henn*, 4 Car. & P. (Eng.) 494, 19 Eng. C. L. 491.

in mitigation.<sup>62</sup>

e. *Defendant's Liability to Criminal Prosecution.*—The defendant's liability to criminal prosecution, where the act with the wife was accomplished forcibly and against her will, cannot be set up in mitigation of damages.<sup>63</sup>

**2. Circumstances Affecting the Wrong.**—A. **ACT DONE BY FORCE.** The plaintiff can show that the wife was sought and overcome by the defendant, and that the act was done by force and against her will.<sup>64</sup>

B. **WHERE WIFE CONSENTS.**—The defendant may show that the wife sought him, threw herself in his way, and willingly consented to the act.<sup>65</sup>

**3. Affection and Domestic Happiness of Husband and Wife.** The affection existing between the husband and wife, the general condition of their domestic relations, prior to the advent of the defendant, may be shown, as affecting the amount of damages suffered by the plaintiff.<sup>66</sup>

62. *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 39 Atl. 731.

63. *Klopper v. Bromme*, 26 Wis. 372; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; *Jacobsen v. Siddal*, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360.

64. **Act Done by Force and Against the Will of the Wife.** *Jacobsen v. Siddal*, 12 Or. 280, 7 Pac. 108, 53 Am. Rep. 360, in which it was held by Lord, J.: "Nor are the rights of the plaintiff affected in such case, whether the act was done by the consent of the wife, or was accomplished forcibly and against her will, except in aggravation or mitigation of the injury." *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260.

In *Bedan v. Turney*, 99 Cal. 649, 34 Pac. 442, the court said: "The husband's right of action is established upon proof of the intercourse, and the means by which the intercourse was effected are but incidents to increase or mitigate the damages."

65. *Harrison v. Price*, 22 Ind. 165; *Coleman v. White*, 43 Ind. 429; *Clouser v. Clapper*, 59 Ind. 548; *Bracy v. Kibbe*, 31 Barb. (N. Y.) 273; *Voltz v. Blackmar*, 64 N. Y. 440.

**Where Plaintiff's Wife Sought the Defendant and Willingly Consented.** The defendant may show in mitigation that the wife was a willing and

eager party to the criminal intercourse. In this case the wife went out to defendant in a cornfield where he was at work and had intercourse with him in a fence corner; the court held: "A wife that will go to a cornfield to meet her paramour and have intercourse with him on the ground in a fence corner is much less valuable to her husband than one who stays at home and demeans herself becomingly." The court further held that the jury could not consider the "injury to the happiness, reputation and honor of the plaintiff's family." *Ferguson v. Smithers*, 70 Ind. 519, 36 Am. Rep. 186. That the wife seduced the defendant may be shown in mitigation of damages, not in bar. *Seiber v. Pettit*, 200 Pa. St. 58, 49 Atl. 763.

**66. Evidence of Family Relations of Husband and Wife.**—In actions for criminal conversation, one of the principal grounds on which the husband is allowed to recover damages is that by the wrongful act of the defendant, he has been deprived of the confidence and affection of his wife. If the defendant invades domestic peace, destroys conjugal felicity, and, by his solicitations, alienates and seduces the wife's affection from a kind and tender husband, he inflicts a more grievous wrong, and ought to incur a far heavier penalty in damages, than if love and harmony and

affectionate intercourse between husband and wife had been previously impaired or lost through the misconduct and cruel treatment of the husband. It is, therefore, proper to admit in evidence statements of the wife made prior to the alleged seduction concerning her husband's cruel treatment of her. *Palmer v. Crook*, 7 Gray (Mass.) 418.

In *Hadley v. Heywood*, 121 Mass. 236, it was held that evidence of unhappy relations existing between the plaintiff and his wife, not caused by the conduct of the defendant, was properly submitted to the jury; for, though this was in no sense a justification or palliation of the defendant's conduct, yet such evidence was admissible as affecting the question of damages, because if these unhappy relations existed, the injury done to the husband was less than it otherwise might have been. *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 39 Atl. 731.

In *Dance v. McBride*, 43 Iowa 624, the defendant offered evidence tending to show that the plaintiff and his wife had never seen each other until he visited her for the purpose of marrying her, having previously made an offer of marriage by letter. The court excluded the evidence, but upon appeal this was held to be error. The court, by Adams, J., said: "While the evidence could not be regarded as having much weight, we are of the opinion that it should have been admitted. It tended to show that the marriage in its inception was not one of affection. The acts complained of occurred within eighteen months from the time the marriage took place. The inauspicious way in which it was contracted, as well as any fact tending to prove that no love ripened between the parties, were proper facts to be considered by the jury in the assessment of damages."

In an action for seduction of plaintiff's wife, it is competent for the defendant to prove, under an answer of general denial, in mitigation of damages, that owing to the wicked and depraved disposition of the plaintiff, he and his wife, before the alleged improper intimacy, lived unhappily together; that the plaintiff

frequently cursed, abused and struck her, and about three years before their final separation, drove her from his house under threats of killing her. *Coleman v. White*, 43 Ind. 429.

*Contra.*—But evidence of unhappy relations between the husband and wife, before and at the time of the seduction, is held inadmissible in *Van Vacter v. McKillip*, 7 Blackf. (Ind.) 578, and in *Dallas v. Sellers*, 17 Ind. 479, 79 Am. Dec. 489.

**Evidence of Happiness and Affection** between husband and wife is held admissible in the following cases: *Edwards v. Crook*, 4 Esp. 39; *Preston v. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430; *Jones v. Thompson*, 6 Car. & P. 415; *Willis v. Bernard*, 8 Bing. 376, 5 Car. & P. 342; *Trelawney v. Coleman*, 2 Stark. 191; *Bell v. Bell*, 1 Sw. & Tr. 565.

Trouble between plaintiff and his wife eighteen years before the wrong alleged is too remote to be considered in mitigation of damages. *Dorman v. Seabee*, 21 Ky. L. Rep. 634, 52 S. W. 809.

Unhappy relations between plaintiff and his wife may be shown as affecting the amount of damages. *Prettyman v. Williamson*, 1 Pen. (Del.) 224, 39 Atl. 731.

The wife's written declarations to her husband have sometimes been excluded. *Whitman v. Egbert*, 27 App. Div. 374, 50 N. Y. Supp. 3.

It is indicated in the following cases that the wife's statements to third persons are competent to show the state of affection between herself and her husband. *Willis v. Bernard*, 8 Bing. 376; *Jones v. Thompson*, 6 Car. & P. 415; *Trelawney v. Colman*, 2 Stark. 191.

Correspondence between husband and wife before the seduction is admissible to show the terms on which they lived together. *Long v. Booe*, 106 Ala. 570, 17 So. 717.

The terms upon which the husband and wife lived together, previous to the adultery, their relations to each other, her chastity, character and conduct, her condition and health are proper subjects of inquiry on the question of damages. *Lee v. Hammond*, 144 Wis. 550, 90 N. W. 1,073.

**4. Pecuniary Condition of the Parties.**—A. DEFENDANT.—In actions for criminal conversations it is proper to admit evidence of the pecuniary condition of the defendant.<sup>67</sup>

B. PLAINTIFF.—It is likewise held admissible to hear evidence regarding the pecuniary condition of the plaintiff.<sup>68</sup>

**5. Social Rank of the Parties.**—The cases are not in harmony regarding the admission of evidence to show the social rank and condition of the parties.<sup>69</sup>

**67. Defendant's Pecuniary Condition.**—*Delaware*.—Herring v. Jester, 2 Houst. 66; Robinson v. Burton, 5 Harr. 335.

*Illinois*.—Rea v. Tucker, 51 Ill. 110, 99 Am. Dec. 539; Cochran v. Ammon, 16 Ill. 316; Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88.

*North Carolina*.—McAulay v. Birkhead, 35 N. C. 28; Johnson v. Allen, 100 N. C. 131, 5 S. E. 666.

*Virginia*.—Clem v. Holmes, 33 Gratt. 722, 36 Am. Rep. 793.

In an action for criminal conversation, the husband is entitled to punitive damages, and it is not improper to admit evidence that the seducer is a rich man, nor is it improper for the court to say "there is a very great difference in a penalty as between a rich man and a poor man." Matheis v. Mazet, 164 Pa. St. 580, 30 Atl. 434.

In addition to compensatory damages, criminal conversation being wanton and criminal in its nature, and therefore the action being vindictive, the jury are always permitted to give damages for the double purpose of setting an example and of punishing the wrong-doer. For these purposes proof of the condition in life and circumstances, as well of the husband as of the party committing the injury, is highly proper and should be considered by them in estimating the damages. Browning v. Jones, 52 Ill. App. 597.

**Contra, English Doctrine.**—The English doctrine seems to be that

while evidence of the defendant's general circumstances and situation in life is admissible, yet his specific pecuniary means and ability to pay damages cannot be shown. James v. Biddington, 6 Car. & P. 589, followed in Salter v. Walker, 21 L. T. (N. S.) 360; Hodsoil v. Taylor, L. R. 9 Q. B. Cas. 79; Bell v. Bell, 1 Sw. & Tr. 565; Wilson v. Leonard, 5 Ir. Jur. (O. S.) 101; Kniffen v. McConnell, 30 N. Y. 285.

**68. Plaintiff's Pecuniary Condition.**—See statement from Browning v. Jones, 52 Ill. App. 597; Thompson v. Glendenning, 1 Head (Tenn.) 87.

In an action on the case for criminal conversation with the plaintiff's wife, evidence of the pecuniary circumstances of the parties is proper. Rea v. Tucker, 51 Ill. 110, 99 Am. Dec. 539.

But where such a case is tried several years after the injury complained of, it is error to admit proof of the plaintiff's bankruptcy at the time of the trial. Peters v. Lake, 66 Ill. 206, 16 Am. Rep. 593.

**Contra.**—Norton v. Warner, 9 Conn. 172.

**69. Evidence of Social Rank Admitted.**—In an action for criminal conversation it is not improper to charge the jury that they may take into consideration the social relations of the parties. Matheis v. Mazet, 164 Pa. St. 580, 30 Atl. 434.

**Contra.**—Norton v. Warner, 9 Conn. 172.



# CROSS-EXAMINATION.

## I. DEFINITION, 807

## II. THE RIGHT, 807

1. *In General*, 807
2. *The Basis of the Right*, 807
3. *Direct Examination Anticipating Defense*, 808
4. *Testimony in Chief Stricken Out*, 808
5. *Witness Incompetent or Unable to Testify*, 808
6. *To Whom Belongs*, 808
  - A. *Generally*, 808
  - B. *Interest of Party Accruing After Suit Begun*, 809
  - C. *Parties Jointly Indicted*, 809
  - D. *Cross-Examination by Party*, 809
  - E. *Cross-Examination by Court*, 809
  - F. *Examination of Adverse Party Before Trial*, 809
7. *Loss of Cross-Examination as Affecting Direct Examination*, 809

## III. CONDUCT AND MODE OF THE CROSS-EXAMINATION, 811

1. *In General*, 811
2. *Postponement of Cross-Examination*, 812
3. *Restoring Witness*, 812
4. *Calling Witness from Stand for Consultation*, 812
5. *Order of Cross-Examination*, 812
6. *Counsel Contradicting Witnesses*, 813
7. *Order as to Counsel Conducting Cross-Examination*, 813
8. *Form of Questions*, 813
  - A. *Assuming Facts Not Proved*, 813

- B. *Opinion, Inferences, etc.*, 813
- C. *Misreciting Evidence*, 814
- D. *Questions to Prejudice Jury*, 814
- E. *Leading Questions*, 814
  - a. *Generally*, 814
  - b. *Intervention of Third Parties*, 815
  - c. *Witness Showing Bias*, 815
  - d. *Cross-Examination on New Matter*, 815
- 9. *Recalling Witness*, 815

#### IV. LIMITS OF THE CROSS-EXAMINATION, 816

- 1. *Witnesses Called by Court*, 816
- 2. *Witnesses Called by Parties*, 816
  - A. *Called But Not Examined*, 816
  - B. *Witnesses Examined in Chief*, 817
    - a. *Preliminary Issues*, 817
    - b. *Cross-Examination on Merits*, 817
      - (1.) *English Rule*, 817
      - (2.) *Rule in Canada*, 818
      - (3.) *Rule in United States*, 818
        - (A.) *Conflict in Authorities*, 818
        - (B.) *Authorities Following English Rule*, 818
          - (a.) *Generally*, 818
          - (b.) *Husband and Wife*, 820
          - (c.) *Accomplices*, 820
          - (d.) *Witness Called Subpoena Duces Tecum*, 820
          - (e.) *Witness to Prove Destruction of Original Instrument*, 820
          - (f.) *Irrelevant Matters*, 821
          - (g.) *Discretion of Court*, 821
          - (h.) *Statutes*, 821

- (i.) *Cross-Examination on Matters Gone Into on Direct*, 821
- (C.) "*American Rule*," 822
  - (a.) *Generally*, 822
  - (b.) *Preliminary or Formal Proof*, 829
  - (c.) *Subscribing Witness*, 829
  - (d.) *Statutes*, 830
  - (e.) *Discretion of Court*, 831
  - (f.) *Cross-Examination on New Matter*, 832
- (D.) *Res Gestae Rule Applied to Cross-Examination*, 832
  - (a.) *Generally*, 832
  - (b.) *Details of Event or Transaction*, 835
  - (c.) *Statements, Conversations, etc.*, 835
  - (d.) *Admissions and Confessions*, 837
- (E.) *Contradiction, Modification, etc., of Direct Examination*, 838.
- (F.) *Statements Brought Out on Direct*, 840
- (G.) *Fraud*, 840
- 3. *Cross-Examination of Adverse Party*, 841
  - A. *In General*, 841
  - B. *Statutes*, 841
  - C. *Limits*, 843
  - D. *Cross-Examination by Own Counsel*, 843
  - E. *Defendant in Criminal Prosecution*, 844
    - a. *In General*, 844
    - b. *Statutes*, 845
    - c. *Limit of Cross-Examination*, 846
      - (1.) *Generally*, 846
      - (2.) *By Statutes*, 847
    - d. *Recalling*, 849
    - e. *Aid of Counsel*, 849

**V. MATTERS IRRELEVANT TO ISSUES, 849**

1. *Bias, Prejudice, Hostility, etc.*, 849
  - A. *Generally*, 849
  - B. *Discretion of Court*, 856
2. *Cross-Examination to Test Accuracy, etc.*, 857
  - A. *Generally*, 857
  - B. *Questions Not Founded on Facts in Case*, 858
  - C. *Positiveness of Witness*, 859
  - D. *Knowledge of Facts as Foundation for Belief*, 859
  - E. *Religious Belief*, 859
  - F. *Substance of Interview*, 860
  - G. *Reason for Acts*, 860
  - H. *Discretion of Court*, 860
3. *Cross-Examination of Witnesses to Reputation, etc.*, 861
  - A. *Generally*, 861
  - B. *Character for Peaceableness*, 863
4. *Cross-Examination of Witness to Value*, 863
  - A. *Generally*, 863
  - B. *Value of Adjoining Property*, 865
5. *Cross-Examination as to Past*, 866
  - A. *Matters Not Involving Crime*, 866
    - a. *In General*, 866
    - b. *Specific Wrongful Acts*, 868
  - B. *Matters Involving Crime*, 870
    - a. *In General*, 870
    - b. *Indictment*, 871
    - c. *Conviction and Imprisonment*, 872
      - (1.) *In General*, 872
      - (2.) *Production of Record of Conviction*, 872
    - d. *Discretion of Court*, 873
6. *Contradictory Statements*, 874
  - A. *Generally*, 874
  - B. *Discrepancy Between Testimony and Pleading*, 875

- C. *Introduction of Writing*, 876
- 7. *Conclusiveness of Answers as to Irrelevant Matters*, 877
  - A. *Generally*, 877
  - B. *Matters Showing Witness' Temper, Disposition, etc.*, 879
- 8. *Discretion of Court*, 880

## VI. MATTERS TENDING TO DEGRADE WITNESS, 885

- 1. *Matters Not Incriminating*, 885
  - A. *Materiality to the Issue*, 885
    - a. *In General*, 885
    - b. *Reason for Rule*, 886
    - c. *Transactions Must Not Be Too Remote*, 887
    - d. *Limiting Inquiry to Reputation in Neighborhood*, 887
    - e. *Conclusiveness of Answer*, 887
  - B. *Matters Immaterial to the Issue*, 887
    - a. *In General*, 887
    - b. *Reasons for Exclusion*, 888
    - c. *Privilege Personal to Witness*, 890
    - d. *Authorities Permittin<sup>g</sup> Such Questions*, 890
  - C. *Discretion of Court*, 891
- 2. *Incriminating Questions*, 892
  - A. *Generally*, 892
  - B. *Facts Forming Links in Chain of Evidence*, 893
  - C. *Danger of Incrimination Must Be Real*, 893
  - D. *Privilege Personal to Witness*, 894
  - E. *Question for Court*, 894
  - F. *Loss of Privilege*, 895
    - a. *Conviction Barred by Limitation*, 895
    - b. *Waiver*, 895
    - c. *Accomplices*, 898

- G. *Evidence Given Under Misapprehension*, 899
- H. *Inference from Claim of Privilege*, 899
  - a. *In General*, 899
  - b. *Answering in Part*, 899
- 3. *Exposure to Civil Liability*, 900

## VII. CROSS-EXAMINATION OF PARTY, 902

- 1. *Civil Actions*, 902
  - A. *Generally*, 902
  - B. *Incriminating Questions*, 902
  - C. *Prejudicial Questions*, 903
  - D. *Discretion of Court*, 903
- 2. *Criminal Prosecution*, 903
  - A. *Generally*, 903
  - B. *Limits*, 903

## VIII. CROSS-EXAMINATION ON WRITTEN INSTRUMENTS, 910

## IX. RE-CROSS-EXAMINATION, 913

- 1. *In General*, 913
- 2. *Limits of Re-Cross-Examination*, 913

### CROSS-REFERENCES.

Contradiction of Witnesses ; Corroboration ;  
Direct Examination ; Depositions ;  
Expert and Opinion Evidence ;  
Impeachment ;  
Privilege ; Privileged Communications ;  
Witnesses ; Written Evidence.

## I. DEFINITION.

The cross-examination of a witness is defined as the examination of the witness by a party opposed to the party who called him.<sup>1</sup>

## II. THE RIGHT.

**1. In General.** — The right of proper cross-examination is recognized as one of the most important rights that a litigant has, and indeed is as fully secured to him as is the right to examine a witness in chief.<sup>2</sup>

**2. The Basis of the Right.** — The basis upon which the right of cross-examination is founded has been said to be that *ex parte* statements are too uncertain and unreliable to be considered in the investigation of controverted facts,<sup>3</sup> and should not

1. Bouv. Law Dict., Tit. "CROSS-EXAMINATION." See also Standard Dict., same title.

2. Coey v. Darknell, 25 Wash. 518, 65 Pac. 760.

In Edmonds v. Pearson, 3 Car. & P. 13, a witness was irregularly subpoenaed by the defendant, who did not pay him his fees. Being afterwards subpoenaed by the plaintiff, he was sworn and examined in chief by the plaintiff, but refused to submit to a cross-examination by the defendant until his fees were paid him. It was held that he must submit to a cross-examination.

In People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830, a criminal prosecution, the defendant's wife was called as a witness on his behalf on a former trial. It was stipulated that all of her testimony on that trial should be read as evidence, subject to all legal objections. Defendant's counsel refused to read a portion of the direct examination of the witness; the prosecuting attorney, however, insisted that it should be read on the ground that it rendered certain portions of the cross-examination admissible, and it was held that, under the stipulation, the direct examination must be read.

**Husband and Wife.** — The California Code of Civ. Proc. (§ 1,881) provides that "a husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent;" and in Steinberg v. Meany,

53 Cal. 425, it was held that an examination in chief of a husband by the wife is to be deemed and taken as a consent on her part to his examination by the opposite party.

3. "The power of cross-examination has been justly stated to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth. By means of it the situation of the witness with respect to the parties and the subject of the litigation, his interest, his motives, his inclinations and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his power of discernment, memory and description are all fully investigated and ascertained, and submitted to the consideration of the jury before whom he has testified giving the added opportunity of observing his demeanor and determining the weight and value of his testimony." Thayer's Case Ev., 2d ed., p. 1,207; citing 1 Greenl. Ev. 14th ed., 446.

"The term 'cross-examination' would not, perhaps, strictly import anything more than a leading and searching inquiry of the witness for further disclosures touching the particular matters detailed by him in his examination in chief. This, however, is stated to be one of the principal and most efficacious tests which the law has devised for the discovery of truth. And inasmuch as it has for its object the disclosure

therefore be received in evidence.\*

**3. Direct Examination Anticipating Defense.** — That the testimony in chief was intended to anticipate a defense, and properly should have followed evidence of that defense, does not deprive the party of the right to cross-examination.<sup>5</sup>

**4. Testimony in Chief Stricken Out.** — It is no reason for rejecting or striking out a cross-examination of a witness (if competent and relevant), that his testimony in chief has been stricken out.<sup>6</sup> But there can be no cross-examination upon evidence which has been excluded or stricken out.<sup>7</sup>

**5. Witness Incompetent or Unable to Testify.** — When a witness is incompetent to testify for want of knowledge concerning the matters to which he is called to testify, and testifies to nothing material to the issues, it is not error to refuse to permit him to be cross-examined.<sup>8</sup>

**6. To Whom Belongs.** — A. GENERALLY. — The right to cross-examine belongs to every party whose interests or claims are antagonistic or hostile to those of the party whose witnesses are sought to be cross-examined.<sup>9</sup> Nor can a prisoner on trial, whose liberty is at stake, be deprived of his legal right to cross-examine witnesses merely because of an inadvertently offensive expression either by

of not merely the extent and degree of accuracy of the witness' knowledge, as well as the means of his knowledge, but also his motives, inclinations, powers of memory, and relative situation in respect to the parties, and the subject matter of the investigation, it becomes an important test of the credibility of the witness." *Legg v. Drake*, 1 Ohio St. 286.

4. *Kissam v. Forrest*, 25 Wend. (N. Y.) 651; *People v. Cole* 43 N. Y. 508.

5. *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286, where the court, in so holding, said: "The plaintiff had the benefit of the testimony in chief and had no right to deprive the defendant of the privilege of proper cross-examination."

**Anticipating Defense.** — Thus, evidence of the consideration paid by the holder of a promissory note, in an action thereon by him against the maker, is unnecessary, yet if the plaintiff in such an action volunteers, in anticipation of the defense, in his direct examination, testimony that he purchased it for a valuable consideration, he is subject to cross-examination fully in regard to the consideration. *Kenny v. Walker*, 29 Or.

41, 44 Pac. 501. See also *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661; *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286.

6. *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499.

7. *Jones v. State*, 35 Fla. 289, 17 So. 284; *Callison v. Smith*, 20 Kan. 28, where the court in so ruling said that "as a rule the admissibility of a cross-examination depends upon the admissibility of the direct. If upon any matter the testimony in chief is excluded no cross-examination thereof is allowed."

8. *Watkins v. U. S.*, (Okla.), 50 Pac. 88.

9. In a statutory proceeding to determine claims of heirship to the estate of a decedent, every person who appears, and, either by complaint or answer, sets up a claim of heirship peculiar to himself, is an actor, and has a separate and independent right to conduct his case according to his own judgment, including the right to cross-examine the witnesses of the other claimants, and this right is not to be denied merely because other claimants had previously cross-examined the witnesses. *Estate of Kansson*, 127 Cal. 496, 59 Pac. 950.



himself or his counsel.<sup>10</sup>

**B. INTEREST OF PARTY ACCRUING AFTER SUIT BEGUN.** — A party whose interest in the subject matter of the litigation accrued prior to the commencement of the action is entitled, when added as a party, to cross-examine witnesses previously examined.<sup>11</sup>

**C. PARTIES JOINTLY INDICTED.** — Where two persons are jointly indicted, and a witness called by one of them gives evidence incriminating the other, the latter has a right to cross-examine the witness.<sup>12</sup>

**D. CROSS-EXAMINATION BY PARTY.** — The court will allow a defendant in a criminal prosecution, though he has counsel, to cross-examine the prosecuting witness himself.<sup>13</sup> But where a prisoner is accorded a full cross-examination of a state's witness through his counsel, a denial by the court of his request to personally cross-examine the witness is no violation of the constitutional right of the prisoner to defend by counsel, in person, or by both.<sup>14</sup>

**E. CROSS-EXAMINATION BY COURT.** — The trial judge may, in a criminal case, when the interests of the state are manifestly in incompetent hands, and in order to prevent miscarriage of justice, cross-examine witnesses for the accused, but the right to do so should be exercised sparingly, and with great discretion.<sup>15</sup>

**F. EXAMINATION OF ADVERSE PARTY BEFORE TRIAL.** — The examination of an adverse party before trial in pursuance of a statute for that purpose is in the nature of a cross-examination, and governed by substantially the same rules.<sup>16</sup>

**7. Loss of Cross-Examination as Affecting Direct Examination.** The right to cross-examine a witness is of such importance that where the party entitled to it has been deprived of it, the party calling the witness is not entitled to the benefit of his direct examination,<sup>17</sup> as when the witness refuses to answer a question pertinent

10. *Whiteman v. People*, 83 Ill. App. 369, holding, however, that as it did not appear that the prisoner was in any way injured by the action of the court in stopping cross-examination the error was not fatal.

11. *Lange v. Braynard*, 104 Cal. 156, 37 Pac. 868, so holding, although the party had already cross-examined the witnesses as counsel for his co-parties. See also *Wood v. Swift*, 81 N. Y. 31, where the case had been referred to a referee, and witnesses examined, when the complaint was amended by bringing in new parties defendant, and the added defendants were held to have the privilege of cross-examining the witnesses already examined.

12. *Reg. v. Burdett*, 6 Cox C. C. 458. See also *Reg. v. Woods*, 6 Cox's C. C. 224.

13. *Rex v. Parkins*, 1 Car. & P. 548; holding, also, that in such case questions may be suggested to him by his counsel.

14. *Roberts v. State*, 14 Ga. 18.

15. *Nightingale v. State*, 62 Neb. 371, 87 N. W. 158; *Fager v. State*, 22 Neb. 332, 35 N. W. 195.

16. *Plato v. Kelly*, 16 Abb. Pr. (N. Y.) 188.

17. *Kissam v. Forrest*, 25 Wend. (N. Y.) 651, wherein the rule at common law was discussed and the authorities examined, and the conclusion arrived at that the rule was that no evidence should be admitted

and not privileged,<sup>18</sup> or becomes so severely ill as to render cross-examination impossible,<sup>19</sup> or dies after his direct examination and before cross-examination,<sup>20</sup> or before his cross-examination has been finished,<sup>21</sup> or fails to appear for further cross-examination.<sup>22</sup> But it must appear that the party entitled to the right has been deprived of it in order to have this effect.<sup>23</sup> But failure to avail himself of the right to cross-examine afforded will not deprive the party calling the witness of his direct examination.<sup>24</sup>

Nor can a party who voluntarily deprives himself of the right complain,<sup>25</sup> as where, although afforded an opportunity to cross-examine, a postponement is had at his request.<sup>26</sup>

In *Chancery*, however, there have been cases in which the direct examination has been received, although there has been no opportunity to cross-examine.<sup>27</sup>

but what was or might be the subject of cross-examination by both parties. See also *Sperry v. Moore*, 42 Mich. 353, 4 N. W. 13.

"The benefit of cross-examination is an essential condition to the reception of direct testimony." *Heath v. Waters*, 40 Mich. 457.

In *Canada* it is also held that the examination in chief of a witness will not be read, if the right to cross-examination has been denied. *Colville v. Johnston*, 5 Ont. Pr. 462.

18. *Burnett v. Phalon*, 11 Abb. Pr. (N. Y.) 150. And see *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77.

19. *People v. Cole*, 43 N. Y. 508; *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77, where the court said: "It may be taken as the rule that where a party is deprived of the benefit of the cross-examination of a witness by the act of the opposite party, or by the refusal to testify, or other misconduct of the witness, or by any means other than the act of the party himself, or some cause to which he assented, that the testimony given on the examination in chief may not be read." Compare *Forrest v. Kissam*, 7 Hill (N. Y.) 463.

If the Witness Was in Such a Weak and Dying Condition as to preclude cross-examination, and such cross-examination was not waived, his deposition should not be admitted. *Pringle v. Pringle*, 59 Pa. St. 281.

20. *Kissam v. Forrest*, 25 Wend. (N. Y.) 651. This case was reversed in 7 Hill 463, but the Court

of Appeals in *People v. Cole*, 43 N. Y. 508, held the latter decision to be of no authority.

21. *Sperry v. Moore*, 42 Mich. 353, 4 N. W. 13.

22. *Matthews v. Matthews*, 53 Hun 244, 6 N. Y. Supp. 589.

To entitle the party to have the direct examination stricken out because the witness does not appear for cross-examination, the loss must be chargeable to the misconduct or neglect of the party calling him, otherwise the other party is not entitled to relief. *Burden v. Pratt* (N. Y. Super. Ct.), 8 Alb. L. J. 382.

23. *Curtice v. West*, 50 Hun 47, 2 N. Y. Supp. 507.

24. *Succession of Townsend*, 40 La. Ann. 66, 3 So. 488; *Bradley v. Mirick*, 91 N. Y. 293.

25. *Wilson v. Shelby Mfg. & Imp. Co.*, 96 Ala. 515, 38 Am. St. Rep. 134; *Cazenove v. Vaughan*, 1 Maule & S. (Eng.) 4.

26. *Celluloid Mfg. Co. v. Arlington Mfg. Co.*, 47 Fed. 4.

If a party desiring to cross-examine a witness does so, and he is not prevented by his adversary, or by the adjournment of the court, from completing it, and if he defer it to another day for his own convenience, the party calling the witness is not obliged to detain him, and if the witness absent himself it is not the fault of the party calling him. *Burden v. Pratt* (N. Y. Super. Ct.), 8 Alb. L. J. 382.

27. *Davies v. Otty*, 35 Beav. 208; *Abadom v. Abadom*, 24 Beav. 243;

### III. CONDUCT AND MODE OF THE CROSS-EXAMINATION.

1. **In General.** — Necessarily much must be left to the discretion of the presiding judge as to the conduct and mode of the cross-examination, subject, of course, to the rules discussed elsewhere in this article as to pertinency of the cross-examination to the direct, and the like;<sup>28</sup> as, for example, limiting the time for cross-examination,<sup>29</sup> and stopping repetition of questions already answered,<sup>30</sup> are matters necessarily confided to the discretion of the judge, and it is only when this discretion is abused that an appellate court should

*Cazenove v. Vaughan*, 1 Maule & S. 4; *Scott v. McCann*, 76 Md. 47, 24 Atl. 536. And see *Kissam v. Forrest*, 25 Wend. (N. Y.) 651.

In *O'Callaghan v. Murphy*, 2 Sch. & Lef. 158, where the cross-examination was postponed and prevented in consequence of the illness and subsequent death of the witness, the court allowed a deposition to stand.

28. *In re Carmichael*, 36 Ala. 514.

Whether or not a plaintiff, after having rested his case, and after the introduction of testimony by the defendant, shall be permitted to cross-examine the defendant's witnesses in chief, rests in the sound discretion of the court. *Young v. Bennett*, 5 Ill. 43.

In *State v. Brown*, 2 Marv. (Del.) 380, 36 Atl. 458, a criminal prosecution of several defendants, one of the counsel representing all the different defendants was allowed by the court to cross-examine the state's witnesses.

29. *Hughes v. State*, 70 Ark. 420, 68 Pac. 676.

In *Munro v. Stowe*, 175 Mass. 169, 55 N. E. 992, where the cross-examination had been conducted in such manner as to indicate that little, if anything, more of importance could be elicited by further cross-examination, it was held a reasonable exercise of discretion for the court to limit the further cross-examination to one hour.

30. *Arkansas*. — *Hughes v. State*, 70 Ark. 420, 68 S. W. 676.

*California*. — *People v. Rader*, 136 Cal. 253, 68 Pac. 707; *Spitler v. Kaeding*, 133 Cal. 500, 65 Pac. 1,040.

*Georgia*. — *McLeod v. Wilson*, 108 Ga. 790, 33 S. E. 851.

*Indiana*. — *Miller v. Coulter*, 156 Ind. 290, 59 N. E. 853.

*Iowa*. — *Waterbury v. Chicago, M. & St. P. R. Co.*, 104 Iowa 32, 78 N. W. 341.

*Kansas*. — *Hughes v. Ward*, 38 Kan. 452, 16 Pac. 810.

*Michigan*. — *Gutsch v. McIlhargey*, 69 Mich. 377, 37 N. W. 303.

*Minnesota*. — *Peterson v. Johnson-Wentworth Co.*, 70 Minn. 538, 73 N. W. 510.

*Texas*. — *Gulf R. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535.

*Washington*. — *Fleischmer v. Beaver*, 21 Wash. 6, 56 Pac. 840; *Gillian v. Davis*, 14 Wash. 183, 44 Pac. 152.

"The court shall exercise a reasonable control over the mode of interrogation so as to make it rapid, distinct, as little annoying to the witness and as effective for the extraction of the truth as may be, but subject to this control the parties may put such legal and pertinent questions as they may see fit. The court may, however, stop the production of further evidence on a particular point when the evidence on that point is already so full as to preclude reasonable doubt." *Hughes v. State*, 70 Ark. 420, 68 S. W. 676.

**Where There Are Numerous Parties**, the trial court may, in its discretion, prevent frequent and apparently useless repetitions of the same questions put by different parties on cross-examination, and this notwithstanding that the different parties may be hostile to each other in their claims. *In re Kasson's Estate*, 127 Cal. 496, 59 Pac. 950.

Where a witness in a prosecution for murder has already testified that he was a friend of the deceased, it is not error for the court to exclude questions on cross-examination relating solely to business matters be-

interfere.<sup>31</sup> Although for the purpose of testing the credibility of a witness it is proper to allow counsel to frame substantially the same questions in various forms, and call for repetition of answers already made by the witness.<sup>32</sup>

**Stopping the Cross-Examination of a Witness** is not prejudicial error where the witness has been fully examined by the cross-examiner as to every fact within his knowledge having any pertinent and legal bearing on the case.<sup>33</sup>

**Arbitrarily Excusing a Witness From Further Cross-Examination** before counsel has completed the cross-examination is such an abuse of discretion on the part of the court as will convict it of error, especially where there is no evidence of any disposition on the part of counsel to abuse his right of cross-examination.<sup>34</sup>

**2. Postponement of Cross-Examination** to a subsequent stage of the trial is a matter always within the sound discretion of the court.<sup>35</sup>

**3. Restoring Witness.**—Where the right to cross-examine has been lost through an erroneous ruling of the court, which the court admits, the witnesses should be restored to the stand for the purpose of cross-examination.<sup>36</sup>

**4. Calling Witness From Stand for Consultation.**—The court may, in its discretion, permit a party to be called from the witness stand during the cross-examination for consultation with his counsel and immediately recalled.<sup>37</sup>

**5. Order of Cross-Examination.**—It is in the discretion of the judge to say in what order several defendants having different interests shall cross-examine the plaintiff's witnesses.<sup>38</sup>

tween the witness and the deceased. *State v. McCann*, 16 Wash. 249, 47 Pac. 443.

**Where a Conversation Partly in a Foreign Language** has been fully gone into and interpreted on cross-examination, it is not error to refuse to permit it to be again detailed. *Ulrich v. People*, 39 Mich. 245.

**31.** It is error for the court to interfere and stop the cross-examination of a witness, and state, in the hearing of the jury, that the witness had not made a certain statement about which he was being cross-examined, when the record shows plainly that the witness had made the statement. *Hughes v. State*, 70 Ark. 420, 68 S. W. 676.

**32.** *Aurora v. Hillman*, 90 Ill. 61; *Jones v. Stevens*, 36 Neb. 849, 55 N. W. 251. See further on this question *infra* "TESTING CREDIBILITY."

**33.** *Mann v. State*, 134 Ala. 1, 32 So. 704; *Quincy G. & E. Co. v. Bau-*

*mann*, 104 Ill. App. 600; *affirmed* 67 N. E. 807.

**34.** *Bennett v. Eddy*, 120 Mich. 300, 79 N. W. 481.

**35.** *Campau v. Dewey*, 9 Mich. 381.

A party's legal right to cross-examine a witness is not infringed by a mere postponement of the cross-examination to a subsequent stage of the trial. *Baker v. Sherman*, 71 Vt. 439, 46 Atl. 57.

**36.** *Perry v. Jefferies*, 61 S. C. 292, 39 S. E. 515; *holding*, however, that although the witnesses were not restored to the witness stand for cross-examination, failure in this respect was not fatal because the cross-examining party had the full benefit of their testimony on their restoration for a full examination by him.

**37.** *Schloss v. Estey*, 114 Mich. 429, 72 N. W. 264.

**38.** *Fletcher v. Crosbie*, 2 M. & Rob. 417. Compare *Ridgeway v. Philips*, 1 C. M. & R. 415.

**6. Counsel Contradicting Witnesses.** — Counsel while cross-examining witnesses should not be allowed to contradict the witnesses without themselves being sworn.<sup>39</sup>

**7. Order as to Counsel Conducting Cross-Examination.** — The court may make reasonable rules respecting the counsel to conduct the cross-examination of a witness.<sup>40</sup>

Sometimes a rule of court limits the cross-examination to one counsel only.<sup>41</sup>

**8. Form of Questions.** — A. ASSUMING FACTS NOT PROVED. — A question on cross-examination should not assume as facts matters which are not in proof.<sup>42</sup>

B. OPINION, INFERENCES, ETC. — A question on cross-examination which does not call for a fact, but for an opinion,<sup>43</sup> or for an

39. *Selby v. Detroit R. Co.*, 122 Mich. 311, 81 N. W. 106.

The statements of the prosecuting attorney in a criminal prosecution are not competent evidence against the accused, unless he is sworn and examined, and submits himself to cross-examination, as any other witness. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

40. *Olive v. State*, 11 Neb. 1, 7 N. W. 444, holding, however, that no rule can be upheld which arbitrarily dictates which of several attorneys, there being no disagreement between them, shall cross-examine, or which requires the same attorney who took part in the examination in chief to conduct the cross-examination.

41. But an assistant counsel is not thereby prevented from objecting to questions put on cross-examination to a witness who has already been cross-examined by his associate on the same side. *Baumeier v. Antiau*, 65 Mich. 61, 31 N. W. 888.

42. **Assuming Facts Not Proved.** *Howland v. Oakland Consol. St. R. Co.*, 115 Cal. 487, 47 Pac. 120.

43. *Ross v. Com.*, 21 Ky. L. Rep. 1,344, 55 S. W. 4.

**Where a Witness Has Testified in Chief to Facts** only, questions, on cross-examination, which called for his opinions in relation to the matters in issue are properly ruled out. *Pierson v. Chicago G. W. R. Co.*, 116 Iowa 601, 88 N. W. 363.

**Non-Experts.** — The rule forbidding questions put to witnesses to be so framed as to elicit an opinion

only, applies with equal force to questions put to non-expert witnesses on cross-examination. *Vawter v. Ohio & Miss. R. Co.*, 14 Ind. 174.

In *Maloney v. Dailey*, 67 Ill. App. 427, an action to recover damages for causing the intoxication of plaintiff's husband, it was urged that the court erred in refusing to permit the husband to testify on cross-examination that the intoxication relied on in the case at bar was the same upon which the plaintiff had recovered in an action against another person. The court had in fact merely ruled that the witness could be asked what he testified to in the other case, that "it was for the jury to hear the evidence and determine whether the intoxication proved in this case was the same upon which recovery was had in the *Blumke* case, and witness was required to state what he did testify in that case. It was not for him to swear to his conclusion or opinion on the point."

Where an employee has testified in chief that he was employed by and was under the direction of the superintendent of a corporation, it is not error to permit him to be asked on cross-examination whether or not such superintendent did or did not have control and authority to direct the witness in his employment; the question is not objectionable as calling for a conclusion, because, if the witness was employed by the superintendent, the court would know as a matter of law, without the assistance of the witness' opinion, that the superintendent did have author-

inference on the witness' part from the facts to which he has previously testified,<sup>44</sup> or for an argument in answer to the argument contained in the question itself,<sup>45</sup> is properly rejected.

**C. MISRECITING EVIDENCE.** — It has been held that whether or not a question is to be rejected because it misrecites the testimony of the witness in an endeavor to get him to commit himself to an error in the recital is discretionary with the court.<sup>46</sup>

**D. QUESTIONS TO PREJUDICE JURY.** — Questions on cross-examination eliciting testimony which merely tends to prejudice and excite the passions of the jury against the opposite party transcend the limits of a proper cross-examination.<sup>47</sup>

**E. LEADING QUESTIONS.** — a. *Generally.* — The general rule is that leading questions may be permitted upon the cross-examination of a witness.<sup>48</sup> Although the witness may be impartial, the words cannot be put into his mouth to be echoed back again.<sup>49</sup>

**The Reason for the Rule Allowing Leading Questions** is that the witness having been called by one party may not be equally willing to disclose all he knows that shall be favorable to the other party.<sup>50</sup>

Where there are two defendants, each making separate defenses, and each endeavoring to cast the fault upon the other, it is not error for the trial judge, in the exercise of his discretion, to disallow leading questions propounded on cross-examination by one defendant when objected to by the other.<sup>51</sup>

**Statutes.** — Sometimes leading questions are allowable by express

ity to direct him. *Donovan v. Ferris*, 128 Cal. 48, 60 Pac. 519, 79 Am. St. Rep. 25.

The practice as to framing questions so as to elicit an opinion on cross-examination of expert witnesses is treated in the article on "EXPERT AND OPINION EVIDENCE."

44. *Union P. R. Co. v. O'Brien*, 161 U. S. 451, *affirming* 49 Fed. 538.

45. *People v. Harlan*, 133 Cal. 16, 65 Pac. 9.

46. *Harris v. Central R. Co.*, 78 Ga. 525, 3 S. E. 355, where the court said on this question: "It is the duty of the court both to protect a witness under cross-examination from being unfairly dealt with, and to allow a searching and skillful test of his intelligence, memory, accuracy and veracity. As a general rule it is better that cross-examination should be too free than too much restricted. This is a matter that necessarily belongs to and abides in the discretion of the court."

47. *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216;

*Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205.

48. *Parkin v. Moon*, 7 Car. & P. 408; *U. S. v. Dickinson*, 2 McLean (U. S.) 325, 25 Fed. Cas. No. 14,958; *Phares v. Barber*, 61 Ill. 271; *Boles v. State*, 24 Miss. (2 Cushm.) 445; *Vawter v. Ohio & M. R. Co.*, 14 Ind. 174; *Ferguson v. Rutherford*, 7 Nev. 385.

**The Right of Reasonable Cross-Examination** by leading questions is absolute. The denial of it is the denial of a valuable right, and if prejudicial constitutes reversible error. *Hempton v. State*, 111 Wis. 127, 86 N. W. 596, where it was held error to arbitrarily deny the privilege of cross-examination by leading questions on the mere ground of the youth of the witness.

49. *Clingman v. Irvine*, 40 Ill. App. 606.

50. *U. S. v. Dickinson*, 2 McLean (U. S.) 325, 25 Fed. Cas. No. 14,958.

51. *Mt. Adams & E. P. I. R. Co. v. Lowery*, 74 Fed. 463. See also *Sanger v. Flow*, 48 Fed. 152.

statutory provision.<sup>52</sup>

b. *Intervention of Third Parties.* — The rule permitting leading questions on the cross-examination of a witness is not changed by the intervention of third parties adverse to both plaintiff and defendant.<sup>53</sup>

c. *Witness Showing Bias.* — Refusal to permit a witness manifesting a strong bias in favor of the party cross-examining him to be asked leading questions is discretionary with the presiding judge.<sup>54</sup>

d. *Cross-Examination on New Matter.* — The cross-examining party cannot put leading questions to a witness whose cross-examination has been extended to new matter,<sup>55</sup> although there is authority to the contrary.<sup>56</sup>

9. *Recalling Witness.* — The party entitled to cross-examine may waive his right to do so at the time and recall the witness and

52. *State v. Larkins*, 5 Idaho 200, 47 Pac. 945.

53. *Succession of Townsend*, 40 La. Ann. 66, 3 So. 488.

54. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816; *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317, where it was said: "The witness may have purposely concealed such bias in favor of one party, to induce the other to call him\* and make him his witness; or the party calling him may be compelled to do so, to prove some single fact necessary to his case."

55. *United States.* — *Harrison v. Rowan*, 3 Wash. C. C. 580, 11 Fed. Cas. No. 6,141; *Philadelphia & I. R. Co. v. Stimson*, 14 Pet. 448.

*California.* — *Jackson v. Son*, 2 Cal. 178.

*New York.* — *People v. Moore*, 15 Wend. 419.

*Pennsylvania.* — *Ellmaker v. Buckley*, 16 Serg. & R. 72; *Castor v. Bavington*, 2 Watts & S. 505; *Floyd v. Bovard*, 6 Watts & S. 75.

"A different rule would enable a party to develop his defense untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary. When it passes beyond that

it becomes direct and affirmative evidence of the party, and should be subject to the appropriate restraint. There is no reason in the nature of the case why a direct examination should be guarded against the evil and danger resulting from leading questions which does not apply to an effort upon cross-examination to introduce a new and affirmative defense." *People ex rel Phelps v. Court of O. and T.*, 83 N. Y. 436.

When an adverse witness has testified to any point material to the party calling him, he may then and there be fully cross-examined by leading questions by the adverse party upon all matters pertinent to the case of the party calling him, except exclusively new matter, and "nothing shall be deemed new matter except it be such as could not be given under a general denial." *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

When the cross-examination of a witness is extended to matters not connected with the particular facts disclosed in the direct examination, leading questions to the witness may be proper or improper, according to the circumstances, and the control of this must rest within the discretion of the court. *Legg v. Drake*, 1 Ohio St. 286.

56. *Dickinson v. Shee*, 4 Esp. 67; *Moody v. Rowell*, 17 Pick. (Mass.) 490, 28 Am. Dec. 317. And see *Morgan v. Brydges*, 2 Stark. 314.

cross-examine him after he opens his case.<sup>57</sup> But after a witness on trial has been cross-examined it is discretionary with the court to permit or refuse a further cross-examination; it cannot be demanded as an absolute right,<sup>58</sup> especially when the witness has gone fully into the same matters on his first examination.<sup>59</sup>

Recalling an accused person for the purpose of further cross-examination after he has testified in his own behalf is not improper.<sup>60</sup>

Where a witness for the prosecution is recalled for further examination, the prisoner's counsel has a right to further cross-examine.<sup>61</sup>

#### IV. LIMITS OF THE CROSS-EXAMINATION.

**1. Witnesses Called by Court.** — Where a witness is called not by either of the parties, but by the court, as being able to elucidate the truth, neither party can cross-examine him as of right; the permission of the court must first be obtained.<sup>62</sup>

**2. Witnesses Called by Parties.** — A. CALLED BUT NOT EXAMINED. Merely calling and swearing a witness without proceeding with his examination in chief does not give the right to cross-examine;<sup>63</sup> although there is authority to the effect that whenever a witness is intentionally sworn, the adverse party has the right to cross-

<sup>57</sup>. *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

<sup>58</sup>. *State v. Hoppiss*, 27 N. C. 406; *Com. v. Nickerson*, 5 Allen (Mass.) 518.

Whether or not a witness who has been examined and cross-examined, shall be recalled in order to make some change in the statements made by him on cross-examination, is discretionary with the trial court. *Faust v. U. S.*, 163 U. S. 452.

In *People v. Thiede*, 11 Utah 241, 39 Pac. 837, a prosecution for murder, error was alleged in permitting the prosecution to recall a witness for the defendant after the defense had rested. The facts were that after the direct examination of the witness, in which she had stated that the defendant was kind to his wife, the prosecution on cross-examination put some questions with a view of showing the defendant's cruelty towards the deceased. Rebutting testimony was offered by the prosecution, and permission was then asked that the witness in question might be recalled for further cross-examination, in order to lay a proper foundation for impeachment by showing that she had made contradictory statements, and

it was held no error in court to permit this.

An accused who takes the stand as a witness on his own behalf may, for the purpose of laying a foundation for his contradiction, be recalled for additional cross-examination by the state. *State v. Favre*, 51 La. Ann. 434, 25 So. 93, *affirming State v. Walsh*, 44 La. Ann. 1, 122, 11 So. 811.

<sup>59</sup>. *Chicago & A. R. Co. v. Eaton*, 96 Ill. App. 570, *affirmed* 194 Ill. 441, 62 N. E. 784.

<sup>60</sup>. *State v. Horne*, 9 Kan. 119; *State v. Cohn*, 9 Nev. 179; *Com. v. Eisenhower*, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670; *Abbott v. Com.*, 23 Ky. L. Rep. 226, 62 S. W. 715.

<sup>61</sup>. *Rex v. Watson*, 6 Car. & P. 653.

<sup>62</sup>. *Coulson v. Disborough*, (1894), 2 Q. B. Div. 316; *Com. v. Morrell*, 99 Mass. 542; *Wilkerson v. State*, (Tex. Crim.), 57 S. W. 956.

<sup>63</sup>. *Austin v. State*, 14 Ark. 555; *State v. Carter*, 51 La. Ann. 442, 25 So. 385; *Toole v. Nichol*, 43 Ala. 406, wherein the witness was sworn and put under the rule for separate examination, the court saying: "The



examine,<sup>64</sup> unless he is sworn by mistake, or unless an immaterial question having been put to him, his further examination in chief has been stopped by the court.<sup>65</sup>

**B. WITNESSES EXAMINED IN CHIEF — a. Preliminary Issues.** The right to cross-examine does not extend to preliminary issues,<sup>66</sup> such as the circumstances under which the admissions or confessions of one accused of crime were obtained, at least, as a matter of right; it is discretionary with the court.<sup>67</sup>

**Dying Declarations.** — On an issue as to whether or not dying declarations were made under a sense of impending death and without hope of recovery, so as to render them admissible, the accused has a right to cross-examine a state's witnesses offered for the purpose of showing that they were so made.<sup>68</sup>

**b. Cross-Examination on Merits.** — (1.) **English Rule.** — In England the right of the cross-examination is not strictly limited to matters gone into on the direct examination, but extends to all matters involved in the issues, no matter how formal and unimportant the testimony of the witness may have been in chief, so long as he was sworn and gave some evidence.<sup>69</sup> So, under this rule, a witness who is called to a particular fact may be fully cross-examined on the merits.<sup>70</sup> So also may a witness called merely to

purpose of the cross-examination is to sift the testimony of a witness, and to try his integrity. When he has not been examined in chief, there can be no necessity for this;" it was held error to permit cross-examination under the circumstances.

64. Mason Southern R. Co., 58 S. C. 70, 36 S. E. 440, 37 S. E. 226, 79 Am. St. Rep. 826; Bogert v. Bogert, 2 Edw. Ch. (N. Y.) 399; Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499; Lunday v. Thomas, 26 Ga. 537.

**So Held in England.** — Phillips v. Sheriff of Middlesex, 1 Esp. 357. See also Stephen's Dig. Ev. 126; Rex v. Brooke, 2 Stark. 472, 20 Rev. Rep. 723.

*Compare* Reed v. James, 1 Stark. 132; Davis v. Dale, 1 M. & M. 514; Simpson v. Smith, 1 Stark. 162n.

65. Clifford v. Hunter, 3 Car. & P. 16; Wood v. Mackinnon, 2 M. & Rob. 273; Creevy v. Carr, 7 Car. & P. 64; Aiken v. Cato, 23 Ga. 154. *Compare* Rush v. Smith, 1 C. M. & R. 94.

66. Where the sole purpose of the direct examination of a witness is to show non-production of a document after a notice to produce it, so

as to permit the introduction of secondary evidence of its contents, the witness cannot be cross-examined as to the origin and existence of the document. Schreyer v. Turner F. Co., 29 Or. 1, 43 Pac. 719.

67. Com. v. Morrell, 99 Mass. 542. *Compare* Becker v. Quigg, 54 Ill. 390.

*Contra.* — Com. v. Van Horn, 188 Pa. St. 143, 41 Atl. 469; State v. Miller, 42 La. Ann. 1, 186, 8 So. 309, 21 Am. St. Rep. 418, wherein it is held that the accused, in such case, has the undeniable right, by his counsel, to cross-examine the witnesses of the state in reference to the time, place and circumstances of the alleged confession, and to ascertain for himself whether it was voluntarily made; he cannot be restricted to the sole right of attacking the confessions after their introduction in evidence by other and countervailing proof.

68. State v. McGowan, 66 Conn. 392, 34 Atl. 99. And see article "DYING DECLARATIONS."

69. Morgan v. Brydges, 2 Stark. 314; Clifford v. Hunter, 3 Car. & P. 16.

70. Morgan v. Brydges, 2 Stark.

produce a document on a *subpoena duces tecum*, or to identify it.<sup>71</sup>

(2.) **Rule in Canada.** — In Canada the liberal rule is followed, allowing a full cross-examination in the whole case without regard to the examination in chief.<sup>72</sup>

(3.) **Rule in United States.** — (A.) **CONFLICT IN AUTHORITIES.** — In the United States, however, the authorities are in conflict on this question.

(B.) **AUTHORITIES FOLLOWING ENGLISH RULE.** — (a.) *Generally.* — Thus in many of the states the liberal English rule allowing full cross-examination on the merits is allowed, without regard to whether the matters thus elicited were or were not gone into on the examination in chief,<sup>73</sup> and they have accordingly held that where a party

314; *Rex v. Brooke*, 2 Stark. 472, 20 Rev. Rep. 723; *Dawson v. Callaway*, 18 Ga. 573. And see *Moody v. Rowell*, 19 Pick. (Mass.) 490, 28 Am. Dec. 317.

71. *Rex v. Brooke*, 2 Stark. 472, 20 Rev. Rep. 723; *Summers v. Mosely*, 1 C. M. & R. 96n.

*Compare* *Turnbull v. Richardson*, 69 Mich. 400, 37 N. W. 499.

72. See *Crandell v. Moore*, 6 U. C. L. J. 143.

73. *Alabama.* — *Huntsville, B. L. & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. 295; *Johnson v. Armstrong*, 97 Ala. 731, 12 So. 72.

*Georgia.* — *Dawson v. Callaway*, 18 Ga. 573; and see *infra* this section as to statutes recognizing this rule.

*Louisiana.* — *Davidson v. De Lallande*, 12 La. Ann. 826; *King v. Atkins*, 33 La. Ann. 1,057; *reaffirming* previous Louisiana cases to this effect. *Compare* *State v. Taylor*, 45 La. Ann. 1,303, 14 So. 26.

*Massachusetts.* — *Blackington v. Johnston*, 126 Mass. 21; *Com v. Morgan*, 107 Mass. 199.

*Michigan.* — *Ireland v. Cincinnati, W. & M. R. Co.*, 79 Mich. 163, 4 N. W. 426; *People v. Barker*, 60 Mich. 277, 27 N. W. 539; *Hay v. Reid*, 85 Mich. 296, 48 N. W. 507.

*Missouri.* — *State v. Soper*, 148 Mo. 217, 49 S. W. 1,007; *State v. Sayers*, 58 Mo. 502; *Page v. Kankey*, 6 Mo. 433; *Posch v. Southern Elec. R. Co.*, 76 Mo. App. 601; *Brown v. Burrus*, 8 Mo. 26; *St. Louis & I. M. R. Co. v. Silver*, 56 Mo. 265; *Jones v. Roberts*, 37 Mo. App. 163.

*North Carolina.* — *State v. Allen*, 107 N. C. 805, 11 S. E. 1,016.

*Ohio.* — *Legg v. Drake*, 1 Ohio St. 286.

*South Carolina.* — *Kibler v. McIlwain*, 16 S. C. 550.

*Tennessee.* — *Sands v. Southern R. Co.*, 108 Tenn. 1, 64 S. W. 478.

*Texas.* — *Rhine v. Blake*, 59 Tex. 240; *Wentworth v. Crawford*, 11 Tex. 127.

"This rule has the support of reason as well as of authority. The oath administered to a witness requires him to speak the truth, *the whole truth*, and nothing but the truth, and, therefore, when a witness is put upon the stand he ought to be allowed an opportunity for stating all the facts within his knowledge bearing upon the issues involved in the case, and should not be confined to those facts only about which the party who offers him as a witness chooses to interrogate him. It is very true that the other party may put him on the stand as his witness and examine him as to any facts within his knowledge which he may desire to bring before the court, but he is not obliged to do so; and it may and often does happen that the other party would prefer to forego the opportunity of bringing out such facts rather than adopt one of his adversary's witnesses as his own. In such case the result would be that the witness would have no opportunity of telling *the whole truth* as he has been sworn so to do." *Kibler v. McIlwain*, 16 S. C. 550.

"Experience has shown that this rule is convenient and easy of application in practice, and works no disadvantage to the party who pro-

produces and swears a witness the adverse party may cross-examine the witness generally, even though he be interested to testify against the party calling him,<sup>74</sup> limited, however, by the rule that a party cannot, before the time for opening his own case, introduce his distinct grounds of defense or avoidance by the cross-examination of his adversary's witnesses.<sup>75</sup>

Thus, a witness for the plaintiff may be cross-examined by the defendant touching all the matters which it is competent for the plaintiff to prove, under the issue, in order to entitle him to recover.<sup>76</sup>

And on the other hand, the plaintiff may cross-examine the defendant's witnesses to all matters which the defendant may prove

duces a witness. On the other hand, a different rule, by making it necessary for the court, during the examination of a witness, constantly to determine what is or is not new matter, upon which the opposite party has the right to put leading questions, leads to confusion and delay in the progress of trials." *Beal v. Nichols*, 2 Gray (Mass.) 262. In this case the witness was called for the sole purpose of proving the execution of two written instruments which the adverse party had refused to admit, and the witness was then cross-examined generally against objection, but the court in sustaining the ruling said that a party calling a witness, even for formal proof of a written instrument, or other preliminary matter, thereby makes him his witness, and it follows that the adverse party has the right to cross-examine the witness upon all matters material to the issue.

In *Burke v. Miller*, 7 Cush. (Mass.) 547, the plaintiff called a witness merely to prove the former execution of a deed, and the defendant began to cross-examine him as to matters of defense. The court ruled that this was improper at that time and that the cross-examination should be deferred until the case of the defendant was opened. This course was pursued, and when the witness was recalled he was cross-examined by the defendant, and this ruling was sustained on a writ of error.

In Missouri the great majority of the cases hold as stated in the text. See cases cited *supra* this note. But it has also been said: "It is cus-

tomary to allow a party to a suit much liberty in the cross-examination of his adversary's witness, but it has always been held that the courts may exercise a sound discretion and confine such cross-examination within reasonable bounds, otherwise the practice in that respect might result in confusing and in annoying the witness and thereby tend to defeat the real purpose sought to be obtained—the truth." *Hutchins v. Missouri Pac. R. Co.*, 97 Mo. App. 548.

The Earlier Cases in Michigan followed the strict rule limiting the cross-examination to matters brought out in chief. *Campau v. Dewey*, 9 Mich. 381; *People v. Horton*, 4 Mich. 69, but these cases have been distinctly overruled and the liberal rule followed in that state. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Wilson v. Wagar*, 26 Mich. 452. And see cases title *supra* this note.

74. *Webster v. Lee*, 5 Mass. 334; *Fulton Bank v. Stafford*, 2 Wend. (N. Y.) 483.

The party calling the witness in such case cannot confine the cross-examination to matters in which the witness has no interest. *Merrill v. Berkshire*, 11 Pick. (Mass.) 269. And see *Jackson v. Varick*, 7 Cow. (N. Y.) 238; *affirmed* 2 Wend. 166.

75. *Legg v. Drake*, 1 Ohio St. 286.

76. It is error to refuse a party the right to cross-examine his adversary's witnesses as to the facts which would, if proven, defeat the latter's claim; and the error is not cured because the witness is subsequently introduced by the party deprived of cross-examination and ex-

under the issue in order to sustain his defense.<sup>77</sup>

**The Reason of This Rule is Obvious.**—If a party voluntarily calls upon an interested and incompetent witness for the purpose of sustaining by his testimony something favorable to his side, he admits that the witness is above the reach of improper influences, and his adversary should have the full benefit of such admission.<sup>78</sup>

(b.) *Husband and Wife.*—Sometimes, although the liberal rule is generally followed, yet a distinction is made where a wife is a witness for her husband as defendant in a criminal prosecution; and it is then held that in such case the cross-examination of the wife must be confined strictly to matters inquired into in chief.<sup>79</sup>

(c.) *Accomplices.*—The cross-examination of an accomplice testifying as a witness for the prosecution is not to be restricted to facts testified to by him in chief, but the defendant has the right to cross-examine the witness upon any matter that is pertinent to the issues joined.<sup>80</sup>

And an accomplice called as a witness for the defendant in a criminal prosecution is subject to cross-examination by the prosecution the same as any other witness, although on his own trial he could not be required to answer to any facts which he had not voluntarily sworn to.<sup>81</sup>

(d.) *Witness Called Subpoena Duces Tecum.*—Where a witness is produced and sworn under a subpoena *duces tecum*, and examined only in reference to a document in his possession, the opposite party is entitled to cross-examine him generally as to the merits of the case.<sup>82</sup>

(e.) *Witness to Prove Destruction of Original Instrument.*—Where a witness is produced to prove the destruction of an original writing, and that the copy offered was a correct copy thereof, the adverse party has, in general, the right to cross-examine him generally.<sup>83</sup>

amined as to those facts. *White v. Dinkins*, 19 Ga. 285.

77. *Legg v. Drake*, 1 Ohio St. 286.

78. *Page v. Kankey*, 6 Mo. 433.

79. **The Effect of the Violation of This Rule** is to make the wife a witness against her husband, which is not permissible. *Gaines v. State*, 38 Tex. Crim. 202, 42 S. W. 385; *Jones v. State*, 38 Tex. Crim. 87, 40 S. W. 807, 41 S. W. 638.

In *Merritt v. State*, 39 Tex. Crim. 70, 45 S. W. 21, a criminal prosecution, wherein the defendant had introduced his wife as a witness to certain facts, it was held that to permit the state on cross-examination to show other and different facts, not germane or pertinent to her direct

examination, and of a character prejudicial to the defendant, was fatal error.

80. *Duffey v. State*, 41 Tex. Crim. 391, 55 S. W. 176.

81. "The exemption (sought to be) invoked is one which the law allows only to a defendant when a witness in his own case and not when testifying for another. It is moreover a personal privilege which he alone can claim, and not a third party who uses him as a witness." *State v. Kennedy*, 154 Mo. 268, 55 S. W. 293.

82. *Ficken v. Atlanta*, 114 Ga. 970, 41 S. E. 58.

83. *Lunday v. Thomas*, 26 Ga. 537.

(f.) *Irrelevant Matters.* — Under the rule allowing the liberal cross-examination it is competent for one party on cross-examination to ask the witness about a matter his adversary had called out on direct examination, whether it was material or not.<sup>84</sup>

(g.) *Discretion of Court.* — But whether a witness may be examined as to matters not inquired about in chief is a matter largely discretionary with the trial court.<sup>85</sup>

(h.) *Statutes.* — And in some jurisdictions there are statutes expressly recognizing this rule.<sup>86</sup>

(i.) *Cross-examination on Matters Gone Into on Direct.* — And of course it is not improper under this rule to permit cross-examination upon matters inquired into in the examination in chief.<sup>87</sup>

84. *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163; *Winter v. Burt*, 31 Ala. 33.

85. *Huntsville, B. L. & M. S. R. Co. v. Corpening*, 97 Ala. 681, 12 So. 295; *Blackington v. Johnson*, 126 Mass. 21.

In the very nature of things, much must be left to the discretion of the trial judge, who, by observing the conduct and demeanor of the witness, is better qualified to prescribe in each case the boundary of collateral facts within which to restrict the cross-examination; and although cases may arise in which the trial court may transcend the proper limits, yet, unless the cross-examination seeks to elicit facts which are palpably irrelevant and immaterial, or unless the record affirmatively shows that improper indulgence was granted in the given case, the matter must be left entirely to the absolute discretion of the presiding judge. *Stoudenmeier v. Williamson*, 29 Ala. 558.

86. *News Pub. Co. v. Butler*, 95 Ga. 559, 22 S. E. 282.

In Georgia the civil code, § 5,282, provides that the right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him; and this right must not be abridged, especially where the witness is the opposite party to the cause on trial and has testified for the purpose of making out his own case. *Barnwell v. Hannegan*, 105 Ga. 396, 31 S. E. 116. "It is the duty of the court to protect the witness under cross-examination from being unfairly dealt with, but to allow a searching and skillful test of his intelligence, memory, accuracy

and veracity. As a general rule it is better that cross-examination should be too free than too restricted." *Harris v. Central R. Co.*, 78 Ga. 525, 3 S. E. 355.

In Idaho a statute provides that the "opposite party may cross-examine the witness as to any facts material to the issues in the action." See *State v. Larkins*, 5 Idaho 200, 47 Pac. 945.

Where material allegations of the complaint are denied by the answer, the defendant may cross-examine the plaintiff's witnesses to disprove those allegations. *Idaho Mercantile Co. v. Kalanquin*, (Idaho), 66 Pac. 933.

On the trial of a criminal prosecution it is held that the accused should be permitted, on cross-examination of the prosecuting witness, to interrogate the witness fully as to any matters connected with the transaction. *State v. Webb*, 6 Idaho 428, 55 Pac. 892.

87. *Hamilton v. People*, 29 Mich. 173.

Where a witness has been examined touching transactions had with a deceased person, it is not error for the court to allow opposing counsel to cross-examine the witness in regard to the same subject matter, in the absence, at least, of any motion by the party calling the witness to withdraw the evidence given on direct examination. *Lydia Pinkham Veg. Med. Co. v. Gibbs*, 108 Ga. 138, 33 S. E. 945.

On a trial for an indictment for burglary, in which two defendants are charged with having stolen property, -and in which a witness, who corroborates the testimony of the

(C.) "AMERICAN RULE."—(a.) *Generally.*—In other jurisdictions, however, the so-called "American Rule" is followed, that is, the right to cross-examine a witness extends only to such facts and circumstances as are connected with the matters testified to in chief,<sup>88</sup> and that a party should not be allowed to extend his cross-

owner of the property as to over-hearing, on a certain night, a conversation between the defendants in respect to dividing the property, details on his direct examination his movements generally on the night he claims to have overheard the conversation, it is permissible on cross-examination of such witness for the defendant to ask him his reason for the movements so described by him. *Yarbrough v. State*, 115 Ala. 92, 22 So. 534.

In *Oxsheer v. State*, 38 Tex. Crim. 499, 43 S. W. 335, a criminal prosecution, it was held that a state witness who had testified in chief that he had become responsible for defendant's fees to the attorneys representing him, should be allowed to explain on cross-examination why he became so responsible.

In an action to recover the purchase price of personal property, defended on the ground that the property was defective and practically worthless, and in which the defendant has testified in chief to the profits generally obtained on such property bought at a price named, it is proper to ask the defendant, on cross-examination, as to the price at which the property in question was sold. *Jackson Sleigh Co. v. Holmes*, 129 Mich. 370, 88 N. W. 895.

Where a witness, on direct examination, has testified that a person was using a house for residence and a grocery, it is not improper, on cross-examination, to ask the witness the extent of its being so used. *Maxwell v. State*, 129 Ala. 48, 29 So. 981.

Where a witness for the defense in a murder trial, on his direct examination, places the character of the deceased as a peaceable, law-abiding citizen in issue, it is competent, on cross-examination, to elicit from the witness the fact that the deceased was considered a good man by the people of his neighborhood. *State v. Gregory*, 158 Mo. 139, 59 S. W. 89.

**A Character Witness** who has testified in chief that the general character of a person was good, may be asked on cross-examination if he has not said, at a time and place, that such person was a bad man. *Jackson v. State*, 78 Ala. 471.

Where a witness has, on direct examination, as tending to show that a testatrix maintained her mental faculties, testified that a few hours after executing the will in question a priest was called to administer the last sacrament, and that the testatrix participated in the service, repeated audibly and properly the prayers, and appeared to comprehend the service, it is proper to ask the witness, on cross-examination, as to what the services consisted of. *Henrich v. Saier*, 124 Mich. 86, 82 N. W. 879.

**88. United States.**—*Philadelphia & I. R. Co. v. Stimson*, 14 Pet. 448; *Houghton v. Jones*, 1 Wall. 702; *Clary v. Hardeeville B. Co.*, 100 Fed. 915.

**Arkansas.**—*Austin v. State*, 14 Ark. 555.

**California.**—*Braly v. Henry*, 77 Cal. 324, 19 Pac. 529; *Howland v. Oakland C. St. R. Co.*, 115 Cal. 487, 47 Pac. 225; *People v. Godwin*, 123 Cal. 374, 55 Pac. 1,059; *Landsberger v. Gorham*, 5 Cal. 450; *Aitken v. Mendenhall*, 25 Cal. 212; *Tonini v. Cevasco*, 114 Cal. 266, 46 Pac. 103; *Bradley v. Clark*, 133 Cal. 196, 65 Pac. 395; *People v. Higuera*, 122 Cal. 466, 55 Pac. 252; *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495.

**Colorado.**—*Denver T. & Ft. W. R. Co. v. Smock*, 23 Colo. 456, 48 Pac. 681; *Henry v. Colorado Land & W. Co.*, 10 Colo. App. 14, 51 Pac. 90.

**Connecticut.**—*State Bank v. Waterhouse*, 70 Conn. 76, 38 Atl. 904, 66 Am. St. Rep. 82; *Ashborn v. Waterbury*, 69 Conn. 217, 37 Atl. 498; *State v. Smith*, 49 Conn. 376; *Murphy v. Murphy*, 74 Conn. 198, 50 Atl. 394.

**District of Columbia.**—*Woodbury v. District of Columbia*, 5 Mack. 127.

*Florida*.—*Thalheim v. State*, 38 Fla. 169, 20 So. 938; *Tischler v. Apple*, 30 Fla. 132, 11 So. 273.

*Illinois*.—*East Dubuque v. Burhyte*, 173 Ill. 553, 50 N. W. 1,077; *Maloney v. Dailey*, 67 Ill. App. 427; *Chicago R. I. & R. Co. v. N. Illinois C. & I. Co.*, 36 Ill. 60; *Bell v. Prewitt*, 62 Ill. 361; *Hartshorn v. Byrne*, 147 Ill. 418, 35 N. E. 622; *Hurlburt v. Meeker*, 104 Ill. 541; *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217.

*Indiana*.—*Patton v. Hamilton*, 12 Ind. 256; *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463; *Aurora v. Cobb*, 21 Ind. 492.

*Indian Territory*.—*Dorrance v. McAlester*, 1 I. T. 473, 45 S. W. 141.

*Iowa*.—*Bowsher v. Chicago B. & Q. R. Co.*, 113 Iowa 16, 84 N. W. 958; *Creager v. Johnson*, 114 Iowa 249, 86 N. W. 275; *Wilhelmi v. Leonard*, 13 Iowa 330; *State v. Cokeley*, 4 Iowa 477; *Krager v. Pierce*, 73 Iowa 359, 35 N. W. 477; *State v. Judiesch*, 96 Iowa 249, 65 N. W. 157; *State v. Case*, 96 Iowa 264, 65 N. W. 149; *Butler v. Chicago B. & Q. R. Co.*, 87 Iowa 206, 54 N. W. 208.

*Kansas*.—*Schuster v. Stout*, 30 Kan. 529, 2 Pac. 642; *Prosser v. Pretzel*, 8 Kan. App. 856, 55 Pac. 854; *Lawder v. Hinderson*, 36 Kan. 754, 14 Pac. 164.

*Maryland*.—*Herrick v. Swomley*, 56 Md. 439.

*Mississippi*.—*Mask v. State*, 32 Miss. 405.

*Montana*.—*McCormick v. Gliem*, 13 Mont. 469, 34 Pac. 1,016.

*Nebraska*.—*Western U. Tel. Co. v. Cook*, 54 Neb. 109, 74 N. W. 395; *Pennsylvania Co. v. Kennard G. & P. Co.*, 59 Neb. 435, 81 N. W. 372; *Hurlbut v. Hall*, 39 Neb. 889, 58 N. W. 538; *Dinsmore v. State*, 61 Neb. 418, 85 N. W. 445; *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744; *Atwood v. Marshall*, 52 Neb. 173, 71 N. W. 1,064; *Boggs v. Thompson*, 13 Neb. 403, 14 N. W. 393; *Barr v. Past*, 56 Neb. 698, 77 N. W. 123.

*Nevada*.—*Buckley v. Buckley*, 14 Nev. 262.

*New Jersey*.—*Donnelly v. State*, 26 N. J. L. 463.

*New Mexico*.—*Pearce v. Strickler*, 9 N. M. 467, 54 Pac. 748.

*North Dakota*.—*State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

*Oregon*.—*Willis v. Lance*, 28 Or. 371, 43 Pac. 384.

*Pennsylvania*.—*Com. v. Bubnis*, 197 Pa. St. 542, 47 Atl. 748; *Leedom v. Leedom*, 160 Pa. St. 273, 28 Atl. 1,024; *Acklin v. McCalmont O. Co.*, 201 Pa. St. 257, 50 Atl. 955; *Fulton v. Central Bank*, 92 Pa. St. 112; *Hopkinson v. Leeds*, 78 Pa. St. 396, where the court said that "To permit the defendant, under the guise of cross-examination, to give evidence in chief, is not only disorderly, but unfair to the plaintiff." *Farmers' Bank v. Stronecker*, 9 Watts 237.

*Rhode Island*.—*State v. Ballou*, 20 R. I. 607, 40 Atl. 861.

*South Dakota*.—*Bedkey v. Bedkey*, 15 S. D. 310, 89 N. W. 479; *Rosum v. Hodges*, 1 S. D. 308, 47 N. W. 140; *Boucher v. Clark Pub. Co.*, 14 S. D. 72, 84 N. W. 237.

*Utah*.—*People v. Thiede*, 11 Utah 241, 39 Pac. 837.

*Vermont*.—*Stiles v. Estabrook*, 66 Vt. 535, 29 Atl. 961. *Compare Linsley v. Lovely*, 26 Vt. 123.

*Washington*.—*Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743; *State v. McGilverey*, 20 Wash. 240, 55 Pac. 115.

*Wisconsin*.—*Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1,101; *Knapp v. Schneider*, 24 Wis. 70; *Stubbings v. Curtis*, 109 Wis. 307, 85 N. W. 325.

"It seems to be the well recognized rule that when a witness is called by one party, the other has only the right to cross-examine upon the facts to which he testified. If he can give evidence beneficial to the other party, he should call him at the proper time and make him his own witness and examine him in chief, thereby giving the other party the benefit of a cross-examination on his evidence in chief. Otherwise, the party calling the witness would be deprived of cross-examining his own witness called by the other side, and the party against whom the witness was first called would obtain the advantage of getting evidence under the latitude allowed in a cross-examination. It might be that unless the court could see that such an examination had resulted in injury to the opposite party, the judgment would not be re-

examination to new matter,<sup>89</sup> and if the adverse party desires to

versed for that reason alone; but being calculated to work injury, such a practice should be discouraged." *Stafford v. Fargo*, 35 Ill. 481.

In *New York*, the early cases followed the English rule. *Fulton Bank v. Stafford*, 2 Wend. (N. Y.) 483. Except in cases of inquest on default. *Kerker v. Carter*, 1 Hill (N. Y.) 101. But the strict American rule is now followed by the *New York* courts. *Hardy v. Norton*, 66 Barb. (N. Y.) 527; *Rheinfeldt v. Dahlman*, 19 Misc. 162, 43 N. Y. Supp. 281; *People ex rel Phelps v. Court of O. and T.*, 83 N. Y. 436.

And this rule is particularly applicable on the close of a trial in rebuttal of evidence offered in defense. *Rheinfeldt v. Dahlman*, 19 Misc. 162, 43 N. Y. Supp. 281, wherein the court in so ruling held that a cross-examination, permitted to the defendant, of a witness offered in rebuttal by the plaintiff, would in effect reopen the entire case after the defendant had closed his proof, and that it was entirely discretionary with the court to refuse such permission; citing *Lindheim v. Duys*, 11 Misc. 16, 31 N. Y. Supp. 870.

**A Witness Testifying to the Mental Condition of a Testator** on his direct examination whose testimony is confined to a period of time prior to, but not at, the time of the testator's death, cannot be asked on cross-examination as to the testator's mental condition at the time of his death. *Entwistle v. Meikle*, 180 Ill. 9, 54 N. E. 217.

Where a witness has testified in chief as to the condition in respect of sobriety of a person at a certain time but not thereafter, a question as to his condition thereafter is not proper cross-examination. *State v. Hawkins*, 27 Wash. 375, 67 Pac. 814.

In *Oldenburg v. Oregon S. Co.*, 39 Or. 564, 65 Pac. 869, an action to recover damages for injuries to real property resulting from the defendant's damming up a stream of water, wherein the plaintiff's witnesses had testified in chief that during every flood before the defendant's dam was built, more or less drift wood was

lodged on the bar in the river, it was held improper to ask the witness on cross-examination whether such floods generally carried boulders and rocks with them.

Testimony in chief in an action to recover wages for services rendered, that plaintiff's successor was a stronger man and could work longer hours, does not warrant a cross-examination of the witnesses as to the condition of the plaintiff's health when he entered the defendant's employ. *Stevens v. Walton*, (Colo. App.), 68 Pac. 834.

A surveyor, who does not testify in chief that the corner at which he began his survey was an original corner, cannot be cross-examined on that subject as a matter of right. *Baker v. Sherman*, 71 Vt. 429, 46 Atl. 57.

The cross-examination of witnesses in a murder trial, testifying for the defendant to the dangerous and violent character of the deceased, must be limited entirely to the general character of the deceased as a quiet, peaceable man, or as a violent and dangerous one; and it is error to bring out, on cross-examination, that the deceased's reputation was that he would not attack a man unwarrantably, but would defend himself; that his reputation was that he would not go out and wrongfully seek a fight, and was true to his friends; and that his friends always knew where to place him. *Hendrickson v. Com.*, 23 Ky. L. Rep. 1,191, 64 S. W. 954.

In *Yeager v. Spirit Lake*, 115 Iowa 593, 88 N. W. 1,095, an action to recover damages for personal injuries, in which the plaintiff sought also to recover a bill for nursing, the court would not permit the defendant to show, on cross-examination of some of plaintiff's witnesses, that the nursing bill was for services rendered gratuitously.

89. Cross-examination of a witness should be confined to the subject of the examination in chief, and not used as a means to introduce a defense; and when, under the guise of cross-examination, the defendant has improperly brought to the attention



examine the witness as to other matters, he must do so by calling the witness to the stand in the subsequent course of the trial.<sup>90</sup> But it is error to unreasonably restrict cross-examination on matters which are germane to the direct examination.<sup>91</sup>

Where questions on cross-examination do not relate to the facts or circumstances connected with the matters gone into on the direct examination of the witness, but in reality go to new matter, the cross-examining party makes the witness his own, and in substance and effect the cross-examination ceases.<sup>92</sup>

of the jury facts upon which he relies for a defense, they should be considered as evidence in chief for him, and they cannot be made the basis of a compulsory non-suit. *Sullivan v. New York, L. E. & West. R. Co.*, 175 Pa. St. 361, 34 Atl. 798.

A defendant cannot, on the cross-examination of a witness called and examined by the plaintiff, introduce his own affirmative defense against the proper objection of plaintiff's counsel, unless the witness has, in his direct examination, testified to the matters concerning which the defendant seeks to cross-examine him. *First National Bank v. Smith*, 8 S. D. 7, 65 N. W. 437.

Plaintiff in an action to recover the purchase price of personal property, in which defendant has pleaded that the property was raised on the land of a third person, cannot be cross-examined with reference to a lien thereon for unpaid rent at the time of the sale, where he did not touch that subject in his direct examination. *Welch v. Spies*, 103 Iowa 389, 72 N. W. 548.

In *Brophey v. Downey*, 26 Mont. 252, 67 Pac. 312, an action on a promissory note, in which the defendants pleaded that when they made the note they also executed a real estate mortgage to secure its payment, and that the mortgage had not been foreclosed, it was held that the defendants could not show this defense by a cross-examination of the plaintiff's witnesses; that it was new matter to be proved by the defendants in making out their case, and not under the Montana practice by cross-examination of the plaintiff's witnesses who had remained silent on the subject.

In an action on a lease, although it is proper for the defendant to show

that the plaintiff's title had terminated or expired, the defendant cannot, on cross-examination of the plaintiff's witnesses, ask questions as to whether or not certain persons named did not own part of the premises in question. *Chicago v. Peck*, 196 Ill. 260, 63 N. E. 711.

A plaintiff's witnesses, in an action of ejectment, cannot be cross-examined as to the defendant's title. *Thatcher v. Olmstead*, 110 Ill. 26.

<sup>90</sup>. *Houghton v. Jones*, 1 Wall. 702; *State v. Smith*, 49 Conn. 376; *Montgomery v. Aetna L. Ins. Co.*, 97 Fed. 913; *Wills v. Russell*, 100 U. S. 621; *Floyd v. Bovard*, 6 Watts & S. (Pa.) 75.

It is not error to refuse to allow a party, on cross-examination of a witness, to call out new and substantive matters, when the court announces that such party may recall the witness and examine him at a subsequent stage of the trial. *Olive v. Olive*, 95 N. C. 485.

<sup>91</sup>. *People v. Knight*, (Cal.), 43 Pac. 6.

<sup>92</sup>. *Mueller v. Tenth & Twenty-third St. F. Co.*, 46 App. Div. 560, 61 N. Y. Supp. 986; *Jones v. State*, 38 Tex. Crim. 87, 40 S. W. 807, 41 S. W. 638; *McCrea v. Parsons*, 112 Fed. 917.

"The cross-examination of an ordinary witness can only be conducted as to such matters as are pertinent to the matters brought out in the examination in chief; and in most jurisdictions in our country, where a party seeks on cross-examination to bring out matters not germane or pertinent to the examination in chief, if they are legitimate in evidence as competent testimony for the party seeking to bring them out on cross-examination, he will not be permitted to do so in the cross-examina-

So where an examination in chief has been commenced, but before proceeding to any considerable extent the party calling the witness refuses to examine the witness further because of dissatisfaction and surprise at its tenor and effect, and his entire want of confidence in its truth, the adverse party cannot examine the witness on matters other than those brought out.<sup>93</sup>

**Witness to Single Fact.** — And of course under this strict rule, when a witness is called to prove a single fact, examination should be limited to that fact.<sup>94</sup>

**And When Two or More Main Facts are Essential to Establish a Prima Facie Case** for the party upon whom rests the burden of proof, and the direct examination has been confined to matters tending only to the proof of one of these main facts, cross-examination should not be allowed as to the other.<sup>95</sup>

The mere fact that a cross-examination, otherwise proper and legitimate, happens also to sustain a cross action or counter claim is no ground for excluding the cross-examination.<sup>96</sup>

**Disproving Case Made Out in Chief.** — So also matters which go to disprove the opposite party's *prima facie* case as made out by his witnesses may be gone into on cross-examination.<sup>97</sup> It is always proper, however, to permit a full cross-examination regarding the subject matter of the examination in chief, and in the light of all its bearings.<sup>98</sup>

tion of the witness, but when he comes to present his case he can introduce the witness in his own behalf. *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947.

93. *People v. Miller*, 33 Cal. 99.

94. *Stafford v. Fargo*, 35 Ill. 481.

95. *Campau v. Dewey*, 9 Mich. 381.

96. *Wendt v. Chicago, St. P. M. & O. R. Co.*, 4 S. D. 476, 57 N. W. 226; *Rush v. French*, 1 Ariz. 99, 25 Pac. 816.

97. *Ferguson v. Rutherford*, 7 Nev. 385.

*Novotny v. Danforth*, 9 S. D. 301, 68 N. W. 749. This was an action to recover damages to plaintiff's property, alleged to have resulted from wrongful and negligent excavation by the defendant on adjoining land, in which the plaintiff had testified to a state of facts tending to prove that the injuries resulted from the excavation in question, and it was held competent for the defendant to show on cross-examination that the witness was mistaken, and that the injuries resulted from an excavation made by another person for the plaintiff himself.

Where the plaintiff draws out on direct examination, evidence of a contract under which he claims a right to recover, it is proper for the opposite party to prove a different one. *Reese v. Bald Mt. Consol. Gold. Min. Co.*, 133 Cal. 285, 65 Pac. 578.

In *Reese v. Bell*, 138 Cal. XIX, 71 Pac. 87, an action on a promissory note, the plaintiff testified in chief that the note had been assigned to him by a previous endorsee before its maturity, that he had not received payment, and so far as he knew it had not been paid, and that the note had not been in his possession; and as this testimony tended to establish a *prima facie* case for the plaintiff, it was held proper for the defendant, on cross-examination, to go to the bottom of this witness' connection with the note, and draw from him all that he knew about it, even though the facts within his knowledge might tend to prove the allegations set up in defense.

98. *Clark v. Gallagher*, 74 Vt. 331, 52 Atl. 539.

Where a witness in a personal injury suit has testified on his direct

examination that the plaintiff's mental condition since the accident had been impaired, he may be asked on cross-examination as to his having seen the plaintiff intoxicated. Also where a witness has testified in chief that he had talked to no one about the case, he may be asked on cross-examination whether he knew how he came to be subpoenaed. *Driscoll v. Ansonia*, 73 Conn. 743, 47 Atl. 718.

On a proceeding to enjoin a liquor nuisance, in which several witnesses had testified to a sale of liquors in the defendant's place, by his clerk, and the clerk has testified that the defendant did not keep any liquors to his knowledge, the latter may be asked on cross-examination whether or not he sold any liquors to any one looking like the former witnesses. *State v. Hibner*, 115 Iowa 48, 87 N. W. 741. In the same case a witness testified that he and another had obtained liquor at the defendant's place, and the defendant had testified in chief that he never sold them any liquor, and on cross-examination that he did not keep any liquor during the time in question; it was held proper to further ask him if he had any empty bottles back of his prescription case as tending to contradict the statement previously made by him.

Where a witness, in an action to recover the purchase price of machinery sold on approval, and afterwards returned by the defendants, has testified that he was not satisfied with the machinery for certain specified reasons, and that it gave no better results than the machinery the defendants already had, it is proper on cross-examination to ask the witness as to the relative results obtained from the use of the machinery in suit and that already owned by the defendants. *Bostain v. DeLaval Sep. Co.*, 92 Md. 483, 48 Atl. 75.

Where a witness, in an action to recover damages for the wrongful shutting off of the plaintiff's supply of gas, has testified in chief that during the preceding year the defendant had drilled a number of new oil wells, it is competent on cross-examination to show that while there had been an increase in the number of wells, there had also been an increase in the number of patrons at other places. *Indiana*

*Nat. & Ill. Gas. Co. v. Anthony*, 26 Ind. App. 307, 58 N. E. 868.

Where the contestant of a will has, on an issue of testamentary capacity, put in evidence a paper made by the testator containing some inaccuracies in a calculation made by him, it is proper, on cross-examination of the witness, to ask him to produce another paper in the testator's handwriting, upon which the calculation was correct. "If the object of the offer of the first paper was to show an incapacity to calculate, it was competent on cross-examination to rebut that by showing that he could, and the most direct way of doing so was by the production of other calculations." So where the physician has testified that the testator had had a fall at a certain time which had shocked his nervous system for a day or two, it is proper to ask the witness on cross-examination whether the shock in any way impaired the testator's mind. *Berry v. Safe Dep. & T. Co.*, (Md.), 53 Atl. 720.

In *Rowell v. Crothers*, (Conn.), 52 Atl. 818, an action by a physician to recover for injuries resulting from the negligent driving of the defendant against the plaintiff's wagon on a highway, it was held proper to cross-examine the plaintiff, after he had testified in chief that the collision occurred when he was driving to call on a patient, as to whether he had a very large practice, whether he had not talked about the case with an eye-witness of the collision whose deposition was afterwards taken, whether he had any ill-feeling towards the defendant and whether he had any trouble with him, or had told the defendant he would have him removed from his position as a public officer.

Where a defendant, in *assumpsit* for services rendered to him by plaintiff as a witness in his own behalf, denies that he ever contracted with defendant or ever employed him for any purpose and had nothing to do with his employment, and did not owe him a cent, it is error to exclude on cross-examination a question as to whether or not he ever gave the plaintiff any directions about the work for the price of which he

**Claims Founded on Cognate Facts.**—It frequently happens, however, that both sides of a case stand, in part, at least, upon common territory, or are founded in part upon the same or cognate facts;

was sued. *McManus v. Mason*, 43 W. Va. 196, 27 S. E. 293.

In *La Flam v. Missisquoi Pulp Co.*, 74 Vt. 125, 52 Atl. 526, an action between master and servant for personal injuries suffered by the servant, upon an issue as to whether or not it was part of the duties of plaintiff, who was employed wheeling wood to the grinders, to also oil the pumps, it was held proper to ask the foreman of the mill on cross-examination, if, before the plaintiff's employment, the boy who wheeled the wood tended also to the oiling of the pumps as a part of his duties.

Where a witness on his direct examination has testified concerning an entry on his books relative to a matter in issue, it is not error to permit the witness on cross-examination to be asked as to the date when the entry was made. *Sparkman v. Supreme Council Am. L. of H.*, 57 S. C. 16, 35 S. E. 391.

**Distance Train Could Be Seen.**

In *Sullivan v. New York, L. E. & W. R. Co.*, 175 Pa. St. 361, 34 Atl. 798, an action to recover damages for killing of plaintiff's husband by a train at a grade crossing, on defendant's road, two witnesses were asked in their examination in chief to describe the crossing—whether at right angles or diagonal, and the position of the highway in relation to the railroad; to locate the whistling post, to state whether the night was dark or not; whether the highway was rough or smooth, and the amount of travel on it; and whether they had heard the whistle or bell as the train passed. One of the witnesses, who had stated without objection on cross-examination that the wagon road, for a distance of 300 feet from the crossing, was nearly as high as the railroad, was permitted, under objection, to testify that a person riding in a wagon could see the railroad before reaching the crossing. The other witness, who had gone further in his examination in chief, and had stated that the wagon made a noise and that there were houses near the line of the railroad, was permitted, un-

der objection, to testify that if the deceased had stopped within 50 or 100 feet of the crossing he could have seen down the railroad half a mile. It was held that the cross-examination was proper.

**Reputation of House.**—On a prosecution for keeping a disorderly house, in which a witness for the defendant has testified on direct examination that the defendant was reputed to be a charitably disposed person, kind to those sick and in distress, and that he had never seen anything out of the way at the house, it is discretionary with the court to permit the witness to be asked on cross-examination about the reputation of the house. *State v. Beebe*, 115 Iowa 128, 88 N. W. 358.

**Probabilities.**—In *Coe v. Darknel*, 25 Wash. 518, 65 Pac. 760, on an issue as to whether or not the defendant was entitled to a credit on the note sued on for the sale of a crop made by him to the plaintiff, both the defendant and a witness in his behalf testified in chief as to the fact of the sale, and the terms thereof as set up; and it was held proper on cross-examination concerning this contract of sale, for the plaintiff to show by the witnesses that the crop which they had testified was sold was in poor condition and of little value, such evidence being admissible to show whether the contract of sale as set up was probable. The court said: "The scope of cross-examination is not confined to merely asking a witness if certain facts about which he has testified in chief were or were not true. It would be of little use if it were so restricted. It is often as much to test the accuracy of the witnesses' statements in chief by a searching inquiry as to all matters directly stated or suggested by his testimony."

**Matters in Mitigation of Damages Not Pledged.**—Where the plaintiff in trespass *quare clausum* has testified in direct examination that the defendant entered without license or permission, it is error to stop the defendant from cross-examining the

and in such cases it is then impossible to adhere so strictly to this rule as in other cases.<sup>99</sup>

(b.) *Preliminary or Formal Proof.* — And under this rule cross-examination generally upon the merits should not be allowed where the direct examination has been confined to mere preliminary or formal proof,<sup>1</sup> such as the execution of the paper.<sup>2</sup> When proved, it is the paper which speaks, and not the witness.<sup>3</sup>

(c.) *Subscribing Witness.* — Where a witness is called merely to testify as a subscribing witness to a signature, it is improper to permit the adverse party to bring out his case on cross-ex-

plaintiff, upon the ground that he had not pleaded license; he is entitled to cross-examine on this point for the purpose of showing the fact in mitigation of damages. *Williams v. Hathaway*, 20 R. I. 534, 40 Atl. 418.

**99. Rule Stated.** — "It is well settled that a witness cannot be cross-examined, if objection is made, except as to facts and circumstances connected with matters testified to by him on his direct examination. But it is sometimes difficult to say whether a given fact or circumstance is connected with a matter previously stated by him in the sense of this rule. If the broadest latitude be given to the rule, a cross-examination might extend to the whole case, for all the facts of a case may be said to have a certain connection with each other. This rule is, therefore, qualified by another, which is equally well settled. It is, that a party who has not yet opened his own case cannot be allowed to introduce it by a cross-examination of the witness of his adversary. In most cases, doubtless, guided by these rules, a court will be able to prescribe with accuracy the limits to a cross-examination; yet it frequently happens that both sides of a case stand, in part, upon common territory, or are founded in part upon the same or cognate facts. In such cases it is impossible to adhere strictly to the one rule without violating the other, for the question put may apply equally to new matter and to matter already stated, or at least it may be difficult to decide whether it does or does not." *Thorn-ton v. Hook*, 36 Cal. 223.

**1. Witness to Identify.** — In *Donnelly v. State*, 26 N. J. L. 463, the

witness had been called to prove certain maps of the premises which were used upon the trial, and also the disposition made by him of certain articles in the rooms occupied by the deceased at the time of his death, and for whose murder the defendant was on trial, in order to identify the deceased as the person named in the indictment; it was held that the witness could not be cross-examined as to whether he had seen any of the prisoner's clothing or effects taken possession of by another person.

**Commissioners Appointed by Agreement to Report Certain Facts,** who produce their report, and are called merely to identify it, can be cross-examined as to the identity of the paper, but not as to its contents, or the basis on which it was made. *Tiley v. Moyers*, 43 Pa. St. 404.

**2. Consideration for Written Instrument.** — Where the direct examination of a holder of a promissory note is merely as to the genuineness of the signature, or the identity of the instrument, there can be no cross-examination as to the consideration. *Braley v. Henry*, 77 Cal. 324, 19 Pac. 529; *Bell v. Prewitt*, 62 Ill. 361; *Youmans v. Carney*, 62 Wis. 580, 23 N. W. 20.

**Ownership of Money Under Certificate Identified.** — The testimony of a witness on direct examination merely identifying a certificate of deposit, and the signature of the payee thereof, with a statement that the certificate had been paid by the bank issuing it, does not authorize a cross-examination as to the ownership of the money represented by the certificate. *Wright v. Wright*, 58 Kan. 525, 50 Pac. 444.

**3. Campau v. Dewey**, 9 Mich. 381.

amination.<sup>4</sup>

(d.) *Statutes.* — In some jurisdictions this strict American rule is expressly recognized by statute.<sup>5</sup>

**4. Error Non-Prejudicial.** — Error in permitting a witness to be cross-examined generally, in such case is not fatal, however, where the witness is subsequently called by the adverse party and testifies to the same matters which were drawn out on cross-examination. *Sutch's Estate*, 201 Pa. St. 305, 50 Atl. 943.

**5. In Oregon,** a statute provides that the adverse party may cross-examine the witness as to any matter stated on his direct examination or connected therewith; and it has been held that under this statute a party has no right to cross-examine a witness except as to facts and circumstances stated on his direct examination, or connected therewith, and within this limitation great latitude should be allowed in conducting the examination; it should not be limited to the exact facts stated on the examination, but may extend to other matters which tend to limit, explain or qualify them, or to rebut or modify any inference resulting therefrom, provided they are directly connected with the matter stated in the direct examination. It is true that the party against whom a witness is called cannot, on cross-examination, go into an independent or affirmative case on his part, but must confine his examination to such facts connected with the direct examination as go to counteract so much of his adversary's case as the direct examination tends to prove; but the fact that evidence called forth by a legitimate cross-examination also tends to sustain some defense or counterclaim, affords no reason why it should be excluded. A party will not be permitted to glean out certain facts from his witness which, without explanation, would give a false coloring to the matter about which he testifies, and then save his witness from the sifting process of a cross-examination by which the real transaction could be shown. *Ah Doon v. Smith*, 25 Or. 89, 24 Pac. 1,093.

Under the Oregon rule, although a cross-examination should not be per-

mitted to go to matters not germane to the direct examination, still if the proper limits of cross-examination are exceeded, the testimony becomes as much the testimony of the cross-examining party as if introduced by him, and such examination becomes subject to the rules governing a direct examination as provided in the Oregon statute. *Osmun v. Winters*, 30 Or. 177, 46 Pac. 780. See also *Long v. Lander*, 10 Or. 175, where it was further held to be discretionary with the trial court whether the testimony should be introduced then and in that manner.

"When a witness is called and examined concerning any particular matter, the law imposes the obligation upon him to state the whole truth concerning such matter within his knowledge, and a direct examination, if perfectly fair, would generally disclose all the witness knows concerning the matter about which he is testifying. But because the party calling him may so skillfully and adroitly conduct the examination in chief as to disclose only those facts which are in his favor and to conceal those which are against him, the law has given to the adverse party the right of cross-examination for the purpose of bringing out the facts thus concealed." *Ah Doon v. Smith*, 25 Or. 89.

**Cross-Examination is Intended to Develop More Fully Matters Brought Out on the Direct Examination,** and it is no error for the court to refuse questions which go to matters not intimately connected with the direct examination. The defendant cannot make out his case in chief by cross-examination of the plaintiff witnesses. *Simmons v. Oregon R. Co.*, 41 Or. 151, 69 Pac. 440, 1,022.

**Witness Asked to Produce Document.** — Where a witness is asked on direct examination to produce a document merely, he cannot be asked on cross-examination as to the consideration or as to how or for what purpose the document was executed.

(e.) *Discretion of Court.* — The presiding judge is, however, clothed with a large discretion in the application of this rule.<sup>6</sup> And unless a trial court should so far overstep the bounds as to admit on cross-examination matters which clearly have no connection with the direct examination, an appellate court will not be justified in interfering,<sup>7</sup> especially where the cross-examination is on facts competent to be proved under the issues in the case;<sup>8</sup> although there is authority that to permit cross-examination on matters about which the witness was not examined in chief is improper and fatal to a verdict.<sup>9</sup>

*Schreyer v. Turner Flouring Co.*, 29 Or. 1, 43 Pac. 719.

In *Louisiana*, a statute restricts the cross-examination of witnesses in criminal cases to the subject matter of the direct examination, or to matters closely connected therewith. *State v. Baker*, 43 La. Ann. 1, 168, 10 So. 256.

6. *United States.* — *Davis v. Coblenz*, 174 U. S. 719.

*Indiana.* — *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860.

*Iowa.* — *Glenn v. Gleason*, 61 Iowa 28, 15 N. W. 659.

*Maryland.* — *Black v. First Nat. Bank*, (Md.), 54 Atl. 88.

*Nebraska.* — *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744.

*New York.* — *Neil v. Thorn*, 88 N. Y. 270; *People ex rel Phelps v. Court of O. and T.*, 83 N. Y. 436.

*Pennsylvania.* — *Helser v. McGrath*, 52 Pa. St. 531.

*Washington.* — *Carroll v. Centralia W. Co.*, 5 Wash. 613, 33 Pac. 431.

*Wisconsin.* — *Stutz v. Chicago & N. W. R. Co.*, 73 Wis. 147, 4 N. W. 653, 9 Am. St. Rep. 769.

**The Range and Extent of a Cross-Examination** is, as a general rule, within the discretion of the court, subject to the limitation that it must be related to matters pertaining to the issue. *People ex rel Phelps v. Court of O. and T.*, 83 N. Y. 436.

**Matters Properly Rebuttal.** — It is within the discretion of the trial judge to permit the plaintiff to bring out on cross-examination of the defendant's witnesses, matters which, in the then state of the case, could be properly shown in rebuttal. *Ranney v. St. Johnsbury & L. C. R. Co.*, 67 Vt. 594, 32 Atl. 810.

**Cross-Examiner Makes Witness His Own.** — It is in the discretion of the court to permit cross-examination upon matters not germane or pertinent to the direct examination, but if it is permitted, the cross-examining party makes the witness his own. *Chicago Ex. Bldg. Co. v. Merchants' Bldg. & Imp. Co.*, 83 Ill. App. 241.

In *Joyce v. St. Paul City R. Co.*, 70 Minn. 339, 73 N. W. 158, an action against a carrier for personal injuries suffered by a passenger, it was held to be discretionary with the judge to allow the conductor, who was called as defendant's witness, to state on cross-examination that he was not the regular conductor, and that there was no other conductor on the train.

7. *Davis v. Coblenz*, 174 U. S. 719; *Gilliland v. State ex rel Shea*, 13 Ind. App. 651, 42 N. E. 238; *Palmer v. Mathews*, 29 App. Div. 149, 51 N. Y. Supp. 839; *Carrere v. Dunn*, 26 Misc. 848, 55 N. Y. Supp. 441, affirmed 26 Misc. 717, 57 N. Y. Supp. 82.

8. *Black v. First Nat. Bank*, (Md.), 54 Atl. 88.

9. *Sauntry v. U. S.*, 117 Fed. 132.

**Testimony Made Basis of Judgment.** — While much must be left to the discretion of the trial judge in determining the extent of the cross-examination, still when the testimony so elicited was not only improper, but was in fact made the basis of the judgment rendered, it will not be regarded as harmless error. *Richardson v. Spangle*, 22 Wash. 14, 60 Pac. 64, an action for malicious prosecution, wherein a justice of the peace was called only to identify certain papers and docket entries in a criminal proceeding instituted in his

And refusal to permit cross-examination of a witness as to matters not brought out in chief is not error, where the cross-examining party subsequently calls the witnesses as his own and examines them fully as to the matters which he sought to inquire about on cross-examination,<sup>10</sup> or where the facts sought to be established are established by other competent and uncontradicted evidence.<sup>11</sup>

**Exclusion of Matter Germane to Direct Examination.**— And even when a question which is proper on examination has been excluded, it is held not to be fatal error unless the party was in fact prejudiced by the ruling.<sup>12</sup>

(f.) *Cross-examination on New Matter.* — Where a witness is called merely to prove the execution of a written instrument and a general cross-examination permitted under the liberal rule previously discussed, the party calling him has no right to cross-examine him upon the new matter brought out on his cross-examination, unless allowed by the court in its discretion so to do.<sup>13</sup>

(D.) **RES GESTÆ RULE APPLIED TO CROSS-EXAMINATION.** — (a.) *Generally.* When the courts, as shown in the previous sections, hold that a cross-examination is to be limited in its extent to matters brought out on the examination in chief, they do not mean that the cross-examination must be limited to the phases of a subject opened up on direct examination; indeed, the rule is well settled that without any reference to the general rule limiting the cross-examination to matters brought out in the direct, the right to cross-examination extends to all matters connected with and which are part of the *res gestæ* of the facts testified to in the examination in chief,<sup>14</sup> although they may be in fact new matter; in short, a subject having been

court by the defendant against the plaintiff, and the court held as stated above, as to permitting the witness to be asked on cross-examination to testify that the complaining witness had asked for a writ of replevin, and had then instituted the criminal proceeding upon the suggestion of the witness.

A witness, in a prosecution for larceny, who has testified in chief to finding money on the premises of one of the defendants, but not as to how he happened to be searching there, cannot be asked on cross-examination why he was making the search. *State v. Savage*, 36 Or. 191, 60 Pac. 1, 128.

10. *East Dubuque v. Burhyte*, 173 Ill. 553, 50 N. W. 1,077; *People v. Sehorn*, 116 Cal. 503, 48 Pac. 495.

11. *Missouri Pac. R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744.

12. *Tischler v. Apple*, 30 Fla. 132, 11 So. 273; *Hartshorn v. Byrne*, 147

Ill. 418, 35 N. E. 622; *Rhodes v. Com.*, 48 Pa. St. 396.

13. *Beal v. Nichols*, 2 Gray (Mass.) 262. Compare *Nichols v. Nichols*, 147 Mo. 587, 48 S. W. 947.

14. *Markley v. Swartzlander*, 8 Watts & S. (Pa.) 172; *Rhodes v. Com.*, 48 Pa. St. 396; *Haynes v. Ledyard*, 33 Mich. 319.

"The power of cross-examination is one of the most efficacious tests which is known to the law for the discovery of truth. To deprive (a party) of this right in a proper case, and in regard to material matter, and when the cross-examination is confined within the general scope of the direct examination, is error for which a judgment of conviction should be reversed. It is always proper to cross-examine a witness fully as to all facts and circumstances connected with the matters stated in his direct examination. *People v. Westlake*, 124 Cal. 452, 57 Pac. 465.



**Under the Liberal Rule** where a witness has testified in chief to having shown one of the parties a certain document at the time stated, the opposing party has the right to cross-examine him as to any conversation that took place at the same time. *People v. Barker*, 60 Mich. 22, 27 N. W. 539.

**Facts Closely Connected With Main Fact.**—In *Jorgensen v. Butte & Mont. Co.*, 13 Mont. 288, 34 Pac. 37, an action for personal injuries, it is held no error to permit a witness, who had sworn to facts contemporaneous with the accident and so closely connected with the main fact, to be cross-examined as to the entire case, especially as he was the person to whose want of skill and care the plaintiff attributed his injuries.

**Circumstances of Attestation.**—In *Markley v. Swartzlander*, 8 Watts & S. (Pa.) 172, the defendant offered in evidence a written agreement and called a subscribing witness who testified to his handwriting as such subscribing witness; and it was held proper for him to be asked on cross-examination as to all that was said by the parties at the time of the execution of the instrument. The court said: "One of the grounds upon which a party producing an instrument attested by a witness is bound to produce the witness, if it is in his power, is that the opposite party may have an opportunity to examine him as to the circumstances that occurred at the attestation and delivery. And these circumstances may relate to various matters besides the mere mode of execution of the instrument, that go to invalidate or modify the effect of the instrument."

**Circumstances Attending Award.** In *Perit v. Cohen*, 4 Whart. (Pa.) 81, an action on an award under a parol submission, it was held that one of the arbitrators after being called by the plaintiff and proving the submission and award, might be cross-examined by the defendant to show that he and the other arbitrators had previously decided they could make no award, and informed the parties of that decision.

**Complaints by Rape Victim.** While in a prosecution for an assault with intent to commit rape, the state

may inquire of the prosecutrix whether she made complaint of the injury, and where and to whom, but not as to the particular facts that she stated, still the defense on cross-examination may inquire fully as to the particular facts. *Wood v. State*, 46 Neb. 58, 64 N. W. 355.

**Acts in Pursuance of Request.** In *Caledonia Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13, an action on a fire insurance policy providing for the ascertainment of the loss by appraisers, in which a witness had testified that the insured had asked him to attend to an agreement for arbitration for him, and that he had agreed to do so, it was held that the question on cross-examination what he did in pursuance of such request toward procuring an appraisal to be made was germane to the matter about which he was testifying.

**Details as to Movements at Certain Time.**—Where a witness has testified in chief with great particularity and detail as to his movements on a certain date and as to his having ridden home with another person named, it is proper to ask him on cross-examination whose wagon the person with whom he rode had that day. *State v. South*, 145 Mo. 663, 47 S. W. 790.

In *Pelley v. Wills*, 141 Ind. 688, 41 N. E. 354, an application to obtain a liquor license, in which a witness for the applicant had testified in chief that he never saw the applicant participate in a game of chance in another saloon run by the applicant, and that the applicant was never present when a game of chance took place between any persons at the saloon, it was held proper on cross-examination to go into the subject in all its details.

**Representations at Time of Agreement.**—In *Morris v. Taliaferro*, 75 Ill. App. 182, an action of *assumpsit* on a contract of employment, it was held that questions put to the plaintiff on cross-examination as to what statements or representations he made to the defendant at the time he was employed as to his ability and capacity to run the business for which he was employed, and as to what wages he had received prior to his employment by the defendant, were proper cross-examination.

once opened up in chief may be exhausted on cross-examination.<sup>15</sup>

**Conduct and Presence of Accused After Offense.**—A witness on a criminal prosecution who testifies in chief for the defense as to the conduct and presence of the accused up to about the time of the alleged offense, may be asked on cross-examination as to his conduct and presence after that date. *Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

**15. General Subject Opened on Direct Examination.**—*Davis v. Hays*, 89 Ala. 563, 8 So. 131; *Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385; *Hartnett v. Goddard*, 176 Mass. 326, 57 N. E. 677; *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350; *State v. Pan-coast*, 5 N. D. 516, 60 N. W. 1,052, 35 L. R. A. 518; *Sayres v. Allen*, 25 Or. 211, 35 Pac. 254.

And the cross-examination is proper, though it calls for particular facts not called for on the direct examination, if they are facts which relate to the *same subject matter*, and bear exclusively upon the *same main fact*, to which the whole examination in chief is directed; facts, the omission to state which, if within his knowledge, give to his direct testimony the injurious effect of false testimony; and whether the facts are within his knowledge can only be known by the inquiry. *Campau v. Dewey*, 9 Mich. 381.

The rule may be that the cross-examination of a witness must be confined to matters gone into on the direct examination; but such matters may be of particulars not alluded to before. Thus in *American Ex. Co. v. Haggard*, 37 Ill. 465, 87 Am. Dec. 257, an action against an express company for not delivering a package of money, in which a witness for the plaintiff having proved a custom of drivers as to delivering parcels and getting receipts, was required to state on cross-examination the particular custom of one driver to steal money parcels.

**Consideration for Note.**—In *Lam-prey v. Munch*, 21 Minn. 379, the question being as to the execution of a note, and a witness for the plaintiff having testified to such execution, it

was held proper to cross-examine him as to all the circumstances connected with it, and among other things as to the consideration of the note.

**Precise Time.**—Where a witness testifying in an action for personal injuries alleged to have resulted from certain machinery breaking, has testified that he saw the machinery after the accident, it is proper to ask him on cross-examination, questions for the purpose of ascertaining the precise time he saw the machinery. *Momence S. Co. v. Groves*, 197 Ill. 88, 64 N. E. 335.

If possession of property for one day is shown on direct examination, the duration of that possession may be inquired into on cross-examination, and if the witness states on his direct examination that he holds possession as agent for another, inquiry may be directed on cross-examination as to the circumstances under which such agency originated. *Blake v. Powell*, 26 Kan. 320. See also *Thornburgh v. Hand*, 7 Cal. 554.

Where a witness has testified in chief that he knew who put in a certain railroad crossing, and when it was put in, it is fair cross-examination to ask him how it came to be put in. *Reynolds v. Great Northern R. Co.*, 69 Fed. 808.

**Illness of Insured.**—Where a wife suing for insurance on her husband's life, which is defended on the ground that at the time of the application he was suffering from the disease which was afterwards the cause of his death, has testified in chief that he took sick with his last illness some time in April, she may, on cross-examination be asked when he was ill before that. *Modern W. of A. v. Van Wald*, 6 Kan. App. 231, 49 Pac. 782.

**Matters Connected With Administration of Estate.**—Where an administrator has testified in chief in relation to some matters connected with his administration of the estate, he may on cross-examination be fully interrogated in regard thereto. *Barker v. Blount*, 63 Ga. 423.

In *Nesbit v. Crosby*, 74 Conn. 554, 51 Atl. 550, wherein a witness had

Where a witness has expressly or by inference stated the cause of a result, the question whether other causes contributed to that result is a proper inquiry on cross-examination.<sup>16</sup>

Where a question propounded to a witness by one party has been but partly answered by the witness, the residue of the answer may be called out on cross-examination.<sup>17</sup>

(b.) *Details of Event or Transaction.* — The details of an event or transaction, a portion only of which has been testified to in chief, may be always drawn out on cross-examination.<sup>18</sup>

(c.) *Statements, Conversations, etc.* — When part of a conversation is stated in chief, all of the conversation, material and pertinent

testified to what he observed of the occurrence in question and stated that he had been in a certain place earlier in the evening, it was held proper to permit him to be asked on cross-examination as to the character of business conducted in that place.

16. *West Chicago St. R. Co. v. Reddy*, 69 Ill. App. 53. See also *Wilson v. Wagar*, 26 Mich. 452.

17. *Mason v. Tallman*, 34 Me. 472.

18. *United States*. — *Eames v. Kaiser*, 142 U. S. 488; *Gilmer v. Higley*, 110 U. S. 47.

*Florida*. — *Wallace v. State*, 41 Fla. 547, 26 So. 713; *Adams v. State*, 28 Fla. 511, 10 So. 106.

*Illinois*. — *Evans v. Mohr*, 42 Ill. App. 225.

*Indiana*. — *Metzer v. State*, 30 Ind. 596; *Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385.

*Maryland*. — *Griffith v. Dffen-derffer*, 50 Md. 478.

*Michigan*. — *Wilson v. Wagar*, 26 Mich. 452.

*Missouri*. — *Burghart v. Brown*, 51 Mo. 600.

*North Dakota*. — *State v. Pan-coast*, 5 N. D. 516, 67 N. W. 1,052, 35 L. R. A. 518.

*Oregon*. — *Maxwell v. Bolles*, 28 Or. 1, 41 Pac. 661.

"One of the main purposes of a cross-examination is to elicit such parts of a transaction imperfectly or not fully disclosed as may qualify or explain that portion of it which has been given, so that the whole and entire occurrence may be exhibited precisely as it took place." *Duttera v. Babylon*, 83 Md. 536, 35 Atl. 64.

"Whenever an entire transaction is in issue, evidence which conceals a part of it is defective, and does not

comoly with the primary obligation of the oath, which is designed to elicit the whole truth. If the witness were, as he always may be, requested to state what he knows about it, he would not do his duty by designedly stopping short of it. Any question which fills up his omissions, whether designedly or accidental, is legitimate and proper on cross-examination. . . . A party cannot glean out certain parts, which alone would make out a false account, and save his own witness from the sifting process by which only those omissions can be detected. There could be no such thing as cross-examination if such a course were allowed." *Chandler v. Allison*, 10 Mich. 460.

"The cross-examination would be a mere farce if he (the cross-examining party) should not be allowed to show by it just what the whole transaction was, so far as it might be within the knowledge of the witness." *Wilson v. Wagar*, 26 Mich. 452.

It is competent to inquire on cross-examination into the details of the event testified to in chief by the witness, and to develop and unfold the whole transaction about which the witness has been but partially interrogated. *Duttera v. Babylon*, 83 Md. 536, 35 Atl. 64, where a witness to an instrument executed by mark had testified in chief to the execution of the instrument, it was held proper to ask him on cross-examination as to who was present and what was said by the maker of the instrument at the time it was executed.

**Survey.** — Where a surveyor has been examined in chief as to a part only of the surveys and measurements made by him, the adverse

to the case, may always be elicited on cross-examination,<sup>19</sup> but it is not error to refuse to permit what is not material or pertinent to be so elicited.<sup>20</sup> Nor is it error to refuse to permit cross-examination as to a conversation which was neither wholly nor partially referred to on the direct examination.<sup>21</sup> Nor is it error to refuse to permit cross-examination as to portions which do not explain the portion testified to in chief.<sup>22</sup>

party has the right to cross-examine him regarding the rest of such surveys and measurements, for the purpose of arriving at the method of investigation pursued by him. *Clark v. Gallagher*, 74 Vt. 331, 52 Atl. 539.

19. *United States*. — *Home Beneficial Ass'n v. Sargent*, 142 U. S. 691.

*California*. — *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811; *Clarke v. Clarke*, 133 Cal. 667, 66 Pac. 10.

*Colorado*. — *Patrick v. Crowe*, 15 Colo. 543, 25 Pac. 985.

*Dakota*. — *U. S. v. Knowlton*, 3 Dak. 58, 13 N. W. 573.

*Illinois*. — *Phares v. Barber*, 61 Ill. 271; *Black v. Wabash, St. L. & P. R. Co.*, 111 Ill. 351, 53 Am. Rep. 628.

*Indiana*. — *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673; *Metzer v. State*, 39 Ind. 596.

*Michigan*. — *People v. Warren*, 122 Mich. 504, 81 N. W. 360, 80 Am. St. Rep. 582.

*Nebraska*. — *Walsh v. Peterson*, 59 Neb. 645, 81 N. W. 853.

*Texas*. — *Sager v. State*, 11 Tex. App. 110.

20. Especially where such portion is also otherwise objectionable. *Huribut v. Boaz*, (Tex. Civ. App.), 23 S. W. 446.

21. *Wilhelmni v. Leonard*, 13 Iowa 330; *Bratt v. State*, (Tex. Crim.), 41 S. W. 624; *Gaines v. State*, 38 Tex. Crim. 202, 42 S. W. 385.

In *Lewis v. Clark*, 86 Md. 327, 37 Atl. 1,035, an action to recover a balance of rent claimed to be due under a written lease, in which the plaintiffs had proved by one of themselves as a witness, the execution of the lease and the amount of rent paid, it was held that the defendant could not cross-examine him as to conversations which had taken place between himself and the witness prior to the execution of the lease, with reference to the property leased.

Where a witness, in an action against a railroad company for the loss of property destroyed by fire, resulting from the defendant's negligence, has testified in chief that very soon after the train claimed to have set the fire, passed, he discovered fire on the right of way; that soon after the defendant's section hands came and tried to keep it from spreading, and that during the same day he saw the section men at the plaintiff's house and talked to them; he cannot be asked on cross-examination as to whether he said anything to the men about what he had seen; no question in chief had been asked him as to any conversation with the men. *Lake Erie & Western R. Co. v. Miller*, 24 Ind. App. 662, 57 N. E. 596.

**Threats.** — On a prosecution for murder it is not error to exclude a question on cross-examination of the state's witnesses as to whether or not the witness had heard the deceased threaten the defendant at a certain time, where at the then stage of the trial no defense had been offered showing overt or hostile demonstration on the part of the deceased at the time of the homicide. *Andrews v. State*, 134 Ala. 47, 32 So. 665.

22. Where the testimony of a witness upon his examination in chief has been confined to a conversation he had with the defendant which tends to connect the defendant with the commission of the crime charged, it is not error to restrict his cross-examination to matters brought out in chief concerning that conversation. *State v. Coates*, 22 Wash. 601, 61 Pac. 726.

Where the plaintiff's counsel inquired of a witness as to a demand and refusal in trover, it does not follow as a matter of course that the defendant's counsel may go into everything which the defendant stated

Where a witness on his direct examination is asked whether or not he had any information from a person named about the transaction involved in litigation, it is proper to ask him on cross-examination what such person did in fact say to the witness concerning the transaction.<sup>23</sup>

(d.) *Admissions and Confessions.* — The general rule is that where confessions or admissions are elicited on direct examination, the opposite party is entitled to draw out the whole of such confessions or admissions on cross-examination.<sup>24</sup>

And where the answer of a person to a question asked by the witness in the course of a conversation testified to is sought to be elicited, and the answer would be unintelligible without stating the question also, the question may be put to the witness, but this rule does not include what the witness may have said in the conversation any further than as his language may be necessary to understand what was said by the other party to the conversation.<sup>25</sup>

on the occasion as to his claim. *Green v. Anderson*, 1 Bay (S. C.) 358.

23. *Miller v. Coulter*, 156 Ind. 290, 59 N. E. 853.

24. *Young v. Bennett*, 5 Ill. 43; *People v. Strong*, 30 Cal. 151.

"Ordinarily a party against whom some part of a conversation or statement has been adduced is entitled to have the whole of the conversation, or all that was said in connection with that statement, put before the jury." So where some part of a statement or conversation by the defendant in a criminal prosecution has been elicited on direct examination of the state's witness as *prima facie* importing a threat, the defendant has a right to call out on cross-examination the whole of the conversation or all that was stated in connection with the statement. *Drake v. State*, 110 Ala. 9, 20 So. 450.

**Statements While Under Arrest.** A witness who testified on his direct examination for the defendant in a criminal prosecution as to statements made by him while under arrest for participating in the crime for which the defendant is accused, may be cross-examined by the prosecutor as to such statements. *People v. Baker*, 112 Mich. 211, 70 N. W. 431. Such an examination, said the court, "is simply cross-examination of a witness upon a subject about which he had testified in response to questions put to him by the counsel for respondent."

Where the state in a criminal prosecution has offered evidence of inculpatory statements made by the defendant, the defendant has the right on cross-examination to show other exculpatory statements made by him in the same conversations and in reference to the same subject matter. *Thalheim v. State*, 38 Fla. 169, 20 So. 938.

**Different Confessions.** — A witness who testifies to a confession of guilt made by the prisoner to himself, and states in general terms that he soon afterward heard the prisoner make other confessions, may be asked on cross-examination as to the nature and character of such other confessions referred to. *Dick v. State*, 30 Miss. 631, where the court said: "It was clearly the right, and might have been of the greatest importance to the prisoner, to cross-examine in relation to those confessions—an imperfect statement, and reference to which had been made to the jury. . . . If these 'other confessions' were different in any material respect from those first made directly to the witness, as might possibly have been the case, the accused was clearly entitled to bring out by cross-examination every circumstance that was calculated to destroy or weaken their force as confessions, or to show that those confessions were incompetent evidence against him."

25. *Young v. Bennett*, 5 Ill. 43.

Nor does the rule stated permit cross-examination as to conversations occurring at other times and places.<sup>26</sup>

**Former Testimony.** — So where the party producing the witness calls for part of the testimony given by a witness on a former trial, the opposite party is entitled on cross-examination to call out all that was said by the witness upon the subject inquired about in chief.<sup>27</sup>

But a stenographer testifying to admissions made by a party as a witness on a former trial cannot be cross-examined as to testimony of such party as to which the stenographer was not examined in chief.<sup>28</sup>

(E.) CONTRADICTION, MODIFICATION, ETC., OF DIRECT EXAMINATION. Irrespective of which rule is followed, the right to cross-examine extends not only to any fact which will contradict or qualify any particular facts elicited on direct examination,<sup>29</sup> but the testimony in chief may always be qualified or explained, or rebutted, or any resulting inferences modified.<sup>30</sup>

26. *Hatch v. Potter*, 7 Ill. 725.

27. *Phares v. Barber*, 61 Ill. 271; *Roberts v. Roberts*, 85 N. C. 9.

Where a witness for plaintiff, in a civil action for assault and battery, testifies in chief to a part of the evidence given by the defendant on a criminal trial for the same offense, it is error to prevent him from testifying on cross-examination to the residue of such evidence. Such evidence is in the nature of an admission, and to permit detached portions only of an admission to be given in evidence, would work great injustice and manifest wrong. *Aulger v. Smith*, 34 Ill. 534.

In *State ex rel Jackson Co. v. Chick*, 146 Mo. 645, 48 S. W. 829, where the witness had testified that the defendants had on a former trial admitted signing the bond sued on, it was held that the defendants could on cross-examination show by the witness that they had also stated that the penalty in the bond was changed, without their consent, after they signed it. "The evidence called out in the cross-examination developed the fact that they did not admit that they signed the instrument as it was when sued on."

And where a stenographer is asked what a witness on a previous trial had testified to as to the writing of a certain letter, it is error to refuse to permit the stenographer to be

cross-examined as to what the witness had further testified to as to the circumstances and facts in regard to the writing of the letter. *DuVivier v. Phillips*, 18 Mont. 370, 45 Pac. 554. This ruling was made under a Montana statute to the effect that when part of an act, declaration, conversation or writing is given in evidence by one party, the whole of the subject may be inquired into by the other.

28. *Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498.

29. *Wilson v. Wagar*, 26 Mich. 452; *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155; *Baird v. Daly*, 68 N. Y. 547. And see *infra* this article.

It is error to refuse to allow a question on cross-examination which has a tendency to contradict the witness' testimony on his direct examination. *Bray v. State*, 118 Ala. 653, 23 So. 659.

Inquiries on cross-examination should not be permitted when their obvious purpose is to intimate, contrary to the fact, that another witness has testified differently from the one under examination. *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310.

30. *United States*. — Post Pub. Co. v. Hallam, 59 Fed. 530.

*California*. — *Graham v. Larimer*, 83 Cal. 173, 23 Pac. 286.

*Illinois*. — *Springside Co. Min. Co. v. Grogan*, 67 Ill. App. 487.

The Object of a Cross-Examination is to break or weaken the force of the testimony given by the witness on his direct examination.<sup>31</sup>

*Indiana*.—Blough v. Parry, 144 Ind. 463, 43 N. E. 560.

*Kansas*.—Blake v. Powell, 26 Kan. 320.

*Massachusetts*.—Faxon v. Jones, 176 Mass. 206, 57 N. E. 359.

*Michigan*.—Campau v. Dewey, 9 Mich. 381; Wilson v. Wagar, 26 Mich. 452; Haynes v. Ledyard, 33 Mich. 319.

*New York*.—People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846.

*Oregon*.—Maxwell v. Bolles, 28 Or. 1, 41 Pac. 661.

*Utah*.—Fissure Min. Co. v. Old Susan Min. Co., 22 Utah 434.

See also Stiles v. Estabrook, 66 Vt. 535, 29 Atl. 961, wherein it was held that if a witness testified in chief that he once saw an ancient fence in a certain locality, clearly he might be asked on cross-examination whether there was a row of trees beside the fence, and if so on which side it was; that an inquiry as to the locality of the fence with reference to fixed objects near it would be a part of the *res gestae* of the direct testimony.

**Rule Stated.**—"It is further essential to the development of the true logical idea of cross-examination to observe that it is the *tendency* of the direct examination which determines the *subject* of it, as a *test* of cross-examination; for example, it is that essential or ultimate fact in the plaintiff's case which the direct examination tended to prove, which determines the logical limits of the cross-examination, and not merely the particular minor facts and circumstances tending to the proof of that fact. As the plaintiff is at liberty to adduce any number of these particular or secondary facts, however disconnected with each other, so that they tend to the proof of the essential resultant fact, which he is bound to establish, so must the defendant be equally entitled, on cross-examination, to elicit any number of such particular facts as may tend to disprove that resultant fact, or to weaken the tendency, in its favor, of the particular facts stated on the direct examination. . . .

Where the defense assumes substantially the form of confession and avoidance, and, without controverting the facts stated on the direct examination tending to show a *prima facie* case on the part of the plaintiff, seeks to avoid their effect by a new and independent state of facts, the defendant cannot be allowed to enter into such a defense on cross-examination; because it would not tend to contradict or modify any fact stated on the direct examination; and the facts constituting such a defense, tending, as they would, to a different point from those stated on the direct examination, would have no logical connection with them, and could not tend to weaken, explain or modify his testimony in chief. But when a defendant, on cross-examination of a plaintiff's witness, enters upon an inquiry calculated only to contradict or weaken facts or inferences from facts stated on the direct examination, and which were necessary to support the plaintiff's *prima facie* case, he can not, I think, properly be said to enter upon his defense, within the meaning of this rule. The purpose of such an inquiry is to show that the plaintiff has not made a case which calls for any defense; and the testimony sought thus to be elicited relates to the plaintiff's rather than the defendant's case." Campau v. Dewey, 9 Mich. 381.

A general agent of an insurance company, who has testified on his direct examination, in an action by a solicitor against him for commissions, that he paid half of the commissions on the first premium on certain policies to a third person, may be asked on cross-examination, for the purpose of rebutting the inference to be drawn from his testimony that his agreement with the solicitor called for less than half the first premium, as to how much annual commissions he is entitled to on policies after the first year. Raymond v. Day, 111 Mich. 443, 69 N. W. 832.

31. State v. Pancoast, 5 N. D. 516, 67 N. W. 1,052, 35 L. R. A. 518.

(F.) STATEMENTS BROUGHT OUT ON DIRECT. — A witness may be cross-examined upon statements volunteered by him on his direct examination and unobjected to,<sup>32</sup> or upon irresponsive answers,<sup>33</sup> but it is not a matter of right in such case where the statement is irrelevant.<sup>34</sup>

(G.) FRAUD. — The cross-examination of witnesses testifying on an issue of fraud is generally given a wide latitude, especially where the witnesses are alleged to have been parties to the fraud;<sup>35</sup>

32. *Apple v. County Com'rs*, 127 Ind. 553, 27 N. E. 166.

*Compare Kilgore v. State*, 124 Ala. 24, 27 So. 4, wherein it was held that where a witness for the state in a criminal prosecution makes a voluntary statement not called for by any question of the prosecuting attorney, the defendant should not be permitted on cross-examination of the witness to make such statement the basis for calling out rebuttal evidence which would be clearly objectionable without it.

33. **Irresponsive Answer Permitting Cross-Examination.** — In *State v. Armstrong*, 27 Wash. 57, 69 Pac. 392, a prosecution for assault, in which the defendant on his own behalf was asked in chief whether or not he had any other trouble than the offense with which he stood charged, to which he responded that he tried to get along with his neighbors; although the question itself was intended to relate to other troubles with the prosecuting witness, it was held proper to permit the prosecution on cross-examination to ask him fully as to quarrels and fights with others of his neighbors.

34. *People v. French*, 95 Cal. 371, 30 Pac. 567. See also *Cone v. Smith*, 3 Kan. App. 607, 45 Pac. 247.

35. *Connecticut*. — *Hallock v. Alvord*, 61 Conn. 194, 23 Atl. 131.

*Illinois*. — *Pease v. Barkowsky*, 67 Ill. App. 274.

*Indiana*. — *Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385.

*Indian Territory*. — *Dorrance v. McAlester*, 1 I. T. 473, 45 S. W. 141.

*Iowa*. — *Clark v. Reiniger*, 66 Iowa 507, 24 N. W. 16; *Chapman v. James*, 96 Iowa 233, 64 N. W. 795.

*Kansas*. — *DeFord v. Orvis*, 42 Kan. 302, 21 Pac. 1, 105.

*Michigan*. — *Jacobson v. Metzger*, 35 Mich. 103; *Ganong v. Green*, 71 Mich. 1, 38 N. W. 661; *Miller v.*

*Hanley*, 94 Mich. 253, 53 N. W. 962; *Anderson v. Walter*, 34 Mich. 113; *Stevenson v. Woltman*, 81 Mich. 200, 45 N. W. 825.

*Minnesota*. — *Lynch v. Free*, 64 Minn. 277, 66 N. W. 973.

*Montana*. — *Pincus v. Reynolds*, 19 Mont. 564, 49 Pac. 145.

*Nebraska*. — *Altschuler v. Coburn*, 38 Neb. 881, 57 N. W. 836; *Armagost v. Rising*, 54 Neb. 763, 75 N. W. 534.

*New York*. — *Townsend v. Felt-housen*, 156 N. Y. 618, 51 N. E. 279.

*Utah*. — *Cahoon v. West*, 20 Utah 93, 57 Pac. 715.

*Wisconsin*. — *Kalk v. Fielding*, 50 Wis. 339, 7 N. W. 296.

**Limitations.** — While great latitude must of necessity be given in the cross-examination of witnesses charged with participation in fraudulent transactions which are at issue, yet this latitude is subject to limitation in the sound judicial discretion of the trial judge, and unless it is made to appear that such discretion has been exercised to the injury of the complaining party, reversal is not warranted merely because of such limitation. *Omaha Nat. Bank v. Thompson*, 39 Neb. 269, 57 N. W. 997; *Atwood v. Marshall*, 52 Neb. 173, 71 N. W. 1,064.

**On an Issue of Fraud and Breach of Warranty as to Pedigree of Cattle Sold as thoroughbred** which had been registered in a certain herd book, a wide latitude in cross-examination of the defendant's witnesses with relation to the herd book, its authority as to pedigree among dealers and the like, should be given. *Shambaugh v. Current*, 111 Iowa 121, 82 N. W. 497.

**Where a Husband Has Testified in Chief That He Was Holding Property as Agent for His Wife under a sale thereof to her by him, which his creditors claim to be**



indeed, it is said that the cross-examining party in such case has the right to probe the transaction to the bottom, and to bring to light every fact relating to it.<sup>36</sup> And this rule is especially applicable where it is apparent on the face of the transaction that there was something suspicious about it.<sup>37</sup>

**3. Cross-Examination of Adverse Party.**—A. IN GENERAL. — If a party offers himself as a witness in his own behalf he cannot complain that his adversary is permitted to cross-examine him within the proper limits.<sup>38</sup>

B. STATUTES. — Sometimes there are statutes providing that a party to the proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agents of any corporation which is a party to the record may be examined upon the trial thereof as if under cross-examination at the instance of the adverse parties, or any of them.<sup>39</sup> But such a statute does not permit a

fraudulent and void as to them, he may, on cross-examination, be fully interrogated as to all the circumstances of the alleged sale by him, and the nature of his possession as such agent. *Bowers v. Mayo*, 32 Minn. 241, 20 N. W. 186.

36. *Dorrance v. McAlester*, 1 I. T. 473, 45 S. W. 141.

37. *Schuster v. Stout*, 30 Kan. 520, 2 Pac. 642.

38. So held even though he was not a competent witness. *Pryor v. Harris*, 30 Ala. 118.

Where a party voluntarily places himself on the witness stand to testify to facts instead of filing an affidavit, as permitted by statute, the adverse party has the right to cross-examine him. *Scott v. Bassett*, 174 Ill. 390, 51 N. E. 577, where the party in question took the stand himself to lay the proper foundation for secondary evidence instead of filing an affidavit as he might have done.

Although one of several defendants may be examined as a witness against his co-defendants, this does not make him a general witness in the cause, nor authorize his co-defendants to cross-examine him as to any matter of defense not called out on his direct examination. *Bell v. Chambers*, 38 Ala. 660.

In *Patterson v. Kennedy*, 2 Ch. Chamb. (Can.) 372, it was held that a defendant is liable to cross-examination on his answer to a bill filed by

a wife and co-plaintiffs against her husband.

In *Thompson v. Hind*, 1 Ch. Chamb. (Can.) 247, it was held that a plaintiff has a right to examine the defendant at the trial of the cause, although he may have already cross-examined the defendant on his answer or an affidavit which the defendant has made in the cause.

In England, it is held that upon a petition before the registrar for alimony *pendente lite*, the wife is not entitled, as a matter of course, under rules 86 and 191 of the divorce court rules of 1865, to an order for the cross-examination of her husband upon his answer, even though there be a great discrepancy between the amount of his income as alleged by her in her petition and the amount as stated by him in his answer; and whether the husband shall be ordered to attend for cross-examination is a matter resting entirely within the discretion of the registrar, and the court will not interfere with the exercise of his discretion in this respect unless satisfied that he has either proceeded on a wrong principle or has exercised his discretion wrongfully. *Sykes v. Sykes*, 2 L. R. (1897) Probate Div. 163.

39. Under the Minnesota Statute, a party to the record called at the instance of the adverse party, and examined as a witness as if under cross-examination, may be compelled to testify as fully upon all matters

material to the issue as any other witness. *Pfefferkorn v. Seefield*, 66 Minn. 223, 68 N. W. 1,072.

**This Statute Means** simply that any party to the record may be called as a matter of right for cross-examination by any other party to the action, where the record shows there is an issue between them to be tried. *Bowers v. Schuler*, 54 Minn. 99, 55 N. W. 817. And not otherwise. *Suter v. Page*, 64 Minn. 444, 67 N. W. 67.

**Assignor in Bankruptcy.** — In *Chas. P. Kellogg Co. v. Holm*, 82 Minn. 416, 85 N. W. 159, an action was commenced against the defendant to rescind a sale and obtain possession of certain goods claimed to have been purchased through false representations as to the defendant's financial standing. Before the expiration of the time to answer, the defendant filed a petition in bankruptcy and did not appear or answer, but the receiver in bankruptcy did appear and defend; and it was held that the defendant assignor in bankruptcy might be called for cross-examination under this Minnesota statute, as one to be benefited by the action being defended.

In *Dorrance v. McAlester*, 1 Ind. Ter. 473, 45 S. W. 141, on an issue of fraudulent conveyance by the witness under examination, it was held proper, after he had testified in chief to the fact that he was in business, had identified the conveyance in question, and testified to the value of the property transferred, to ask him on cross-examination how much money he put into the business.

In *Steinberg v. Meany*, 53 Cal. 423, *replevin* by a wife to recover property seized under a writ of attachment against her husband, in which the husband had testified for her that he was managing the property for her as her agent, it was held proper to ask him on cross-examination as to the understanding between himself and the defendant, relative to attaching the property in question.

**Under the Minnesota Statute** discussed elsewhere in this article, where parties holding intimate domestic relations are charged with a conspiracy to defraud, great latitude should be allowed in their cross-ex-

amination. *Pfefferkorn v. Seefield*, 66 Minn. 223, 68 N. W. 1,072.

**The Minnesota Statute Permitting the Cross-Examination of Officers or Agents of a Corporation** which is a party to the record, applies to any officer, agent or superintendent having actual supervision or control of the work or act of the corporation involved in the case, whether his rank be that of a general officer or not. "The statute is a remedial one and must be construed with reasonable liberality. To limit it, by construction, to the general officers of the corporation, would defeat the purpose of the statute, for, as a rule, such general officers have no personal knowledge as to what occurs in the actual work of the corporation." *Bennett v. E. W. Backus Lumb. Co.*, 77 Minn. 198, 79 N. W. 682.

Where a wife in a proceeding against both husband and wife, with the consent of her husband testifies as a witness in his or her own behalf, the cross-examination is not to be limited to matters inquired of in the direct examination. In such case the husband completely waives the statutory privilege that the wife shall not be examined as a witness for or against him without his consent; and she may be cross-examined concerning any matter pertinent to the issue, regardless of the extent of her direct examination. *National German Am. Bank v. Lawrence*, 77 Minn. 282, 80 N. W. 363; *reversing* 79 N. W. 1,016.

**In Delaware**, a statute passed in 1859 provided that a party to the record in any action or judicial proceeding, or a person for whose immediate benefit such proceeding was prosecuted or defended, might be examined as if under cross-examination at the instance of the adverse party or any of several parties. But in *Terry v. Platt*, 1 Pen. (Del.) 185, 40 Atl. 243, it was held that inasmuch as a general statute removing all disabilities of parties to testify had since that time been passed, a party is now a competent witness and as such could be called but not examined as in cross-examination under that statute. See *DeFord v. Green*, 1 Marv. (Del.) 316, 40 Atl. 1,120.

plaintiff to call to the stand and cross-examine a defendant against whom judgment has been entered by default.<sup>40</sup> Nor does such a state statute apply to a suit in equity in a court of the United States.<sup>41</sup>

**C. LIMITS.**—In some jurisdictions it is held that cross-examination of a party testifying in his own behalf need not be confined so strictly to matters brought out on direct as in the case of other witnesses, but a greater latitude is undoubtedly permissible;<sup>42</sup> although where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion.<sup>43</sup>

In other jurisdictions, however, it is held that the strict American rule applies to the cross-examination of a party as a witness the same as to the examination of other witnesses, and that the cross-examination must be confined to matters brought out on direct.<sup>44</sup>

**D. CROSS-EXAMINATION BY OWN COUNSEL.**—A party may be

40. *Suter v. Page*, 64 Minn. 444, 67 N. W. 67. "The object of the statute," said the court in this case, "was to permit a party to call his adversary at the trial without making him his own witness and elicit from him, if possible, material facts within his knowledge precisely as if he already had been examined on his own behalf in chief. It was not intended to permit a plaintiff to make one of his own witnesses a nominal party to the record and then call him and cross-examine him not as an adverse party, but as a witness against the actual adverse defendants."

41. *Calivada Col. Co. v. Hays*, 119 Fed. 202. See also *Dravo v. Fabel*, 132 U. S. 487, where the court said: "The Act of Congress providing that the practice, pleadings, forms and modes of procedure in civil causes in the courts of the United States shall conform, as nearly as may be, to the practice, pleadings, forms and modes of procedure existing at the time in like causes in the courts of record in the state, expressly excepts equity and admiralty causes. 17 Stat. 197, c. 255, § 5, Rev. Stat. § 914. So that, when the plaintiffs used the depositions of Dippold & Fabel, taken 'as under cross-examination' they made those parties their own witnesses."

42. *Rea v. Missouri*, 17 Wall. (U. S.) 532; *Schultz v. Chicago & M.*

*W. R. Co.*, 67 Wis. 616, 31 N. W. 321.

The fullest latitude should be given on cross-examination to a party to a suit, especially where he occupies the relation of a trusted agent or employee on matters connected with his transactions done for his principal in the latter's absence. *Ryan v. Dutton*, (Tex. Civ. App.), 38 S. W. 546.

43. *Rea v. Missouri*, 17 Wall. (U. S.) 532. See also *Norris v. Cargill*, 57 Wis. 251, 15 N. W. 148.

44. *Hansen v. Miller*, 145 Ill. 538, 32 N. E. 548; *Lee-Clark Andreesen Hdw. Co. v. Yankee*, 9 Colo. App. 443, 48 Pac. 1,050.

**One of Two Plaintiffs in Replevin** may be cross-examined as to his whole understanding and his co-plaintiff's admissions concerning a matter of fact in issue. *DeGraw v. Emory*, 113 Mich. 672, 72 N. W. 4.

Where a party appears as a witness on his own behalf, the adverse party has the right to so cross-examine him as to elicit any facts which would in any way tend to corroborate the testimony of the cross-examiner, or to contradict that of the party testifying. *McManus v. Mason*, 43 W. Va. 196, 27 S. E. 293.

And under this rule the cross-examining party cannot call out matters which constitute his defense, or are the basis of his claim of non-responsibility, and have no connection with the matters stated in the

cross-examined by his own counsel as to matters relevant to his direct examination by his adversary as a witness for the latter;<sup>45</sup> but it is prejudicial error for the court to permit the defendant's counsel under the guise of cross-examination to go into the whole subject of his defense,<sup>46</sup> especially by propounding to him questions which are leading, self-serving and suggestive.<sup>47</sup>

E. DEFENDANT IN CRIMINAL PROSECUTION. — a. *In General.* When a defendant in a criminal prosecution voluntarily takes the stand as a witness in his own behalf, he thereby subjects himself to the same rules of cross-examination<sup>48</sup> that govern other witnesses,

direct examination. *People ex rel Phelps v. Court of O. and T.*, 83 N. Y. 430; *Denniston v. Philadelphia Co.*, 161 Pa. St. 41, 28 Atl. 1,007; *Norris v. Cargill*, 57 Wis. 251, 15 N. W. 148; *Sullivan v. Collins*, 107 Wis. 291, 83 N. W. 310.

In *Miller v. Dill*, 149 Ind. 326, 49 N. E. 372, an action canceling a note on the ground that it was forged, it was held improper to ask one of the plaintiffs on cross-examination whether he had not heard his co-plaintiff making statements affecting the chastity of the defendant, on the theory that the note in suit was executed by the plaintiff in compromise of a contemplated slander suit based upon such statement, where the examination in chief had not involved any inquiry as to such statement.

Where a question is not competent as proper cross-examination, the fact that it is addressed to a party while testifying as a witness does not change the rule even if intended to elicit a circumstance against interest. *Clukey v. Seattle Elec. Co.*, 27 Wash. 70, 67 Pac. 379.

The Rule in Wisconsin is that although cross-examination of a party may be given more latitude than in the case of an ordinary witness, still the cross-examination must be confined to matters brought out in chief. *Sullivan v. Collins*, 107 Wis. 291, 83 N. W. 310; *overruling Weadock v. Kennedy*, 80 Wis. 449, 5 N. W. 393. Compare *Knapp v. Schneider*, 24 Wis. 70; *Lauterbach v. Netzo*, 111 Wis. 326, 87 N. W. 229.

<sup>45.</sup> *Reeve v. Dennett*, 141 Mass. 207, 6 N. E. 378; *Teel v. Byrne*, 24 N. J. L. 631.

<sup>46.</sup> *Freehill v. Hueni*, 103 Ill. App. 118.

<sup>47.</sup> *Bishop v. Averill*, 17 Wash. 209, 49 Pac. 237.

Where a party to the suit is called by the opposite party, he is not thereby made a witness for all purposes, but can be cross-examined by his own counsel or the counsel of his co-party only as to those matters upon which he has been examined by the party calling him. *Lamb v. Ward*, 18 U. C. Q. B. 304. See also *Mutual Fire Ins. Co. v. Palmer*, 20 U. C. Q. B. 441. Compare *Dickson v. Pinch*, 11 U. C. C. P. 146.

<sup>48.</sup> *Alabama*. — *Clarke v. State*, 78 Ala. 474, 56 Am. Rep. 45.

*California*. — *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50.

*Colorado*. — *McKeone v. People*, 6 Colo. 346.

*Connecticut*. — *State v. Griswold*, 67 Conn. 290, 34 Atl. 1,046, 33 L. R. A. 227.

*Illinois*. — *Chambers v. People*, 105 Ill. 409; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

*Indiana*. — *Keyes v. State*, 122 Ind. 527, 23 N. E. 1,097. Compare *Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

*Iowa*. — *State v. Red*, 53 Iowa 69, 4 N. W. 831.

*Kansas*. — *State v. Snyder*, 8 Kan. App. 686, 57 Pac. 135; *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61; *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406.

*Louisiana*. — *State v. Favre*, 51 La. Ann. 434, 25 So. 93; *State v. Cain*, 106 La. 708, 31 So. 300.

*Maine*. — *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688.

*Massachusetts*. — *Com. v. Mullen*, 97 Mass. 545; *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Com. v. Morgan*, 107 Mass. 99.

with certain exceptions as to privileges discussed in subsequent sections of this article;<sup>49</sup> compelling the accused in such case to submit to cross-examination is not a violation of the constitutional prohibition against compelling an accused to be witness against himself.<sup>50</sup> And this is the rule also in England<sup>51</sup> and in Canada.<sup>52</sup>

b. *Statutes*.—In some jurisdictions there are statutes which in express terms provide that the accused shall be subject to cross-examination as any other witness.<sup>53</sup>

But it is not the purpose of such statutes that the accused, when a witness on his own behalf, should be treated differently from other witnesses, or that the statute should be used as a cover to ask incompetent or improper questions, calculated to prejudice him before the jury.<sup>54</sup>

*Michigan*.—*People v. Howard*, 73 Mich. 10, 40 N. W. 789.

*Nevada*.—*State v. Huff*, 11 Nev. 17.

*New Hampshire*.—*State v. Ober*, 52 N. H. 459.

*New York*.—*Connors v. People*, 50 N. Y. 240; *People v. Courtney*, 31 Hun. 199; *Fralich v. People*, 65 Barb. 48; *People v. Hooghkerk*, 96 N. Y. 149; *Brandon v. People*, 42 N. Y. 265.

*North Carolina*.—*State v. Allen*, 107 N. C. 805, 11 S. E. 1,016.

*North Dakota*.—*State v. Pancoast*, 5 N. D. 516, 67 N. W. 1,052, 35 L. R. A. 518; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477.

*South Carolina*.—*State v. Mitchell*, 56 S. C. 524, 35 S. E. 210.

*Texas*.—*Monticue v. State*, 40 Tex. Crim. 528, 51 S. W. 236; *Barkman v. State*, (Tex. Crim.), 52 S. W. 69; *Holly v. State*, 39 Tex. Crim. 301, 46 S. W. 39.

*Wisconsin*.—*Frank v. State*, 94 Wis. 211, 68 N. W. 657.

*Wyoming*.—*Johnson v. State*, 8 Wyo. 494, 58 Pac. 761.

A defendant who voluntarily offers himself as a witness in his own behalf, and testifies in chief, thereby subjects himself to a legitimate and pertinent cross-examination. The fact that he is also a party accused of a crime clothes him with no greater right or privilege as a witness, nor subjects him to any different rule of cross-examination than others. The same latitude and the same limitations apply to his cross-examination as if he were not a party. *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496.

**Motive**.—A cross-examination of a defendant in a criminal case as to motive will be permitted, where he has denied on his direct examination the motives as stated by another witness. *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1,052, 35 L. R. A. 518.

Indeed there are authorities which permit a cross-examination as to motive, where the direct examination is nothing more than a general denial of the crime, or even less than that. *Thomas v. State*, 103 Ind. 419, 2 N. E. 808; *Com. v. Clark*, 145 Mass. 251, 13 N. E. 888; *People v. Tice*, 131 N. Y. 651, 30 N. E. 494; *U. S. v. Mulaney*, 32 Fed. 370.

In *Idaho* an accused may be cross-examined about matters relating to the issues, but about which he had not testified in chief. *State v. Larkins*, 5 Idaho 200, 47 Pac. 945.

49. See *infra* "TESTING CREDIBILITY."

50. *State v. Larkins*, 5 Idaho 200, 47 Pac. 945.

51. *Reg. v. Gawthorpe*, 59 J. P. 377; *Attorney General v. Radloff*, 10 Exch. 84; *Reg. v. Payne*, L. R. 1 C. C. 349.

52. *Reg. v. Fee*, 13 Ont. Rep. 590, not following *Queen v. Halpin*, 12 Ont. Rep. 330.

53. By Statute, in *Missouri*, an accused person who takes the stand for himself can be cross-examined as any other witness. *State v. Hathorn*, 166 Mo. 229, 65 S. W. 756. For such statutes see *infra* this section, treating of "LIMITS OF CROSS-EXAMINATION."

54. *Leo v. State*, 63 Neb. 723, 89 N. W. 303.

c. *Limit of Cross-Examination.* — (1.) **Generally.** — Whether the range of the cross-examination of an accused person is to be confined to matters elicited on the direct examination will, in the absence of any statutory provision to the contrary, depend somewhat upon the rule prevailing in the particular jurisdiction governing the range of the cross-examination of witnesses generally.<sup>55</sup>

Thus in the absence of a statute the rules in civil cases govern, that is, that the cross-examination must be relevant and must pertain to the matter about which the witness testified in chief.<sup>56</sup> Although in other jurisdictions the liberal rule in civil cases is also followed in criminal prosecutions.<sup>57</sup>

55. See notes 56 and 57.

56. *State v. Pancoast*, 5 N. D. 516, 67 N. W. 1,052, 35 L. R. A. 518; *State v. Chingren*, 105 Iowa 169, 74 N. W. 946; *State v. Eifert*, 102 Iowa 188, 65 N. W. 309, 63 Am. St. Rep. 433.

In *Com. v. VanHorn*, 188 Pa. St. 143, 41 Atl. 469, a prosecution for murder, in which testimony had been given to make out a possible case of insanity, it was held proper after the prisoner had, as a witness, given a perfectly rational and minute description of all the facts precisely as he claims they occurred, to ask him on cross-examination "you don't say you are insane, do you?"

It is not competent to ask an accused person on trial for murder why he did not tell a person named about the killing, where his direct examination brought out nothing to the effect that he did not tell such person. *Rogers v. State*, (Tex. Crim.) 71 S. W. 18. But it is competent in the cross-examination of a person accused of murder to ask him, with reference to his denial as to the killing, his reason for such denial and his reason for concealing the alleged offense. *Rogers v. State*, (Tex. Crim.), 71 S. W. 18.

The **Strict Rule** does not, as to an accused person on cross-examination, operate to restrict his cross-examination to the specific facts of the direct examination, but a subject opened up on direct may be fully gone into on cross-examination. *Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

Permitting the defendants in a criminal prosecution, who have testified in chief as to their movements from early in the evening of the night

on which the offense was committed, to be cross-examined as to their movements from noon of that day up to the evening, is discretionary with the trial judge. *Barrego v. Terr.*, 8 N. M. 446, 46 Pac. 349.

57. *State v. Allen*, 107 N. C. 805, 11 S. E. 1,016; *State v. McGee*, 55 S. C. 247, 33 S. E. 353, 74 Am. St. Rep. 741; *Disque v. State*, 49 N. J. L. 249, 8 Atl. 281; *Guy v. State*, 90 Md. 29, 44 Atl. 997; *Com. v. Lannan*, 13 Allen, (Mass.), 563; *Brown v. State*, 38 Tex. Crim. 597, 44 S. W. 176; *Grooms v. State*, 40 Tex. Crim. 319, 50 S. W. 370; *Alexander v. State*, 40 Tex. Crim. 395, 49 S. W. 229, 50 S. W. 716.

"The rule that the cross-examination is limited to the matters brought out on the direct examination has never prevailed in this country, either in civil or criminal actions, though it is otherwise in England. The rule that it is competent to bring out such evidence upon cross-examination of the defendant's witnesses is not varied by the fact that the defendant uses himself as a witness in his own behalf. He cannot be compelled to testify, and no inference to his detriment can be drawn from his failure to go upon the stand. When he voluntarily does so he waives his constitutional privilege of not being required to give evidence tending to criminate himself, and, to impeach him and shake his evidence, he can be asked questions as to other and distinct offenses from which any other witness who is compelled to go upon the stand will be excused from answering upon pleading his constitutional privilege." *State v. Allen*, 107 N. C. 805, 11 S. E. 1,016. See also *State v. Thomas*, 98 N. C.

(2.) **By Statutes.** — There are statutes, however, in some of the states limiting the cross-examination of defendants in criminal cases, and under those statutes a stricter rule of cross-examination has been enforced.<sup>58</sup> And where the statute in express terms limits

599, 4 S. E. 518, 2 Am. St. Rep. 351.

In *Grooms v. State*, 40 Tex. Crim. 319, 40 S. W. 370, the issue was whether or not the defendant had forged a certain deed, and on his direct examination he had testified that the deed was not in his handwriting, that he had every reason to believe it was in the handwriting of the person whose deed it purported to be, and he claimed to have an old letter from such person which came to him with the deed; and it was held proper to cross-examine him with reference to his genuine handwriting in another paper, which was ruled by the court to be a standard for the comparison of the defendant's handwriting.

The fact that the court gave counsel for the prosecution in a criminal case much latitude in the cross-examination of the defendant, will not require the reversal of a judgment of conviction where the answers elicited were not at all injurious to the defendant. *People v. Mullin*, 163 N. Y. 312, 57 N. E. 473.

The cross-examination of persons who are witnesses on their own behalf, when on trial for criminal offenses, should be generally limited to matters pertinent to the issue, or such as may be proved by the other witnesses. *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183.

It is discretionary with the trial court to allow an accused person testifying for himself to be cross-examined on the whole case, although not gone into on the direct examination. *Disque v. State*, 49 N. J. L. 249, 8 Atl. 281.

In *State v. Edwards*, 106 La. 674, 31 So. 308, a criminal prosecution for murder, on the cross-examination of one of the defendants as a witness for himself, his attention was directed to the time, place and circumstance of a statement attributed to him and said to be at variance with his testimony, the probability of having made which he admitted. Subsequently on cross-examination of the person to whom the

statement was said to have been made, and who had been introduced as a witness for the co-defendant, he was asked whether such statement had been made to him, to which he replied in the affirmative. It was held that the overruling of the objection that the question was not germane to the testimony elicited upon the direct examination of the witness, and that it served to introduce an alleged confession by the defendant, was not, under the circumstances, fatal error.

In *State v. Cain*, 106 La. 708, 31 So. 300, it was held that where a defendant in a criminal prosecution testified in chief that he wrote to a person named, and professed to state what he wrote, he may be interrogated on cross-examination as to the number, dates and contents of the letters; and it was further held that he had not the right to demand, as a condition precedent to answering questions, that the letters themselves in the possession of the prosecuting officer should be submitted to the inspection of himself and his counsel.

Permitting an accused person to be cross-examined upon matters not gone into in chief, is not compelling him to be a witness against himself within the constitutional prohibition. *McGarry v. People*, 2 Lans. (N. Y.) 227.

58. In Georgia the accused in a criminal case while delivering his statement is not under examination as a witness, and it is error for the court during or at the conclusion of the statement to propound a question to the accused seeking to elicit an answer touching the facts brought out by the evidence in the case. It is the right of the prisoner not to be compelled to answer any question nor submit to cross-examination, and he will not be held to have waived such right by making answer to a question put to him by the court. He may be cross-examined in the manner provided expressly by the statute, but his consent thereto is necessary. *Hackney v. State*, 101 Ga.

the cross-examination to matters inquired into on direct it is error to permit the cross-examination to be carried beyond those limits against objection of the accused.<sup>59</sup>

512, 28 S. E. 1,007. See also *Cicero v. State*, 54 Ga. 156; *Vaughan v. State*, 88 Ga. 731, 16 S. E. 64.

And under the Georgia rule, if an accused person on a criminal prosecution in making his statement refers to the subject matter of a suggestion or question which his counsel has made, and prior to such reference the accused has been notified by the judge that if he answered the suggestion or question he would subject himself to cross-examination, he is not even then lawfully subject to such cross-examination. *Walker v. State*, 116 Ga. 537, 42 S. E. 787, where the court said: "The statute expressly declares that the prisoner shall not be compelled to answer questions on cross-examination should he think proper to decline to answer them. Furthermore, so long as the prisoner confines his statement to matters connected with his defense, he has the right to refer to any particular phase of it, and this he may do without let or hindrance. While counsel has no right to make suggestions to him, or to put any question to him, if he do so, even while out of order, the prisoner may lawfully incorporate in his statement any matter which involves the subject of the suggestion or question, without placing himself at any disadvantage, because his right to make such a statement as he may deem proper is unqualified. It does not appear in this case that the prisoner consented to be cross-examined. His counsel objected to it, and when the court ruled that by answering the suggestion or question of his counsel the prisoner has subjected himself to cross-examination, under which ruling the prisoner was cross-examined, he committed an error which required the grant of a new trial."

In Florida, Prior to 1895, it was held that the statute permitting an accused person to make a statement of the matters of his or her defense under oath before the jury, did not subject the accused person to cross-examination. *Miller v. State*, 15 Fla. 577. But in 1895 a statute was

passed, the effect of which was that the accused person could voluntarily take the stand and testify as other witnesses, but subject to the rule governing such other witnesses generally, among which was the right to cross-examination by the state. *Milton v. State*, 40 Fla. 251, 24 So. 60; *Copeland v. State*, 41 Fla. 320, 26 So. 319. But the cross-examination is to be confined to matters brought out in chief. *Wallace v. State*, 41 Fla. 547, 26 So. 713.

59. The California Penal Code provides that a defendant in a criminal action cannot be compelled to be a witness against himself as to all matters, but if he offer himself as a witness he may be cross-examined as to all matters about which he was examined in chief. The effect of this statute is to take from the court any discretion which it might ordinarily exercise in allowing the range of a cross-examination to extend beyond the matter brought out on the direct examination. *People v. Rodriguez*, 134 Cal. 140, 66 Pac. 174; *People v. McGungell*, 41 Cal. 429; *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36; *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520. And it prevents the prosecution from cross-examining him on the case generally, and in effect making him its own witness. *People v. O'Brien*, 66 Cal. 602. The statute does not, however, place any limitation or restriction upon the extent or character of his cross-examination as to all matters about which he was examined in chief, and upon those matters he may be cross-examined as fully as any other witness. *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80; *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

In Oregon, a statute provides that an accused person, when testifying as a witness for himself, gives to the prosecution the right to cross-examine him upon all facts to which he has testified, tending to his conviction or acquittal. *State v. Saunders*, 14 Or. 300, 12 Pac. 441. This statute does not compel him to be a witness against himself beyond such



d. *Recalling*. — It is discretionary of the court whether or not the accused shall be recalled for further cross-examination.<sup>60</sup>

e. *Aid of Counsel*. — Although a person on trial for a criminal offense by taking the stand as a witness for himself may subject himself to the rule applicable to other witnesses, he is not thereby deprived of his rights as a party, and his counsel may speak for him while he is a witness.<sup>61</sup>

## V. MATTERS IRRELEVANT TO ISSUES.

1. *Bias, Prejudice, Hostility, etc.* — A. GENERALLY. — For the purpose of attacking the credibility of a witness, great latitude is allowable on cross-examination, and questions may be asked which are wholly irrelevant to the matter in issue, in accordance with the

cross-examination. "The humane principle of the law that the party shall not be compelled to be a witness against himself is as effectually violated when the cross-examination of the accused is extended beyond the facts to which he has testified, as it would be if he has to be called and made to testify at the instance of the state." *State v. Lurch*, 12 Or. 99, 6 Pac. 408.

In *Missouri*, the rule was formerly that the cross-examination of an accused person was not to be strictly confined to matters elicited on the direct examination. *State v. Testerman*, 68 Mo. 408; *State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506. But it is expressly provided by statute now that an accused person is to be cross-examined only as to matters referred to in his examination in chief. *State v. Chamberlain*, 89 Mo. 129, 1 S. W. 145; *State v. Hathorn*, 166 Mo. 229, 65 S. W. 756; *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *State v. Turner*, 76 Mo. 350; *State v. Worton*, 139 Mo. 526, 41 S. W. 218. But cross-examination upon matters outside the scope of the direct examination is not fatal error where the judgment of conviction was fully warranted by other competent evidence. *State v. Douglass*, 81 Mo. 231; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257.

But under the *Missouri* statute the cross-examination of an accused person is not confined to a mere categorical review of the matters stated in the direct examination, but it may be confined to the subject of

the examination in chief. *State v. Miller*, 156 Mo. 76, 56 S. W. 907, a murder trial in which it was held proper to ask the defendant if he had anything whatever to do with the murder with which he is charged.

In *State v. Cunningham*, 154 Mo. 161, 55 S. W. 382, wherein the defendant had testified in chief that a letter dated as of a certain date was received at his home after he left there, it was held proper to ask him on cross-examination when he left home.

60. *State v. Horne*, 9 Kan. 119; *State v. Cohn*, 9 Nev. 179.

**Whereabouts at Time Offense Committed.** — Where an accused states in chief that he was not present at the time and place of the offense charged, the state may on cross-examination ask him where he was at that time. *State v. Harvey*, 131 Mo. 339, 32 S. W. 1,110.

61. *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183, where the court said: "Especially ought this protection to be afforded to persons on trial for criminal offenses, who often by a species of moral compulsion are forced upon the stand as witnesses, and being there, are obliged to run the gauntlet of their whole lives on cross-examination."

See also *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496, where the court said: "As a party, his right to object to incompetent questions addressed to himself as a witness is the same as if they were addressed to any other witness."

rule. The general rule is that anything tending to show bias<sup>62</sup> or prejudice<sup>63</sup> on the part of a witness,<sup>64</sup> or anything which shows his

62. In the case of *Com. v. Byron*, 14 Gray (Mass.) 31, Hoar, J., said: "We are inclined to the opinion that one of the exceptions was well taken, and would have entitled him to a new trial if a new trial were necessary for the final determination of the prosecution. Mary Sawyer was an important witness for the government. The defendant offered to show 'that before this indictment, or any complaint was made against him for perjury, he had instituted an action of tort against Mrs. Sawyer for damages for abducting and harboring the defendant's wife against his consent; that Mrs. Sawyer was instrumental in obtaining this indictment after the service of said civil action upon her; and that after this indictment was found, she proposed to the defendant to do all she could to stop further proceedings in this perjury case if the defendant would withdraw his said civil action against her.' But the court rejected the testimony as irrelevant. The evidence which was thus offered and rejected seems to have been competent to show the bias of Mrs. Sawyer. *Atwood v. Welton*, 7 Conn. 66."

In an action against a railroad company to recover damages, the plaintiff may be permitted upon the cross-examination of witnesses of a defendant, to show that they were furnished free transportation for their attendance on the trial, or that they were given the general privilege of riding on the defendant's road; such evidence tending to establish a bias on the part of such witnesses. *Alabama G. S. R. Co. v. Johnston*, 128 Ala. 283, 29 So. 771.

In *Drum v. Harrison*, 83 Ala. 384, 3 So. 715, Somerville, J.: "It was competent for the plaintiff to show, on cross-examination, the bias of the witness, Wilkinson, by proving that he was sued in another action by the plaintiff for a portion of the cotton subject to the same mortgage which was held by the plaintiff on the cotton in controversy, and that the defense to each suit was the same, viz., the alleged permission given the

mortgagor to sell the mortgaged property."

63. In *Plummer v. Ossipee*, 59 N. H. 55, 20 Am. Rep. 164, the court said: "Dr. Bassett, a witness of the defendants, examined the plaintiff on the evening of the accident, and testified that he thought her injuries were not serious. The plaintiff was permitted to show, by cross-examination, that, before examining the plaintiff, the witness was informed that she received her injury by being thrown forward upon the dasher and bruising her forehead. The evidence was competent to show the witness' state of mind when he entered upon the examination and how far that affected his conclusions on the nature and extent of the injury. It was a question of prejudice, and a proper subject for cross-examination."

#### 64. Cross-Examination to Show Bias, Prejudice, etc.

*England*.—*Harris v. Tippet*, 2 Camp. 637; *Attorney General v. Hitchcock*, 11 Jur. 478.

*Alabama*.—*Houston Biscuit Co. v. Dial*, 135 Ala. 168, 33 So. 268; *Burger v. State*, 83 Ala. 36, 3 So. 319.

*California*.—*People v. Wasson*, 65 Cal. 538, 4 Pac. 555; *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859.

*Connecticut*.—*Atwood v. Welton*, 7 Conn. 66; *McGinnis v. Grant*, 42 Conn. 77.

*Florida*.—*Driggers v. State*, 38 Fla. 7, 20 So. 758.

*Iowa*.—*Dance v. McBride*, 43 Iowa 624.

*Kansas*.—*State v. Collins*, 33 Kan. 77, 5 Pac. 368; *State v. Krum*, 32 Kan. 372, 4 Pac. 621.

*Maine*.—*Davis v. Roby*, 64 Me. 427.

*Massachusetts*.—*Chapman v. Coffin*, 14 Gray 454; *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; *Wallace v. Taunton St. R. Co.*, 119 Mass. 91; *Brewer v. Crosby*, 11 Gray 29; *Collins v. Stephenson*, 8 Gray 438.

*Michigan*.—*Geary v. People*, 22 Mich. 219; *Crippen v. People*, 8 Mich. 117; *Beaubien v. Cicotte*, 12 Mich. 460; *Patten v. People*, 18 Mich. 314.

friendship<sup>65</sup> or enmity<sup>66</sup> to either of the parties is commonly a proper subject of inquiry. So, also, anything which tends to show that in

100 Am. Dec. 173; *Mears v. Cornwall*, 73 Mich. 78, 40 N. W. 931.

*Minnesota*.—*State v. King*, 88 Minn. 75, 92 N. W. 965.

*New York*.—*Miles v. Sackett*, 30 Hun 68.

*Pennsylvania*.—*Cameron v. Montgomery*, 13 Serg. & R. 128; *Batdorff v. Farmers' Nat. Bank*, 61 Pa. St. 179; *Bennett v. Hethington*, 16 Serg. & R. 193; *Ott v. Houghton*, 30 Pa. St. 451.

*Texas*.—*McFarlin v. State*, 41 Tex. 23; *Blum v. State*, 9 Tex. App. 234.

**65. Friendship.**—In *State v. Oscar*, 52 N. C. 305, *Battle, J.*, said: "After the solicitor for the state had introduced testimony to establish the guilt of the prisoner, his counsel called one of his fellow servants, named Harry, who gave evidence tending to criminate another man, and to exculpate him. On cross-examination, this witness made some statements, which, together with what he had stated in his examination in chief, induced the solicitor to say that he should contend that the witness was an accomplice with the prisoner in the commission of the offense. The counsel for the prisoner then called his master, who testified that the witness, Harry, and the prisoner had shortly before had a fight, and were not on friendly terms. The solicitor then called a witness to prove that Harry and the prisoner were on friendly terms, and to show this, he was permitted by the court, after objection by the prisoner's counsel, to state that he saw Harry and the prisoner conversing together the next morning after the transaction, and that he heard the sound of the conversation sufficiently to know that it was apparently friendly, but he did not hear it with sufficient distinctness to understand its import. The witness, Harry, had not been previously asked whether or not he was on friendly terms with the prisoner. Under the circumstances, and for the sole purpose for which the testimony was offered, we think it was clearly competent."

**66. Cross-Examination to Show Enmity.**—*Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581; *Brewer v. Crosby*, 11 Gray (Mass.) 29; *Drew v. Wood*, 26 N. H. 363; *Newton v. Harris*, 6 N. Y. 345.

**Conduct to Show Hostility.**—In *People v. Thompson*, 92 Cal. 506, 28 Pac. 589, *Garoutte, J.*, said: "The witness, Morris, was an important witness for the prosecution. Upon cross-examination he testified that 'shortly after the shooting he went to the scene of the homicide, and took his rifle with him.' Q. 'What did you take your rifle with you for?' An objection to this question was sustained, upon the ground that it was not cross-examination. Upon redirect examination the witness stated: 'I am sorry the defendant got into that trouble,' and defendant's counsel then asked him the following: Q. 'And you expressed your sorrow by going out toward the house with a Winchester rifle?' An objection was sustained to this question, upon the grounds already stated. These rulings of the court were erroneous.

"It is elementary law, supported by all authority, that the state of mind of a witness as to his bias or prejudice, his interests involved, his hostility or friendship toward the parties, are always proper matters for investigation, in order that truth may prevail and falsehood find its proper level. If the inner workings of a witness' mind are actuating his testimony, and the workings of that mind are brought forth to the light and held up in full view before the jury, results will be obtained much more in accord with truth and justice than though the witness' testimony is weighed and measured by his words alone. If the feelings of the witness, Norris, were so hostile toward the defendant that when he went to the scene of the homicide he took his rifle with him for the purpose of wreaking vengeance upon the slayer of his friend, that would be a fact proper to be placed before the jurors, as throwing light upon the state of the witness' mind, in order that they

the circumstances in which he is placed he has a strong temptation to swear falsely;<sup>67</sup> the situation of the witness in regard to the result of the trial,<sup>68</sup> his interest, whether as employee, surety on

might properly weigh his testimony."

#### **Witness' Relations to Accused.**

On cross-examination the state has the right to ask the defendant's witnesses as to their relations to the accused, the object being to affect their credibility and the weight of their evidence. *State v. Willingham*, 33 La. Ann. 537.

Defendant was charged with murder. A brother of defendant was produced by the state as a witness against him. He was asked on cross-examination whether he was not, up to the then present time, at deadly enmity with accused, and whether he had not at various times carried a gun to shoot him. The question was proper to show the animus of the witness and affect his credibility. *McMasters v. State*, (Miss.), 33 So. 2.

#### **67. Circumstances Tempting Witness to Swear Falsely.**

*Illinois*.—*Powell v. Bergner*, 47 Ill. App. 33.

*Louisiana*.—*State v. Johnson*, 48 La. Ann. 437, 19 So. 476.

*Michigan*.—*Mears v. Cornwall*, 73 Mich. 78, 40 N. W. 931; *Styles v. Decatur*, (Mich.), 91 N. W. 622.

*Missouri*.—*State v. Anslinger*, 171 Mo. 600, 71 S. W. 1,041.

*Montana*.—*Gallick v. Bordeaux*, 22 Mont. 470, 56 Pac. 961.

*Nebraska*.—*Olive v. State*, 11 Neb. 1, 7 N. W. 444; *Blenkiron v. State*, 40 Neb. 11, 58 N. W. 587.

Where a witness had been indicted with defendant, and the indictment had been dismissed, it is competent for defendant to show the effect that the action of certain detectives had upon the witness, as affecting his testimony. *Breckinridge v. Com.*, 97 Ky. 267, 30 S. W. 634.

**Wager on Result of Trial.**—In *Kellogg v. Nelson*, 5 Wis. 125, *Whiton, C. J.*: "It appears by the bill of exceptions that the witness, Herring, was asked by counsel for defendants below whether he had made a wager with any person that the plaintiffs would recover in this suit, and that the judge decided that the question was improper, and that

in consequence of this ruling the witness did not answer the interrogatory. We are of the opinion that this was a proper question to be propounded to the witness. On the cross-examination of a witness, anything which shows his friendship or enmity to either of the parties to the suit is commonly a proper subject of inquiry. So also is anything which tends to show that, in the circumstances in which he is placed, he has a strong temptation to swear falsely."

68. "It is objected, the court permitted two of appellant's witnesses to be asked, on cross-examination, if they had not tried to procure from appellee releases to appellant for his injuries, and, it is argued, such evidence tended to prove appellant admitted its liability. The evidence was not competent for such purpose, but it was proper for the purpose of tending to prove the interest the witnesses had assumed, and might be considered in connection with their credibility, and was therefore proper cross-examination." *Butler Ballast Co. v. Hoshaw*, 94 Ill. App. 68.

**Money Due Witness as Assignor of Cause of Action.**—In *Elliott v. Luengene*, 20 Misc. 18, 44 N. Y. Supp. 775, where the assignor of a cause of action testified, on his cross-examination, that he had an interest in the result of the trial, and that if any money was coming to him he would like to have it, it was held proper, where the question was merely for the purpose of showing his interest in the suit, to ask him to state in what way this money was due him.

**Pecuniary Interest Affected by Result.**—In *Vaughn v. Westover*, 2 Hun (N. Y.) 43, it was held error to exclude questions put to a witness for the purpose of showing whether his pecuniary interest would be affected by the result of the suit on trial. The court in so ruling said: "While interest in the event of the suit will not now absolutely disqualify a witness, it may be shown on his cross-examination, with a

bond, reward for conviction, or otherwise,<sup>69</sup> or inclinations, for or

view to test his credibility. If peculiarly interested in the result, his statements are brought under more careful and rigid examination; hence it is always competent, on cross-examination, to inquire of the witness whether he is not interested to support the cause of action or defense which his testimony tends to maintain. . . . Now the witness may be cross-examined as to any fact bearing on these various matters, with a view to affect his credibility. Therefore he may be interrogated as to his interest in the event of the suit. And in accordance with the rule above recognized, it is competent to inquire how the witness understands the case as regards his interest. His understanding in that regard is the basis of supposed partiality and bias, which may color his statements, if not induce falsehood. A cross-examination is of little value unless open to questions which will disclose the standing of the witness in regard to the subject matter of the litigation. So it should be liberally indulged, with a view to a full disclosure of the influences under which the witness testifies. The exclusion of the questions propounded to the witness, *Strever*, was, as I think, manifestly erroneous."

**69. Interest of Employee.** — In an action for injuries, by an employee, against a railroad company, the plaintiff's counsel may, on cross-examination of defendant's witnesses, ask them if they are not in defendants' employ; if the defendants did not promise to pay their expenses to attend the trial; and if they would not be discharged if they did not do their best as witnesses for the defendant. *Missouri, K. & T. R. Co. v. Smith*, (Tex. Civ. App.), 72 S. W. 418.

**Fact of Employment.** — *Guckavan v. Lehigh Tr. Co.*, 203 Pa. St. 521, 53 Atl. 351, *Brown, J.*, said: "The appellant complains of certain questions that were allowed to be put to its witness, *Dr. Mackellar*, on cross-examination. The examination in chief of this witness, which was hurtful to the plaintiff, would naturally have impressed the jury that when he called to examine the plaintiff on

the day of the accident, and continued to visit her ten or twelve times, he had done so either at her instance or by direction of some of her family. It was not developed by the company that he had been promptly sent to see her by its direction; but on his cross-examination this fact, for the first time, was properly brought out, and when he stated that the company had sent him he was further properly asked whether he was the company's physician, to which he answered that he was not. To affect his credibility, the questions complained of were then asked, and ought not to have been disallowed, for it was legitimate for the plaintiff to show by cross-examination that the witness, who had said he was not the company's physician, had repeatedly, at its instance, and as its representative, gone to examine persons hurt in accidents on its road; and that he had been so employed from time to time by the company was information properly drawn from the witness by the plaintiff for the consideration of the jury in determining what effect they ought to give to his testimony."

Where an accomplice, called as a witness against the defendant, has, by his own testimony, made out a case of murder against himself, it is competent to ask him on cross-examination whether or not he expected to be hung. *State v. Kent*, 4 N. Dak. 577, 62 N. W. 631, 27 L. R. A. 686.

#### **Witness Acting as Surety on Bond.**

In *State v. Calkins*, 73 Iowa 128, 34 N. W. 777, it was held proper to permit the prosecution to ask a witness for the defendant if he was not a bondsman for the defendant. The court said: "The fact that the witness bore that relation to the defendant, while it did not, perhaps, give him any pecuniary interest in the result of the trial, did tend to show that he felt a strong personal interest in defendant, and might properly be considered by the jury in determining what weight and credit ought to be given to his testimony."

In *People v. Benson*, 52 Cal. 380, it was held proper, for the purpose

against either of the parties,<sup>70</sup> may be shown. And at times it is also permissible to investigate the character, habits and mental condition of a witness for the purpose of attacking his credibility.<sup>71</sup>

In short, inasmuch as the jurors are the sole judges of the credibility of witnesses, it is well established that whatever in the slightest degree affects the credibility of an opposing witness<sup>72</sup> and will

of showing the interest of the witness in the result of the trial, to ask him whether there was not a reward offered for the conviction of the defendant. In holding that it was error to reject such a question the court said: "It is difficult to see on what ground this evidence was excluded, as it is perfectly well settled that on cross-examination a witness may be interrogated as to any circumstance which tends to impeach his credibility by showing that he is biased against the party conducting the cross-examination, or that he has an interest in the result adverse to such party."

70. *Mayhew v. Thayer*, 8 Gray (Mass.) 172; *Kellogg v. Nelson*, 5 Wis. 125.

71. *Pease v. Burrowes*, 86 Me. 153, 29 Atl. 1,053; *Johnston v. Farmers' F. Ins. Co.*, 106 Mich. 96, 64 N. W. 5; *Winston v. Cox*, 38 Ala. 268; *Wendt v. Chicago, St. P. M. & O. R. Co.*, 4 S. D. 476, 57 N. W. 226.

72. **Matters Affecting Credit of Witness Generally.**

*Alabama*.—*Worthington v. Gwin*, 119 Ala. 44, 24 So. 739, 43 L. R. A. 382; *Yarborough v. State*, 105 Ala. 43, 16 So. 758.

*California*.—*Wixom v. Goodcell*, 90 Cal. 622, 27 Pac. 419.

*Connecticut*.—*Atwood v. Welton*, 7 Conn. 66.

*Florida*.—*Barber v. State*, 13 Fla. 675.

*Illinois*.—*Bow v. People*, 160 Ill. 438, 43 N. E. 593.

*Kansas*.—*State v. Collins*, 33 Kan. 77, 5 Pac. 368; *Smith v. Morrill*, 39 Kan. 665, 18 Pac. 915.

*Massachusetts*.—*Brewer v. Crosby*, 11 Gray 29; *Collins v. Stephenson*, 8 Gray 438.

*Michigan*.—*Burt v. Long*, 106 Mich. 210, 64 N. W. 60; *Hart v. Walker*, 100 Mich. 406, 59 N. W. 174; *Vincent v. Defield*, 105 Mich. 315, 63 N. W. 302; *People v. Wirth*, 108 Mich. 307, 66 N. W. 41.

*Missouri*.—*Muller v. St. Louis Hos. Ass'n*, 73 Mo. 242.

*New Hampshire*.—*Sumner v. Crawford*, 45 N. H. 416; *Folsom v. Brawn*, 25 N. H. 114.

*New York*.—*People v. Genet*, 19 Hun 92; *Hardy v. Main*, 56 Hun 221, 9 N. Y. Supp. 253; *Collis v. Press Pub. Co.*, 68 App. Div. 38, 74 N. Y. Supp. 78; *Baird v. Daly*, 68 N. Y. 547.

*Pennsylvania*.—*Battdorff v. Farmers' Nat. Bank*, 61 Pa. St. 179; *Bennett v. Hethington*, 16 Serg. & R. 193; *Ott v. Houghton*, 30 Pa. St. 451.

*Texas*.—*Blunt v. State*, 9 Tex. App. 234.

*West Virginia*.—*McManus v. Mason*, 43 W. Va. 196, 27 S. E. 293.

*Wisconsin*.—*Kellogg v. Nelson*, 5 Wis. 125.

**Rule Stated.**—In *Cameron v. Montgomery*, 13 Serg. & R. (Pa.) 128, *Tilghman, C. J.*: "But there is another exception, on a minor point, which is fatal to the plaintiff's judgment. John Russell, a witness for the plaintiff, was asked by the defendant, on his cross-examination, whether the plaintiff had any property of his, under his care, to cover it from his creditors. Having answered that he had not, the defendant's counsel proposed to ask the witness 'whether the plaintiff did not buy the witness' real property at his instance?' The counsel for the plaintiff objected to the question, and the court would not permit it to be put. Why it was objected to, I do not know, but it was certainly evidence. If the plaintiff did buy the defendant's property at his instance, it was a circumstance which might show that the witness was under an obligation to him, and this might have some effect on his evidence. The party against whom a witness is produced has a right to show everything which may in the slightest degree affect his credit. I am of opinion, therefore, that the question

tend to assist the jurors in the judgment which they are to form upon that subject ought not to be withheld from them.<sup>73</sup>

proposed by the defendant's counsel was proper, and ought to have been permitted to be asked."

73. In *Gibson v. State*, (Miss.), 16 So. 298, it was held competent to ask a witness for the state whether at a former term of court he was not prepared to mob the defendant in the event of the latter's acquittal.

**Witness Acting Under Pay.**—It is permissible to show on cross-examination of a witness for the state in a criminal prosecution, that he was employed and acting under pay. *People v. Rice*, 103 Mich. 350, 61 N. W. 540, where the court in so ruling said: "Adams testified that he was a detective, and had been employed to ferret out violations of the local option law and secure convictions, had made a number of complaints, and had been sworn as a witness in a number of like cases. The defense sought to show upon cross-examination that Alley was also employed for the same purpose; that the meetings between Alley and Adams were not accidental; that they had been together at various places; that both had testified in other cases, and that Alley had received pay for taking Adams to different localities in the county. We think this testimony was improperly excluded. The respondents had the right, upon cross-examination, to show that these witnesses were employed, and were acting under pay, as affecting their credibility. *People v. Murphy*, 93 Mich. 45, 52 N. W. 1,042."

See also *Jackson v. Com.*, 18 Ky. L. Rep. 670, 37 S. W. 847, holding that a witness may be asked on cross-examination whether she was paid to come from another county to testify.

**Employing Counsel to Assist Prosecution.**—It has been held competent on the cross-examination of the prosecuting witness in a criminal case to ask if he had not employed counsel to assist in the prosecution. *People v. Blackwell*, 27 Cal. 66, wherein the court said:

"We cannot determine, nor is it either necessary or proper for us to

inquire, what, if any, effect an affirmative answer to the question would have had on the minds of the jury. The defendant had a right to ask the question. If a witness retain counsel in a case to which he is not a party, and in the result of which he has no interest, it is a fact going to the credibility of the witness. The witness may have thus interposed on considerations of humanity, or of public justice, or he may have been influenced by private grudge; but the party against whom the witness is produced is always entitled to inquire of the witness as to the fact, and, if admitted, it goes to the jury for whatever it is worth; and such explanation of motives as the witness may give for his action goes with it." *Citing 1 Greenl. Ev.*, §§ 449-450; *Baker v. Joseph*, 16 Cal. 173.

See also *People v. Cunningham*, 1 Denio (N. Y.) 524, 43 Am. Dec. 709.

*Compare Ball v. U. S.*, 163 U. S. 662, where the witness for the prosecution had testified on cross-examination to the employment by him, at his own expense, of counsel to assist in the prosecution; and it was held proper to exclude further questions as to how much was paid for such assistance.

**Spite of Witness.**—A witness for the state in a murder trial may be asked if the deceased was not her lover. *People v. Worthington*, 105 Cal. 166, 38 Pac. 689, holding that this was permissible for the purpose of showing the witness' spite against the defendant.

**Disparaging Remarks Concerning Witness' Family.**—In *People v. Anderson*, 105 Cal. 32, 38 Pac. 513, it was held competent to show upon the cross-examination of a witness for the prosecution, that the defendant had made disparaging remarks concerning the family of the witness; such testimony is competent as showing bias and ill-feeling on the part of the witness against the defendant.

**Threats of Revenge.**—In *Atwood v. Welton*, 7 Conn. 66, it was held that a witness, on his cross-examination, may be questioned as to his

**B. DISCRETION OF COURT.**—The right to cross-examine a witness upon these subjects must, of course, be restrained within reasonable limits, and must commonly be exercised subject to the discretion of the trial judge; but it is error to exclude questions propounded with a view to show that the witness has conducted him-

being in a controversy with the party against whom he testifies, and whether he has not threatened to be revenged on such party. The court said: "If he should answer affirmatively, it would show a bias on his mind, which ought to be weighed by the jury in considering his testimony. To such a witness as full belief will not be readily yielded as to one who feels no such hostility. If the witness should answer in the negative, it is equally clear, he may be contradicted by other proof. A witness may always be asked any question relative to the issue, for the purpose of contradicting him, if his answer be one way, by other witnesses, in order to discredit his whole testimony. '*Falsus in uno, falsus in omnibus*,' has become a familiar maxim."

The question whether the defendant had a controversy with the witness, and had threatened to be revenged, surely was relevant to the issue; for it tended to prove such a state of mind toward the defendant as might well be submitted to the jury to discredit his testimony as to material facts. There is hardly a point about which there can be less doubt."

In an action to determine the right to administer upon an estate, it was held proper to ask of a witness upon her cross-examination concerning her character for chastity. This was permitted for the purpose of showing the proper weight to be given to her testimony. *Ingersol v. McWillie*, 9 Tex. Civ. App. 543, 30 S. W. 56.

#### **Witness Testifying as Expert.**

In *Lawlor v. Kemper*, 20 Mont. 13, 49 Pac. 398, wherein a witness had stated in chief that he was not a mining expert, it was held proper to ask him on cross-examination if he had not testified in a previous action as such an expert.

**Compounding Felony.**—In *Jenkins v. State*, 34 Tex. Crim. 201, 29 S. W. 1,078, a prosecution for rape, it was

held proper to permit the father of the prosecutrix to be asked on cross-examination if he had not offered, on payment of a certain sum, to leave the state and not prosecute the defendant.

In *Brace v. St. Paul C. R. Co.*, 87 Minn. 292, 91 N. W. 1,099, "upon cross-examination of plaintiff, the defendant offered a letter in evidence bearing upon the extent of the plaintiff's injury. This letter was dated April 29, 1901, and addressed to the Twin City Rapid Transit Company of St. Paul, demanding \$5,000 in settlement for an injury alleged to have occurred in the November previous, and in which appellant described the nature of his injury, and set forth the probability of permanent injury to his knee. The complaint alleged that the accident occurred on June 7, seriously hurting plaintiff's knee, and, for the purpose of testing the credibility of the witness, the letter had a bearing upon the testimony regarding his injury. For the same reason it was proper for the court, upon cross-examination, to allow the defense to inquire whether a few months earlier plaintiff had met with a serious accident without saying anything to anybody about it."

The wife of the plaintiff may be asked if she had not stated in a conversation to a certain party that she was afraid of the plaintiff, and that he had dictated to her what she should testify to. *Donahoo v. Scott*, (Tex. Civ. App.), 30 S. W. 385.

In an action of ejectment, defendant claimed to have taken possession under an oral contract of sale and the assurances of plaintiff that he would make a deed as soon as he obtained a patent. On cross-examination defendant was asked if he did not give money for the purpose of assisting in breaking the patent under which the plaintiff held. The question was objected to, sustained by the court, and on appeal held error. *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.



self improperly with relation to the suit on the trial of which he is called to testify.<sup>74</sup>

**2. Cross-Examination to Test Accuracy, etc. — A. GENERALLY.** The general rule is that great latitude may be allowed on the cross-examination of a witness for the purpose of testing his accuracy, recollection, sincerity, knowledge, observation and the like.<sup>75</sup>

**Source of Information.** — A searching cross-examination is generally permitted for the purpose of impeaching an adverse witness, and when the discovery of truth demands it, the sources of information and means of knowledge of the witness may be inquired about.<sup>75a</sup> And this rule applies also to witnesses testifying to their

74. *Kellogg v. Nelson*, 5 Wis. 125.

75. *De Arman v. State*, 71 Ala. 351; *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *Livingston v. Keech*, 34 Super. Ct. (N. Y.) 547; *People v. Augsbury*, 97 N. Y. 501.

*Taggart v. Bosch*, (Cal.), 48 Pac. 1,092. A witness may be asked any question on cross-examination for the purpose of testing his veracity, accuracy or credibility. Where the witness is a party to the suit, the court should be especially liberal. On an issue as to the genuineness of a note, where it is clear that one of the parties is guilty of absolute falsehood, and where the parties alone have knowledge of the fact in issue, any restriction placed on the cross-examination of either party cannot be said to be harmless unless shown to be so by their evidence.

**75a. Cross-Examination to Test Accuracy, etc.**

*Alabama*. — *Noblin v. State*, 100 Ala. 13, 14 So. 767.

*California*. — *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846.

*Illinois*. — *McCarty v. Chicago*, B. & Q. R. Co., 34 Ill. App. 273.

*Indiana*. — *Hyland v. Milner*, 99 Ind. 308.

*Massachusetts*. — *Com. v. Flynn*, 165 Mass. 153, 42 N. E. 562.

*Michigan*. — *People v. White*, 53 Mich. 537, 19 N. W. 174; *Johnson Harvester Co. v. Miller*, 72 Mich. 265, 40 N. W. 429.

*Virginia*. — *Blankenship v. Chesapeake & O. R. Co.*, 94 Va. 449, 27 S. E. 20.

*Washington*. — *State v. Shelton*, 16 Wash. 570, 48 Pac. 258.

*Wisconsin*. — *Waterman v. Chicago*

& A. R. Co., 82 Wis. 613, 52 N. W. 247.

*Tesney v. State*, 77 Ala. 33, *Clopton, J.*: "On cross-examination, the relative positions of the parties, the distance from each other, and other attendant circumstances, could have been elicited, from which the jury might infer the weight to which his answer was entitled. A controverted question in the case was, who provoked or brought on the difficulty? The witness had already testified that he did not hear the deceased curse or swear, as he rode up, while there was other testimony tending to show that he did. It was competent for the defendant to show that the witness was not in a position to hear."

*Com. v. Crowley*, 167 Mass. 434, 45 N. E. 766. A prosecuting witness having stated that he was struck by the defendant, may be cross-examined as to how he knew the defendant struck him, and he may be asked to minutely describe the action of the defendant when he turned around.

**Location of Object on Map.**

Where a witness has testified to the correctness of a map introduced, and the location of certain objects marked on it, it is proper to cross-examine him as to other points and distances on the map for the purpose of testing the accuracy of his knowledge and observation. *Derk v. Northern Cent. R. Co.*, 164 Pa. St. 243, 30 Atl. 231, where the court said: "The exceptions taken, and errors assigned, to defendant's cross-examination of plaintiff's witnesses are not sustained. The questions put to Frederick Lorenze, an engineer called by plaintiff,

opinion.<sup>76</sup>

B. QUESTIONS NOT FOUNDED ON FACTS IN CASE. — Again, it is permissible upon cross-examination to put questions which are abstract, theoretical and not founded upon facts of the case on trial,

were as to points on a map made by him, which plaintiff put in evidence. Those put to Samuel Culp, also a witness called by plaintiff, as to points marked on the map, were clearly admissible. They testified in chief as to the correctness of the map, and the location of certain objects marked upon it. It was proper, then, for the defendants to cross-examine them as to other points and distances of the locality upon the same map, if for no other purpose than to test the accuracy of the witnesses' knowledge and observation."

**On an Issue of Contributory Negligence of the Plaintiff** it is proper to ask him, on cross-examination, if he remembers a former occasion when he was negligent, where the purpose of the question is merely to test his recollection, and he is not asked further as to the former accident. *Stodder v. New York L. E. & W. R. Co.*, 50 Hun (N. Y.) 221, 2 N. Y. Supp. 780.

76. In *People v. Sutton*, 73 Cal. 243, 15 Pac. 86, the defense having introduced as a witness a medical expert to show defendant's insanity, the prosecution was permitted to ask witness hypothetical questions to test his competency as a medical expert.

In *Bevier v. Delaware & H. C. Co.*, 13 Hun (N. Y.) 254, Mullen, P. J., said: "This action is brought to recover damages for negligently setting fire to the woodland of the plaintiff, and destroying a part of the wood growing thereon and injuring another part. . . . An engine of the defendant passed over the road, scattering fire from the smokestack and firepan in large quantities, and soon thereafter fire appeared in a pile of brush on the defendant's side of the fence. . . . The plaintiff gave evidence, by several witnesses, tending to prove that the fire was set by the engine Unadilla (No. 26), and that its apparatus for preventing the escape of the fire was defective. The defendant called a number of witnesses who testified that the apparatus of the Unadilla for preventing the

escape of fire was in perfect order, having been recently put in thorough repair, and that No. 26 did not leave Binghamton the afternoon of the fire until after the fire was shown to have been set. This evidence made it necessary for the plaintiff to prove, if he could, that it was some other engine of the defendant that caused the fire. Proof was then given that engine No. 13 passed only a short time before the fire appeared upon the side of the railroad adjacent to plaintiff's woodland. Thomas Seeley was called as a witness on the part of the plaintiff, and described the smokestack, etc., of the Unadilla and what repairs, etc., had been made upon it. His evidence tended to prove that it was in good order and not liable to scatter fire. On cross-examination by plaintiff's counsel, the witness stated that shortly after the fire he removed the smokestack from No. 26 and put on a different one, different in shape and general outline. The plaintiff's counsel then put the following question to the witness: 'Why did you go to the expense of taking one off and putting on another on this particular engine?' The defendant's counsel objected to the question, upon the ground that the case is to be determined upon the condition of the engine at the time, and that no act of theirs, made even with the object of adding security against fire afterward, is legitimate to be considered in this case. The objection was overruled, and the defendant's counsel excepted. Had this question been put to a witness on the part of the plaintiff, it might be assumed that the object of the question was to prove that the defendant knew the engine to be defective, and made the repairs for that reason; such evidence would be clearly incompetent. The question, however, was put to the defendant's witness on cross-examination, and was competent to test the accuracy of the witness as to the condition of the engine. If it had been repaired as extensively as he represented, the question would be

for the purpose of testing the knowledge and information of the witness as to the subject upon which he has been examined, and his competency to give the opinion which he may have pronounced.<sup>77</sup>

C. POSITIVENESS OF WITNESS. — Again, on the cross-examination of a witness for the purpose of testing his recollection and sincerity, it is proper to ask him whether he is as positive as to every other fact testified to by him as he is as to the particular fact under inquiry.<sup>78</sup>

D. KNOWLEDGE OF FACTS AS FOUNDATION FOR BELIEF. — Questions are properly allowed where their purpose is to test the witness' knowledge of material facts which may be the foundation of his belief.<sup>79</sup>

E. RELIGIOUS BELIEF. — It is not proper to permit an inquiry on

a very natural one why, if that was true, was another smokestack put on so soon after the fire. The question was competent on cross-examination."

In *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551, 6 So. 143, 4 L. R. A. 848, Stone, C. J., said: "In the rulings on the admission and rejection of testimony the circuit court committed errors. Whether Jackson had authority to bind the company by the statement that he is alleged to have made to Copeland, to the effect that the company conceded its liability for the loss and agreed to pay it, was one of the inquiries of fact which the pleadings raised. He should have been allowed to testify as to the extent of his powers. So, the value of the house, and what it would have cost to replace it, were pertinent inquiries. The policy reserved to the insurance company the option of rebuilding, and made the cost of such rebuilding one of the criteria of liability in case of loss. The witness Stevens, if believed, showed himself to be an expert; and the pillars and marks on the chimneys left standing enabled him to determine the dimensions of the house. He should have been allowed to testify as to its value, and the cost of rebuilding it, as a matter of judgment, if he had heard its description by other witnesses, and as a matter of skilled opinion, when submitted to him hypothetically. The question asked Walker, on cross-examination, should have been allowed. Much latitude is indulged on cross-interrogation of a witness, for the purpose of testing his accuracy and impartiality.

Cross-examination with a view to direct impeachment is not the limit of the right. Many questions may be put, which cannot be made the ground of impeachment by disproof of the truth of the answer the witness may make."

On a prosecution for murder, a map of the room in which the affray took place was introduced in evidence by the state. The defendant attempted to show by the witness, who made the map, while being cross-examined, that he had received instructions from the county attorney as to how the map should be made. This was refused. *Held*, as the accuracy of the map was questioned it was error, as the testimony was relevant and material. *State v. Tighe*, 27 Mont. 327, 71 Pac. 3.

77. *People v. Augsbury*, 97 N. Y. 501.

78. *Central G. R. R. Co. v. Edmondson*, 135 Ala. 336, 33 So. 480, wherein the court said: "Here was no attempt to have the witness to institute a comparison between the truthfulness of different parts of his testimony, but to ascertain the degree of recollection with which the witness testified. Moreover, upon the cross-examination of a witness, in testing his sincerity or recollection, much is left to the discretion of the trial court in the latitude and range of questions, and even to the extent sometimes of asking questions that elicit irrelevant matter. The court committed no error in permitting the question to be asked."

79. *Livingston v. Keech*, 34 Super. Ct. (N. Y.) 547, where it was held

cross-examination into the witness' religious belief.<sup>80</sup>

F. SUBSTANCE OF INTERVIEW. — Where a witness has testified to the effect and purport of an interview, but cannot recollect the exact words, it is proper on cross-examination, for the purpose of testing his memory, to ask him as to the meaning and effect of what he did say.<sup>81</sup>

G. REASON FOR ACTS. — It has been held proper to inquire of a witness on cross-examination what were his reasons for doing certain acts to which he testified on his examination in chief.<sup>82</sup>

H. DISCRETION OF COURT. — While the rule is very liberal regarding questions on cross-examination for the purpose of testing the accuracy of the witness and the like, especially where the witness is a party to the suit,<sup>83</sup> yet the exact extent and limit in each particular case must rest in the sound discretion of the trial judge.<sup>84</sup>

proper to ask a witness, testifying for himself, whether he had not said before the trial that he could, and would, not swear to the facts to which he had just testified.

80. *Free v. Buckingham*, 59 N. H. 219, where the court said: "Upon cross-examination, a witness may be asked any questions which tend to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character; and to this end his way of life, his associations, his habits, his prejudices, his mental idiosyncrasies, (if they affect his capacity), may all be relevant. But it is not customary in modern practice to permit an inquiry into a man's peculiarity of religious belief. This is not because the inquiry might tend to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience contrary to the spirit of our institutions."

81. *Parmelee v. People*, 8 Hun (N. Y.) 623.

82. Such inquiries are often allowed, although they may have no direct tendency to support or disprove the issue, in order to test the accuracy of the recollection of an adverse witness, or to affect his credibility. *New Gloucester v. Bridgham*, 28 Me. 60. In this case an exception was taken to the permission, by the court, on cross-examination of a witness introduced by the defendant, to inquire of him for his reasons, why he did certain acts, to which he had testified on his examination in chief. But the court might, in the exercise of a sound discretion, permit such a cross-

examination. Such inquiries may be allowed oftentimes, although they may have no direct tendency to support or disprove the issue, in order to test the accuracy of the recollection of an adversary's witness, or to affect his credibility. In giving his reasons for doing the act, he might render it incredible that he should have done it. In this very instance the witness had testified to his having been in the habit of getting meals at the defendant's, accompanied with a supply of ardent spirit, for which he paid nothing, otherwise than as he paid for his meals, at the same time that his wife took her meals at another place in the same village, in which the defendant lived. It might well be inquired of him whether he did not so take his meals for the purpose of being supplied with intoxicating drinks; and, then, whether the defendant did not so understand it; and hence to have it inferred that this was a mere subterfuge to avoid the appearance of selling liquor unlawfully."

83. *Taggart v. Bosch*, (Cal.), 48 Pac. 1,092.

84. In *Miller v. Smith*, 112 Mass. 470, the court said: "In cross-examination, with a view to test the truthfulness, judgment and credibility of a witness, great latitude of inquiry is usually allowed, and its extent and limits, where no rule of law is violated, are within the sound discretion of the judge presiding at the trial. *Hathaway v. Crocker*, 7 Met. 262, 266; *Commonwealth v. Sacket*, 22 Pick. 394; *Winship v.*

**3. Cross-Examination of Witnesses to Reputation, etc. — A. GENERALLY.** — It is well settled that upon the cross-examination of a witness who has testified to general reputation, questions may be propounded for the purpose of eliciting the source and extent of the witness' information and the *data* from which he draws his conclusion.<sup>85</sup> So where a witness testifies as to the good or bad character of another for honesty, it is competent to cross-examine him as to his knowledge of specific acts contrary to his testimony.<sup>86</sup> Such a cross-examination is permissible not for the purpose of

Neale, 10 Gray 382; *Swan v. Middlesex*, 101 Mass. 173; *Johnston v. Jones*, 1 Black 209, 226."

In asking questions on cross-examination, which are collateral to the issue, and are for the purpose of testing the recollection of a witness, the latitude allowed is within the sound discretion of the court. *Zeltner v. Irwin*, 21 Misc. 13, 46 N. Y. Supp. 852.

In *Com. v. Shaw*, 4 Cush. (Mass.) 593, it was held to be no abuse of discretion for the court to exclude a question on cross-examination as to whether it was the custom of the witness to open his boarders' letters, and if he knew whether it was right or wrong to open and read the private letters of a boarder. The court said: "The proposed testimony clearly had no direct bearing on the issue. If competent at all, it was so with a view of exhibiting more fully to the jury the particular opinions of the witness, in respect to his own social and moral obligations to others, as detracting from the credit of the witness. We think the testimony was properly excluded by the presiding judge.

"But upon more general grounds, supposing the testimony admissible on cross-examination, we think the exception should be overruled. The manner of conducting the examination of a witness, and particularly the course of proceeding in the cross-examination, is a matter resting much in the sound discretion of the presiding judge, and the limitation of inquiries in respect to matters irrelevant to the point in issue can be so much more appropriately exercised by him, that it seems to us that this must depend very much upon his discretion, he having regard to the appearance of the witness, and his ap-

parent disposition to disclose the whole truth."

In *Heath v. State*, 93 Ga. 446, 21 S. E. 77, it was held proper for the court to refuse to permit a witness, on cross-examination, to go to a window and state how far an object was from the court room where the object could not be seen by the court and jury.

**85.** *People v. Rector*, 19 Wend. (N. Y.) 568; *De Arman v. State*, 71 Ala. 351.

**86.** *Alabama*. — *Jones v. State*, 120 Ala. 303, 25 So. 204; *White v. State*, 111 Ala. 92, 21 So. 330.

*California*. — *People v. Mayes*, 113 Cal. 618, 45 Pac. 860.

*Indiana*. — *McDonel v. State*, 90 Ind. 320.

*Kansas*. — *State v. McDonald*, 57 Kan. 537, 46 Pac. 966.

*Louisiana*. — *State v. Pain*, 48 La. Ann. 311, 19 So. 138.

*Maine*. — *Phillips v. Kingfield*, 19 Me. 375, 36 Am. Dec. 760.

*Massachusetts*. — *Leonard v. Allen*, 11 Cush. 241.

*Michigan*. — *People v. Pyckett*, 99 Mich. 613, 58 N. W. 621; *People v. Frey*, 112 Mich. 251, 70 N. W. 548.

*Nebraska*. — *Basye v. State*, 45 Neb. 261, 65 N. W. 811.

In *McDonel v. State*, 90 Ind. 320, a witness who had testified to the general good reputation for the humanity and honesty of the defendant in the neighborhood where he resided, was asked on cross-examination as to whether she had heard certain rumors, which, had she admitted hearing them, would have materially weakened the force of her evidence in chief. The court said: "The questions were relevant, not to prove that the appellant had been guilty of the offenses referred to in the questions, but to elicit testimony

which might affect the credibility of the witnesses' evidence in chief as to the appellant's reputation for humanity and honesty. One's reputation consists in the general estimation in which he is held by his neighbors. This is to be ascertained from what they generally say of him. When a witness testifies that such reputation is good with respect to some quality or disposition, it is competent to show by his cross-examination that he has heard reports at variance with the reputation he has given the party; and if his admissions of hearing such adverse rumors go to the extent of showing that they were general in the neighborhood where the party resided, the effect of the witnesses' testimony in chief would be destroyed."

In *Basye v. State*, 45 Neb. 261, 63 N. W. 811, Norval, C. J., said: "It is firmly settled by the adjudications in this country that, upon cross-examination of a witness who has testified to general reputation, questions may be propounded for the purpose of eliciting the source of the witness' information, and particular facts may be called to his attention, and he may be asked whether he ever heard them. This is admissible, not for the purpose of establishing the truth of such facts, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony. The extent of the cross-examination of a witness must be left to the discretion of the trial court. The questions put to the several witnesses were within the scope of a legitimate cross-examination, and there was no abuse of discretion in permitting them to be answered."

In *Smith v. State*, 103 Ala. 57, 15 So. 866, it was held that a witness who has testified in chief to the good character of the defendant may be asked on cross-examination whether or not he has heard of certain offenses, specifying them, charged against the defendant before the beginning of the then pending prosecution. This is allowable only on cross-examination, not as evidence affecting the character of the defendant, but as evidence affecting the credibility of the witness testifying to good character. See also *Lowery v. State*, 98 Ala. 45, 13 So. 498.

*Leonard v. Allen*, 11 Cush. (Mass.) 241, Dewey, J.. "The propriety of allowing the party whose character is impeached by a general statement of his bad reputation for moral worth, to elicit particulars on a cross-examination seems to follow from a general practice in reference to evidence of bad reputation of a party, more frequently occurring in the case of witnesses who are impeached. It has been thought useful and favorable to the elucidation of truth in such cases to allow the cross-examination and inquiry as to particulars in the charges, and also in reference to the persons who made them, or gave their opinion as to the character of the individual impeached."

In the case of *People v. Pyckett*, 99 Mich. 613, 58 N. W. 621, McGrath, C. J.: "The defense called several witnesses as to respondent's prior good character. Upon cross-examination, these witnesses were asked as to whether respondent had not been suspected of other crimes and misdemeanors. It is well settled that when a witness is called to attack or defend character, he can only be asked on his examination in chief as to the personal character of the person in question, and he will not be allowed to testify as to particular facts, either favorable or unfavorable to such person, but, upon cross-examination, he may then be asked, with a view to test the value of his testimony, as to particular facts. 1 Tayl. Ev., § 352; 2 Starkie Ev. 304; 3 Rice, Cr. Ev., § 375; Reg. v. Wood, 5 Jur. 225; State v. Merriman, 34 S. C. 16, 12 S. E. 619."

A witness testifying as to the good reputation of defendant for honesty may be asked on cross-examination as to whether it was not commonly known and if he did not know of certain thefts that defendant had committed. *Shears v. State*, 147 Ind. 51, 46 N. E. 331; *State v. Ogden*, 39 Or. 195, 65 Pac. 449.

Where witnesses had testified as to the defendant's good character, they may be asked, on cross-examination, as to particular violent acts said to have been committed by the accused. *State v. Pain*, 48 La. Ann. 311, 19 So. 138.

Where the defendant under a charge of crime calls a witness to

establishing the truth of the facts called to the attention of the witness, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony.<sup>87</sup>

B. CHARACTER FOR PEACEABLENESS. — And where a witness has testified to the good character of a person for peace and order, it is competent to ask the witness on the cross-examination if he had not heard of difficulties in which such person had participated.<sup>88</sup>

4. Cross-Examination of Witness to Value. — A. GENERALLY. — A witness having given an opinion as to value, great latitude may properly be allowed in his cross-examination for the purpose of testing his means of knowledge, and to scrutinize the ground of his judgment,<sup>89</sup> and to elicit specific facts which may aid in weighing his testimony.<sup>90</sup> So where a witness testifies to the value of property under varying conditions it is competent to cross-examine him to determine whether or not the element of damages which

show his general reputation being of a nature tending to negative his commission of the crime, it is permissible to cross-examine the witness as to his knowledge of certain acts of a similar nature charged against defendant; and where the defendant introduced evidence of the bad reputation of a prosecutrix, and the state introduced a witness to establish such reputation as good, this witness may be cross-examined as to the discharge of the prosecutrix from certain employment for immoral conduct. *State v. Ogden*, 39 Or. 195, 65 Pac. 449.

A witness having testified as to the good character of the defendant may be asked on cross-examination as to whether he has heard of the defendant's having attempted to commit suicide. *People v. Frey*, 112 Mich. 251, 70 N. W. 548.

Where a witness for the defendant testified as to the untruthfulness of the testimony of one of the plaintiff's witnesses he may be asked on cross-examination whether he was not given a letter of recommendation by the defendant when he left his employment. *Galveston H. & H. R. Co. v. Bohan*, (Tex. Civ. App.), 47 S. W. 1,050.

87. *People v. Pyckett*, 99 Mich. 613, 58 N. W. 621; *Carpenter v. Blake*, 10 Hun 358; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315; *Forrester v. State*, (Tex. Civ. App.), 42 S. W. 400; *Wachstetter v. State*, 99 Ind. 290, 50 Am. Rep. 94;

*Smith v. Dreer*, 3 Whart. (Pa.) 154.

88. *White v. State*, 111 Ala. 92, 21 So. 330; *Jones v. State*, 120 Ala. 303, 25 So. 204.

89. *Pierce v. Boston*, 164 Mass. 92, 41 N. E. 227; *Brown v. Worcester*, 13 Gray (Mass.) 31; *Curren v. Ampersee*, 96 Mich. 553, 56 N. W. 87; *Damon v. Weston*, 77 Iowa 259, 42 N. W. 187; *Markel v. Mowdy*, 13 Neb. 322, 14 N. W. 409.

*Dittman v. Weiss*, (Tex. Civ. App.), 31 S. W. 67, *Pleasants, J.*: "The appellant's first assignment of error is that the court erred in refusing to permit the witness Jackson, who had testified on behalf of the plaintiffs as to the value of several tracts of land conveyed to Dittman by Amthor, as if each tract had been sold separately and by itself, to testify to the whole number of tracts when sold in bulk. We think the reasonable value of the property sold to Dittman should be ascertained by determining the value of each separate tract, but, notwithstanding, we are of opinion that, on cross-examination of plaintiff's witness, defendant, for the purpose of testing the intelligence of the witness and the worth of his testimony, should be permitted to ask the witness what would be the value of the lands, estimating the several tracts in bulk, as constituting but one sale."

90. In *Wells v. Kelsey*, 37 N. Y. 143. "While the law admits the opinions of those competent to judge, as evidence of the value of property,

it permits the application, in this as in other cases, of the usual tests of truth. On the cross-examination of the witness it is legitimate to ascertain his means of knowledge, to scrutinize the grounds of his judgment, and to elicit such specific facts as may aid in applying and weighing the evidence. Such facts are often at variance with the opinions expressed by the witness, which, from the nature of the case, are usually founded on data unknown to the court. On questions of value, there is usually room for wide diversity of judgment, and when estimates are loosely made, they should be subject to all reasonable scrutiny. In this instance, the inquiries were within the range of fair and legitimate cross-examination, and we think they should have been allowed by the court. A knowledge of the prices actually paid for the boilers on two business sales, both *ante litem motam*, might well aid the jury in weighing the conflicting estimates, and in reaching an intelligent and just conclusion."

*Curren v. Ampersee*, 96 Mich. 553, 56 N. W. 87, where it was held that a witness who had testified that a building in controversy was worth a certain amount, might be asked on cross-examination if he had not paid a much smaller amount for it.

In *Oregon Pottery Co. v. Kern*, 30 Or. 328, 47 Pac. 917, a witness having testified to the value of a scow, its good condition, etc., when leased to the defendant, it was held that he might be asked as to who built it; how good a builder he was, etc.

In *Buck v. Boston*, 165 Mass. 509, 43 N. E. 496, a plaintiff having testified to the value of his farm and adjoining farms, the general good condition of the neighborhood, etc., it was held that he might be asked on cross-examination whether the occupants of the house next to his were not of such a character as to make the neighborhood an undesirable one in which to live.

In *Buist v. Guice*, 105 Ala. 518, 16 So. 915, the court said: "Of the two new points, the first arises upon the trial court's refusal to allow the defendant to ask the plaintiff as a witness in his own behalf at what price he, the plaintiff, sold Irish potatoes

during the season of 1890-91. This action was, in our opinion, erroneous. The *onus* was upon the plaintiff to show the difference in the market value of Irish potatoes at Eufaula at the time he contracted for 250 barrels of such potatoes at \$2.75 per barrel, in September, 1890, and at the time they were to be, but were not, delivered to him, in January, 1891. The plaintiff himself, we gather from the bill of exceptions, testified that the difference was from one dollar to one dollar and a quarter per barrel. And then, upon cross-examination, the defendant proposed to ask him the question stated above, as to the price at which he, the witness, had sold potatoes during the season covering January, 1891, when, according to the contract, if there was a contract, he should have received the 250 barrels of potatoes from the defendant. The inquiry tended directly to test the accuracy of the witness' knowledge of the market value of potatoes at that time, the reasonableness of his estimate of value, and, in consequence, the credibility of his testimony. The defendant was entitled to have him answer the question."

*Wells v. Kelsey*, 37 N. Y. 143. A witness having given his opinion as to value, may properly, on cross-examination, for the purpose of testing his means of knowledge, and to scrutinize the ground of his judgment, and to elicit specific facts which may aid in weighing his testimony, be liberally questioned.

*Dittman v. Weiss*, (Tex. Civ. App.), 31 S. W. 67. Where a witness has given testimony on his direct examination as to the value of certain separate tracts of land, it is competent on cross-examination to ask him as to the value of the whole number of tracts, for the purpose of testing his intelligence, and of weighing the value of his testimony.

*Newbury Water Co. v. City of Newbury*, 168 Mass. 541, 47 N. E. 533. Where the issue involved the value of property purchased by the city from the water company, the officer who made the tax returns showing the value of the company's stock, gave testimony as to the value of the property. On cross-examination it was held competent to ask him to



he has considered is proper or improper to be considered, and whether he has taken into consideration all the elements of value in arriving at a conclusion.<sup>91</sup>

B. VALUE OF ADJOINING PROPERTY. — In some jurisdictions it is held proper on the cross-examination of a witness who has stated on direct examination what he considered to be the value of certain property, to ask him as to the value of adjoining property

identify the tax returns, and to state what they showed the value of the property to be; the object being to show a smaller value of the property than that given by the witness.

"When the witness, Langston, testified that the land was practically worthless after the overflows of 1884 and 1885, with the embankment of defendant as then constructed, it was proper in the cross-examination of the witness by the defendant to prove by him the price of four lots of his land which lay adjacent to the plaintiff's land, and sold by him in the year 1887, in order to test the weight and credibility of his testimony, although in a proper case the value of the land just after the overflow would have been the proper criterion, and it was error in the court to exclude the evidence." *Gulf, C. & S. F. R. Co. v. Hepner*, 83 Texas 136, 18 S. W. 441.

In *Morrill v. Palmer*, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411, the defendant having testified on direct examination as to value of his real estate and improvements, it was competent on cross-examination to ask him as to the value of a certain portion of the real estate and its improvements, the object being to show that the value given as to the portion was greater than he had given on direct examination as to the value of the whole.

91. *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864, when the court said: "The questions to which exceptions were taken arose generally when, upon cross-examination, the witness was asked concerning the method by which he had arrived at his conclusion as to the damage, what elements of damage he had considered, and his reasons for his opinion. No doubt great latitude was given in both the direct and cross-examination of all witnesses, but great latitude should

be allowed in cases of this character, because the objects of such cross-examination are principally to determine the credibility of the witness, and whether or not the element of damages which he has considered is proper or improper to be considered, and whether he has taken into consideration all the elements of value in arriving at a conclusion."

In *Eslich v. Mason City & Ft. D. R. Co.*, 75 Iowa 443, 39 N. W. 700, the court said: "In weighing those opinions, and determining their weight, it was important that the jury should know what facts and circumstances were taken into account by the witnesses in forming them. If it could be shown that any witness had, in forming his opinion, omitted or excluded any consideration which materially affected the question to which it related, the value of his opinion, as evidence, would thereby be impaired. Now, while plaintiffs were not entitled to recover the increased cost of insurance on the property, and did not seek to recover therefor as an item of damage, it is plain that the market value of the property might be materially lessened by reason of it. . . . The facts elicited by the cross-examination then, were competent for the purposes for which they were elicited, namely, for testing the value of the opinion expressed by the witness in his examination in chief."

In *Lentz v. Carnegie*, 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717, it was held proper to ask a witness who had testified to the value of the plaintiff's farm, if he did not know of the sales of farm lands in the vicinity at a much less price. "If he did know of such sales and disregarded them in fixing the price of plaintiff's lands, that circumstance was calculated to affect his credibility, unless it was explained to the satisfaction of the jury."

or lands.<sup>92</sup> But there is authority to the contrary.<sup>93</sup>

**5. Cross-Examination as to Past.** — A. MATTERS NOT INVOLVING CRIME. — a. *In General.* — Questions Prejudicing Witness. — Questions which do not affect the credibility of a witness, but merely tend to excite prejudice against him, are not proper.<sup>94</sup>

92. *O'Sullivan v. New York Elec. R. Co.*, 20 App. Div. 384, 46 N. Y. Supp. 784; *Kansas City & T. R. Co. v. Vickroy*, 46 Kan. 248, 26 Pac. 298; *Chicago & U. B. V. R. Co. v. Andrews*, 30 Kan. 590, 2 Pac. 677; *Board of Com'rs v. Dillard*, 76 Miss. 641, 25 So. 292.

In the case of *Chicago K. & N. R. Co. v. Stewart*, 47 Kan. 704, 28 Pac. 1,017, the court said: "Appeal from the award made by commissioners to lay off and condemn a right of way for a railway company. The commissioners awarded the land owners \$1,999. Both parties appealed. Upon trial, the jury returned a verdict for the land owners for \$2,330.70. Judgment was entered thereon. The railway company excepted, and brings the case here. Upon the trial, the railway company introduced as witnesses J. W. Morris, A. M. McConkey and John S. McMahan, who were farmers living in the vicinity of the land in controversy, and acquainted with the value thereof. Two of these witnesses testified that the land was worth \$2500; another of these witnesses testified that the land was worth \$25 an acre. For the purpose of testing the knowledge and competency of these witnesses, the owners inquired of them, upon cross-examination, concerning the sales of adjoining land. The propriety of allowing proof of the sales of similar property to that in question, made at or about the time of the taking, is sustained by some of the authorities and opposed by others. (Lewis, Em. Dom., § 443.) . . . The evidence objected to was drawn out upon the cross-examination, and we think, where experts or persons are permitted to give their opinions of the value of land, a cross-examination of the kind referred to is not improper, or any ground for the reversal of a case."

*Wyman v. Lexington & W. C. R. Co.*, 13 Metc. (Mass.) 316. It was held "The price for which other ad-

jacent lots had been actually sold was admissible, open of course to any evidence explanatory of the circumstances attending such sale, and tending to show why the purchasers gave a price greater than the true value of the land. If it had been a price fixed by a jury, or in any way compulsorily paid by the party, the evidence of such payment would be inadmissible before the jury. Upon the principle on which we should admit evidence of other sales between other parties of adjacent lots, this evidence was admissible, and none the less so because the railroad corporation were themselves the purchasers."

93. In *East Pennsylvania R. R. v. Hiester*, 40 Pa. St. 53, where the court, speaking of evidence as to the value of adjoining lands on cross-examination, says: "It did not pretend to fix the market value of the land, but assumed to ascertain it by the special, and, it may be, exceptional cases named. This will not do, for, if allowed, each special instance adduced on the one side must be permitted to be assailed, and its merits investigated on the other; and thus would there be as many branching issues as instances, which, if numerous, would prolong the contest interminably. But even this is not the most serious objection. Such testimony does not disclose the public and general estimate which, in such cases, we have seen is a test of value. It would be as liable to be the result of fancy, caprice, or folly, as of sound judgment, in regard to the intrinsic worth of the subject matter of it; and, consequently, would prove nothing on the point to be investigated. The fact as to what one man may have sold or received for his property is certainly a collateral fact to an issue, involving what another should receive, and, if in no way connected with it, proves nothing. It is, therefore, irrelevant, improper and dangerous." See article "VALUE."

94. *People v. Owens*, 132 Cal. 469,

**Questions Prejudicing Party.** — So, also, questions as to collateral and irrelevant matters which do not tend to discredit the witness, but which are merely prejudicial to the party who called him, cannot be asked.<sup>95</sup>

**Discretion of Court.** — The trial judge is vested with a large discretion in the application of these rules.<sup>96</sup>

64 Pac. 770, the defendant was charged with the crime of murder, but sought to excuse killing of the deceased on the grounds of insanity. Upon the cross-examination of a witness for the state, it was proposed to show that the deceased and the witness, though unmarried, were living together as husband and wife. "The relations between the deceased and the woman were matter wholly foreign to the issue on trial. An attorney should not be allowed to place that kind of evidence before the jury upon the pretext that the examination is for the purpose of refreshing the recollection of the witness. If such were the rules of law, then all kinds of matter tending to degrade the witness could be inquired into upon cross-examination — matters wholly foreign to the issue upon trial, and only serving the single purpose of prejudicing the witness in the eyes of the jurors."

In *Perrette v. City of Kansas City*, 162 Mo. 238, 62 S. W. 448, the plaintiff was suing for injuries received from a defective sidewalk and testified that he was a drinking man, but never got drunk and was not a regular drinker. It was held that on cross-examination he could not be asked whether the habit of drinking constantly had a tendency to decrease his life expectancy.

It is incompetent to ask on cross-examination a witness whether he had not spent a particular night at a house of ill-fame. *People v. Tiley*, 84 Cal. 651, 24 Pac. 290.

A prosecuting witness cannot be asked, on cross-examination, as to whether or not he had ever been arrested for being drunk, and how many times he had been drunk since the trouble. *People v. Sutherland*, 104 Mich. 468, 62 N. W. 566.

95. *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26; *People v. Dye*, 75 Cal. 108, 16 Pac. 537.

In *People v. Genung*, 11 Wend. (N. Y.) 19, the court said: "Conly was the principal witness for the prosecution, and the counsel for the defendant, upon his cross-examination, offered to prove by him that he had frequently, during the present session of the court, offered to the prisoner that if he would settle the subject-matter of the indictment, he, the witness, would leave the court and not appear against him. This testimony was objected to by the counsel for the people, and was excluded by the court. I think it was properly excluded. It could legitimately have had no influence with the jury; it did not tend in the slightest degree to impeach the testimony of the witness, or to show that his narration was not true. Admitting that he had improperly endeavored to compromise the prosecution, his positive testimony in relation to the fraudulent conduct of the prisoner was not thereby impeached."

Counsel for the plaintiff cannot, on cross-examination of a defendant, ask questions apparently for the purpose of showing that some of the defendants were wealthy. *Arnold v. Pfaff*, 94 Ill. App. 461.

In *Ross v. Manhattan El. R. Co.*, 29 N. Y. St. 517, 8 N. Y. Supp. 495, where there was no proof that the defendant had relied upon the acquiescence of the plaintiff in building its road, or that the plaintiff was estopped from bringing an action of trespass, the defendant was not permitted to ask the plaintiff, on cross-examination, whether during the construction of the road "you were reserving your objections," as it was considered immaterial by the court.

96. It is a well settled rule that the court, in its discretion, may exclude disparaging questions put to a witness on the cross-examination not relevant to the issue, though avowedly for the purpose of discrediting

b. *Specific Wrongful Acts.*—It is a general rule that it is not proper for the purpose of creating distrust of the integrity of a witness, and thereby disparaging his testimony, to show on his cross-examination particular acts of alleged misbehavior and dishonesty in relation to matters foreign to the issues involved in the trial.<sup>97</sup>

him, even if no claim of privilege be interposed; and such ruling is not reviewable on error unless the discretion be manifestly abused." *People v. Braun*, 158 N. Y. 558, 53 N. E. 529.

In *Com. v. Savory*, 10 Cush. (Mass.) 535, the court said: "We have not deemed it necessary to review the many supposed conflicting cases, as to the rule of law allowing questions to be put on cross-examination to a witness which have a direct tendency to disgrace him, or degrade his character. So far as any questions were asked here, the answers to which might expose the witness to a criminal prosecution, as to such, they were not required to be answered for that reason. But the answer to the whole of the proposed inquiry that was refused is, that it was wholly collateral, and had no direct bearing upon the issue, and being so, the limitation to the cross-examination as to inquiries, as to new and entirely collateral matters, must be left to the sound discretion of the presiding judge, as a matter much more appropriately to be settled by him in view of the state of the case, the course and extent of the cross-examination, and its tendency to throw additional light upon the case. *Com. v. Shaw*, 4 Cush. 493."

In *Mine & Smelt. Supp. Co. v. Park*, 107 Fed. 881, 47 C. C. A. 34, where a witness was called and examined by a plaintiff for the sole purpose of identifying letters and statements relating to an account stated, which was pleaded in the complaint, it was held improper to permit the witness to be cross-examined generally as to the business transactions between the parties, unless in the discretion of the court such an examination was advised for sufficient reasons.

<sup>97</sup>. *England.*—*Spencely v. De Willott*, 7 East 108.

*United States.*—*U. S. v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958.

*Alabama.*—*Linnehan v. State*, 120 Ala. 293, 25 So. 6; *Ortez v. Jewett*, 23 Ala. 662; *Rosenbaum v. State*, 33 Ala. 354.

*California.*—*People v. Un Dong*, 106 Cal. 83, 39 Pac. 12; *People v. Devine*, 44 Cal. 452; *People v. Furtado*, 57 Cal. 345; *Pyle v. Piercy*, 122 Cal. 383, 55 Pac. 141.

*Colorado.*—*Roesch v. Com'rs of Douglas Co.*, 11 Colo. App. 280, 52 Pac. 1,035.

*Illinois.*—*Illinois C. R. Co. v. Allman*, 147 Ill. 471, 35 N. E. 725.

*Indiana.*—*Miller v. Dill*, 149 Ind. 326, 49 N. E. 272; *Lawrence v. Lanning*, 4 Ind. 194; *Davis v. Hardy*, 77 Ind. 272; *De Haven v. De Haven*, 76 Ind. 236; *Dillon v. Bell*, 9 Ind. 320; *Brown v. State*, 24 Ind. 113; *Thompson v. State*, 15 Ind. 473; *Seller v. Jenkins*, 97 Ind. 430.

*Iowa.*—*State v. Philpot*, 97 Iowa 365, 66 N. W. 730; *State v. Falconer*, 70 Iowa 416, 30 N. W. 655; *Clark v. Reiniger*, 66 Iowa 507, 24 N. W. 16; *Nelson v. Chicago R. I. & P. R. Co.*, 38 Iowa 564.

*Kansas.*—*State v. Ray*, 54 Kan. 160, 37 Pac. 996.

*Louisiana.*—*State v. Wiggins*, 50 La. Ann. 330, 23 So. 334.

*Maine.*—*Davis v. Roby*, 64 Me. 427; *Ware v. Ware*, 8 Greenl. 20.

*Massachusetts.*—*Com. v. Hunt*, 4 Gray 421.

*Minnesota.*—*Hicks v. Stone*, 13 Minn. 434; *Tinklepaugh v. Rounds*, 24 Minn. 298; *State v. King*, 88 Minn. 175, 92 N. W. 965.

*New Hampshire.*—*Seavy v. Dearborn*, 19 N. H. 351; *Sumner v. Crawford*, 45 N. H. 416.

*New York.*—*Lawrence v. Barker*, 5 Wend. 301; *Harris v. Wilson*, 7 Wend. 57; *Ludwig v. Glassel*, 34 Hun 312; *Swinarton v. Le Boutillier*, 31 Abb. N. C. 281; *Ingalls v. Ingersoll*, 68 Hun 239, 22 N. Y. Supp. 995; *Greenfield v. People*, 13 Hun 242.

**Rule Stated.**—In *Holbrook v. Dow*, 12 Gray (Mass.) 357, the court said: "The credit of a witness can

So within this rule a witness cannot be asked on cross-examination

be impeached upon the ground of personal character and conduct, only by showing that his general reputation for truth and veracity is bad. Certainly it is a fixed and established rule in the law of evidence, that it is not competent, for the purpose of creating a distrust of his integrity and of thus disparaging his testimony, to prove particular acts of alleged misbehavior and dishonesty in relation to matters foreign to all the questions which are involved in the trial. This point, says Mr. Greenleaf, has heretofore been much the subject of discussion, but it must now be considered as settled and at rest. 1 Greenl. Ev., § 461, *Commonwealth v. Moore*, 3 Pick. 194. Keeping this rule in view, it is obvious that the permission given the plaintiff to inquire of the defendant, upon his cross-examination, whether some of the items stated in the account which he had rendered as assignee of the estate of the plaintiff were not false, and whether he had not inserted in it charges for pretended expenditures which had never in fact been made, was unauthorized and erroneous. These inquiries related to matters which had no connection with, or bearing upon, the question in controversy between the parties. The claim which the plaintiff was endeavoring to establish, and to recover by the prosecution of his suit, was founded upon the alleged promise of the defendant to pay him the sum of fifty-four dollars; a promise which the latter denied that he ever had made. The fact that in other instances he had acted unfairly, or in a manner evincing a want of integrity, would have no tendency, if shown, to prove or disprove the alleged indebtedness. It was not thought that it would, nor was that the purpose for which the questions objected to were proposed to the defendant. They were asked in order to obtain statements in reply respecting particular acts of supposed misconduct and dishonesty, in order thereby to affect his standing and credit with the jury. The court held that for this purpose, at least in the latitude of a cross-examination, the inquiries

ought to be permitted; and the jury were accordingly directed to allow the answers to have no other influence than this. Such a direction necessarily implied that proof of particular acts of misconduct was a legitimate mode of impairing the credit and of disparaging the testimony of a witness. This was a mistake. The defendant, being a general witness under the provisions of the statute, was subject to all the responsibilities which the law attaches, and entitled to all the protection which it affords, to persons standing in that relation. He was to be presumed, like all other persons called upon to give evidence in judicial proceedings, to be capable of supporting at once, and in any emergency, however sudden, his general reputation, but as not likely to be prepared to answer, without notice, in relation to his conduct and management of affairs in particular instances, foreign to the subject of present investigation. Besides this, he was a party to the suit, as well as a witness upon the trial, and his rights in each of these relations were to be respected. His attention was not to be diverted from the issue to be tried to a vindication of his character from particular aspersions which were pointedly insinuated under the guise of interrogatories against it. He had not himself introduced his account as assignee into the case, nor attempted in any way to avail himself of any advantage by it. It was laid before the jury by the plaintiff. There is no pretense that the account, or the manner in which it had been kept, was entitled to have any influence or effect in the determination of the question of fact in controversy between the parties; and being thus wholly immaterial to the issue the defendant had a right to insist that all inquiries concerning it should be rejected."

In California, it is incompetent to impeach a witness on cross-examination by asking him as to his having been in jail, as, under the Code of Civ. Proc., § 2,051, a witness cannot be questioned as to particular wrongful

as to specific acts of immorality or indecency.<sup>98</sup>

The extent of this rule rests within the sound discretion of the trial judge.<sup>99</sup>

**B. MATTERS INVOLVING CRIME.** — *a. In General.* — The authorities are not in harmony in regard to the extent of the cross-examination of a witness regarding his past. There is authority to the effect that it cannot be doubted that a previous criminal experience will depreciate the credit of a witness to a greater or less extent, and there must be some means of reaching this properly, and, accordingly, that a witness may be asked on cross-examination concerning all antecedents which are really significant and which will explain his credibility.<sup>1</sup>

**Form of Question.** — So while it is held proper to ask a witness whether or not he committed the act or whether he has been convicted or imprisoned therefor, it is held that the questions should be so framed as to permit the witness to admit or deny the act itself.<sup>2</sup>

acts. *Clement v. McGinn*, (Cal.), 33 Pac. 920.

98. *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, wherein the court said: "As we have said above, a witness cannot be impeached, on cross-examination or otherwise, by proof of specific wrongful acts. The matter about which he was questioned was entirely foreign to the case, and was wholly immaterial, except to discredit the witness and thereby break the force of her testimony."

99. In *Prescott v. Ward*, 10 Allen (Mass.) 203, inquiries on cross-examination concerning the date of the witness' marriage, and the exhibition of certain papers to her in connection with such inquiries, were held to have been rightly excluded. "So far as they had any tendency to contradict the witness or disparage her character, it was within the discretion of the presiding judge either to allow or reject them. On all matters not relevant to the issue, the extent of the cross-examination is to be regulated by the judicial discretion of the judge at the trial."

1. **Rule Stated.** — In *Wilbur v. Flood*, 15 Mich. 40, the court in discussing this question said: "It has always been held that within reasonable limits a witness may, on cross-examination, be very thoroughly sifted upon his character and antecedents. The court has a discretion as to how far propriety will allow this to be done in a

given case, and will, or should, prevent any needless and wanton abuse of the power. But within this discretion we think a witness may be asked concerning all antecedents which are really significant, and which will explain his credibility, and it is certain that proof of punishment in a state prison may be an important fact for this purpose. And it is not very easy to conceive why this knowledge may not be as properly derived from the witness as from other sources. He must be better acquainted than others with his own history, and is under no temptation to make his own case worse than truth will warrant. There can with him be no mistakes of identity. If there are extenuating circumstances, no one else can so readily recall them. We think the case comes within the well-established rules of cross-examination, and that the few authorities which seem to doubt it have been misunderstood, or else have been based upon a fallacious course of reasoning, which would, in nine cases out of ten, prevent an honest witness from obtaining better credit than an abandoned ruffian."

2. *State v. Pancoast*, 5 N. D. 514, 67 N. W. 1,052, 35 L. R. A. 518, wherein it was held improper to permit the prosecution to ask the defendant, when speaking about the crime inquired into, whether or not he was "accused," whether it was not "claimed," and the like, because

b. *Indictment*.—There is great lack of harmony among the authorities as to whether a witness may be asked on cross-examination as to the fact of his having been indicted for a crime. In some jurisdictions it has been held that he cannot be so cross-examined, because the fact of his indictment cannot legitimately tend to discredit him,<sup>3</sup> since the law presumes him to be innocent until he has been tried and found guilty.<sup>4</sup> In other jurisdictions, however, it is held proper to ask a witness on cross-examination if he has been indicted,<sup>5</sup> or is not then under indictment awaiting trial.<sup>6</sup>

all these things may have been true and yet no such crime as claimed have been committed.

3. *Yager v. Person*, 42 Hun (N. Y.) 400; *People v. Irving*, 95 N. Y. 544; *People v. Gay*, 3 Seld. (N. Y.) 378; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555.

**Rule Stated.**—In *Ryan v. People*, 79 N. Y. 593, the court, in ruling as stated in the text, said: "This court in the recent case of *The People v. Crapo*, while recognizing the legal right, subject to the discretion of the trial judge, to put questions to a witness as to specific facts which tend to discredit the witness or impeach his moral character, held that the mere fact that a witness had been indicted could not legitimately have that effect, and was therefore incompetent. The rule was applied in that case to an accused person who was sworn as a witness in his own behalf, but on principle it seems equally incompetent when applied to any other witness. An indicted person is presumed innocent, and yet the fact of an indictment is sought to impeach him as a witness. I do not think it is a legitimate fact for that purpose. A witness may be asked in the discretion of the court as to transactions which affect his character either for truth or veracity, or his moral character, but not such as do not have that effect. . . . Mr. Greenleaf says: "The situation of the witness with respect to the parties, and to the subject of litigation, his intent, his motives, his inclination and prejudices . . . are all fully investigated and ascertained, and submitted to the consideration of the jury, before whom he had testified, and who have thus had an opportunity of observing his demeanor, and

of determining the just weight and value of his testimony."

**Illustration.**—In *Parker v. Com.*, 21 Ky. L. Rep. 406, 51 S. W. 573, a prosecution for manslaughter, it was held error to permit the commonwealth to show, on the cross-examination of the accused, that he had been indicted for carrying a pistol and for shooting from ambush.

4. In *Lipe v. Eisenlerd*, 32 N. Y. 229, the court in sustaining the refusal of the trial judge to charge the jury that the fact of the witness being under indictment affected his credibility, said that the judge was correct in so refusing, because he had no power to try the issue upon the indictment, and that until the witness was found guilty by the petit jury the law presumes him to have been innocent.

5. *Powell v. State*, (Tex. Crim.), 70 S. W. 218, holding that where an accused takes the stand in his own behalf it is proper and legitimate to ask him on cross-examination if he has been indicted for felony.

6. In *Texas & P. Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843, the court in so ruling said: "On this question there seemed to us, on the first examination of this record, to be such a diversity in the opinions in our courts of last resort, that we thought of certifying it for decision to our supreme court. See *State v. Ivey*, 41 Tex. 38; *Railway Co. v. Johnson*, 83 Tex. 633, 19 S. W. 151; *Dillingham v. Ellis*, 86 Tex. 447, 25 S. W. 618; *Carroll v. State*, (Tex. Crim. App.), 24 S. W. 101. Recently, however, in an opinion by Lightfoot, C. J., of the court of civil appeals for the Fifth District, a question of similar character has been quite elaborately considered, and

c. *Conviction and Imprisonment.* — (1.) *In General.* — In most of the states it is held proper to ask a witness on cross-examination if he has not been convicted of a crime<sup>7</sup> and imprisoned therefor.<sup>8</sup> And the fact that the conviction was had many years before the trial does not affect the right to ask such a question.<sup>9</sup>

(2.) *Production of Record of Conviction.* — In England it is held that a witness cannot be asked on cross-examination for the purpose of impeachment whether he has been confined in jail, unless the record of conviction be produced.<sup>10</sup>

the conclusion announced that such a course of cross-examination is proper, quoting with approval the language in the Carroll Case, that it furnished the jury, who are to pass on the credibility of the witnesses, with a full knowledge 'of his surroundings and status.' *Ingersoll v. McWillie*, 30 S. W. 60. This conclusion having been approved by our supreme court, in an opinion rendered (not before us) in the same case on writ of error, we overrule the twenty-fifth assignment, complaining of the admission of the evidence."

In *Southworth v. Bennett*, 58 N. Y. 659, a note by the reporter states that upon the cross-examination of the plaintiff it was held proper to ask him whether he was not then under indictment for usury.

7. *People v. Crowley*, 100 Cal. 478, 35 Pac. 84.

*Drunkenness.* — In *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603, it was held proper to ask a witness upon cross-examination if he had not been convicted of drunkenness and confined in jail.

8. *California.* — *People v. Crandell*, 125 Cal. 129, 57 Pac. 785; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481.

*Maryland.* — *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603.

*Michigan.* — *Wilbur v. Flood*, 16 Mich. 40; *Clemens v. Conrad*, 19 Mich. 170; *Thompson v. Richards*, 14 Mich. 172; *People v. Morrigan*, 29 Mich. 4; *Dickinson v. Dustin*, 25 Mich. 561.

*Missouri.* — *State v. Martin*, 124 Mo. 514, 28 S. W. 12.

*New York.* — *Brandon v. People*, 42 N. Y. 265; *Russell v. St. Nicholas F. Ins. Co.*, 51 N. Y. 643.

*North Carolina.* — *State v. March*,

46 N. C. 526; *State v. Garrett*, 44 N. C. 357.

*Texas.* — *Walkins v. State*, 33 Tex. Crim. 605, 28 S. W. 536.

*Burglary.* — In *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811, a prosecution for killing a policeman while resisting arrest on suspicion, in which it appeared that burglar's tools were found on defendant's person, it was held proper on cross-examination, for the purpose of showing his character, and also the right of the policeman to arrest him, to ask the defendant if he had not been convicted of burglary in another state, and if he had not served terms in different prisons.

*Working Out Fine.* — In *Sentell v. State*, 34 Tex. Crim. 260, 30 S. W. 226, it was held competent to ask a witness on cross-examination whether he was at the time working out a fine for theft.

*Arrest.* — In *Hill v. State*, 42 Neb. 503, 60 N. W. 916, it was held competent to ask a witness for the defendant on cross-examination if he had been arrested for vagrancy, drunkenness, and other misdemeanors.

In *State v. Pratt*, 121 Mo. 566, 26 S. W. 556, it was held competent to ask a witness if he had not been put in jail for assaulting and beating a woman.

9. *Wolff v. VanHousen*, 55 Ill. App. 295.

10. In *King v. Inhabitants of Castle Careninon*, 8 East 77, it was held that a party interested in a witness' testimony, who was objected to on account of his having been convicted for felony, and his imprisonment being unexpired, was entitled to insist on proof of such conviction by the record, though admitted by the witness himself. Lord Ellenborough says: "The evidence went to affect the rights of third persons, namely,



In the United States the English rule is followed in at least one state.<sup>11</sup> But in most states, however, it is held to be unnecessary to produce the record on the ground that a party cannot know what witnesses will be introduced against him, and that record evidence of past conviction might be wholly inaccessible.<sup>12</sup>

d. *Discretion of Court.* — The limits of the cross-examination of a witness as to his past is a matter which rests largely within the sound discretion of the trial judge, and that discretion is to be exercised in view of all the circumstances.<sup>13</sup>

the litigant parties, for the pauper is no party to the cause in court. Whether or not the witnesses were convicted of a felony would appear by the record; and it cannot be seriously argued that a record can be proved by the admission of any witness. He may have mistaken what passed in court," etc.

11. *Com. v. Sullivan*, 161 Mass. 59, 36 N. E. 583.

12. *Sylvester v. State*, 71 Ala. 17; *Anderson v. State*, 72 Ala. 187; *State v. Hill*, 52 W. Va. 296, 43 S. E. 160.

Rule Stated. — In *Real v. People*, 42 N. Y. 270, wherein a witness had been permitted to be asked on cross-examination whether he had not been in the penitentiary and how long, the court said: "It would be productive of great injustice often, if where a witness is produced, of whom the opposite party has before never heard, and who gives material testimony, and from some source, or from the manner and appearance of the witness, such party should learn that most of the life of the witness had been spent in jails and other prisons for crimes, if this fact could not be proved by the witness himself, but could only be shown by records existing in distant counties, and perhaps states, which for the purposes of the trial are wholly inaccessible. No danger to the party introducing the witness can result from this class of inquiries, while their exclusion might, in some cases, wholly defeat the ends of justice. My conclusion is that a witness upon cross-examination may be asked whether he has been in jail, the penitentiary, or state prison, or any other place that would tend to impair his credibility, and how much of his life he has passed in such places."

*Compare Newcomb v. Griswold*,

24 N. Y. 298. In this case one of the witnesses for plaintiff was asked on cross-examination whether he had been convicted of petit larceny in this state. The question was objected to and the evidence excluded. "The general rule is well settled that evidence by way of impeachment of the character of a witness for veracity must be confined to his general reputation, and that proof of specific acts cannot be given. The embarrassment that would arise from the number of collateral issues which might spring up in the course of a trial would alone constitute a serious objection to the admissibility of evidence to establish specific crimes against the witnesses. Another reason for confining evidence affecting the character of witnesses to their general reputation is, that every man is supposed to be capable of supporting his general character, but would not be likely to be prepared to answer particular charges without notice.

Collateral issues form no exception to the general rule requiring the best evidence to be given; and there is no distinction between evidence to the competency and that to the credibility of a witness. In both issues the party has the same interest, and is entitled to the same grade of evidence upon each; and, upon principal as well as upon authority, parol proof of the conviction was inadmissible." *Citing King v. Inhabitants of Castle Caremion*, 8 East 77; *People v. Herrick*, 13 Johns. 82; *Hills v. Colvin*, 14 Johns. 182.

13. *Maine v. People*, 9 Hun (N. Y.) 113; *Berner v. Mitnacht*, 2 Sweeney (N. Y.) 582; *Thompson v. Thompson*, 79 Me. 286, 9 Atl. 888; *Wilbur v. Flood*, 16 Mich. 40; *Ryan v. People*, 19 Hun (N. Y.) 188.

In *Hill v. State*, 42 Neb. 503, 60

**6. Contradictory Statements.**—A. GENERALLY.—Statements made at other times at variance with the present testimony of the witness may be brought out on his cross-examination for the purpose of discrediting or impeaching the witness.<sup>14</sup> Thus, it is competent to ask a witness on his cross-examination if he did not

N. W. 916, the court said: "As respects the limits within which a witness other than the prisoner may be cross-examined for the purpose of testing his credibility the authorities are not harmonious, but the prevailing opinion is thus stated by Judge Thompson (Thompson Trials, 458): 'Except in cases where the witness is the prisoner on trial, the extent to which an inquiry will be allowed in his past life with a view of affecting his credibility rests in the discretion of the trial court.'"

... It does not follow, however, that a witness will in every case be required to answer questions the tendency of which is to subject him to public disgrace or infamy. It is sufficient for present purposes that the right to object, if such right exists, belongs to the witness whom it is sought to discredit, and not to the party calling him."

In *Doyle v. Beaupre*, 43 N. Y. St. 741, 17 N. Y. Supp. 287, an action for goods sold and delivered in which the defense was that the goods did not conform to the sample, it was held discretionary with the trial judge to permit one of the defendants to be asked on his cross-examination whether his firm had not had many other difficulties of a similar nature.

It is within the court's discretion to interfere and protect a witness against irrelevant inquiries, and in this case the court would not allow inquiries as to acts of bad conduct on the part of the witness, where such acts were immaterial to the issue. *Varona v. Socarras*, 8 Abb. Pr. (N. Y.) 302.

14. *California*.—*People v. Adams*, 137 Cal. 580, 70 Pac. 662; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1,041.

*Illinois*.—*Silvis v. Oltmann*, 53 Ill. App. 392; *Illinois Cent. R. Co. v. Allmon*, 147 Ill. 471.

*Kansas*.—*State v. Sorter*, 52 Kan. 531, 34 Pac. 1,036; *State v. Zimmerman*, 3 Kan. App. 172, 42 Pac. 828.

*Massachusetts*.—*Chapman v. Coffin*, 14 Gray 454; *Day v. Stickney*, 14

Allen 255; *Hathaway v. Crocker*, 7 Metc. 262.

*Michigan*.—*Curren v. Ampersee*, 96 Mich. 553, 36 N. W. 87; *Johnson Harvester Co. v. Miller*, 72 Mich. 265, 40 N. W. 429.

*Minnesota*.—*State v. Lawlor*, 28 Minn. 216, 9 N. W. 698.

*Montana*.—*State v. Broadbent*, 27 Mont. 342, 71 Pac. 1.

*Nebraska*.—*Markel v. Moudy*, 13 Neb. 322, 14 N. W. 409; *Fremont Butter & Egg Co. v. Peters*, 45 Neb. 356, 63 N. W. 791.

*New York*.—*Knight v. Forward*, 63 Barb. 311.

*Texas*.—*Davis v. State*, 36 Tex. Crim. 174, 38 S. W. 174; *Rhea v. State*, 37 Tex. Crim. 138, 38 S. W. 1,012.

*Wisconsin*.—*Waterman v. Chicago & Alton R. Co.*, 82 Wis. 613, 52 N. W. 247.

In *Jackson v. State*, 78 Ala. 471, the court said: "The witness, Taylor, having testified in behalf of the state that the general character of the deceased was good, it was, in our opinion, competent for the defendant, on cross-examination, to ask him if he had not said, at a time and place specified, that the deceased was a bad man. It certainly would have been competent to prove that the witness had heard one or more persons residing in the community make such an assertion. Why not, then, that he himself had done so, as he was as much a constituent part of the community as any other single individual would be? The court erred in excluding this evidence."

"The fact that the witness knew the character of the deceased only in what he termed 'the upper part of the neighborhood in which he lived,' but not in 'the lower portion,' did not affect the competency of his testimony, but only went to its weight or sufficiency. This was only circumscribing his knowledge to a smaller area of the same community."

testify differently before the grand jury,<sup>15</sup> coroner's jury,<sup>16</sup> and the like.

B. DISCREPANCY BETWEEN TESTIMONY AND PLEADING. — Where the witness is a party to the action he may be asked on his cross-examination as to discrepancies between his testimony and sworn

In *State v. Burrell*, 27 Mont. 282, 70 Pac. 982, the court said: "Owing to the frequency with which able counsel raised the point, and contended for it in this court, that when, on cross-examination, a witness is asked if he has not at other times made statements inconsistent with his present testimony, he must have related to him, before an answer is required, the circumstances of times, places and persons present, we find it now proper to say that it is not always necessary to make such relation to the witness. If such a question be asked without reference to such circumstances, the question is proper. If an answer to a question so put should deny that he has made any inconsistent statements, or say that he does not remember, that ends the matter, and he cannot be impeached by production of evidence that he has done so, for the reason that a proper foundation for such impeaching evidence has not been laid."

In *McClanahan v. Dingman*, 57 Neb. 628, 71 N. W. 302, the issue was as to whether the amount to be allowed an attorney for having made a certain collection should be restricted to 10 per cent, he having charged 25 per cent. The party who had employed the witness when giving his testimony was asked in his cross-examination whether he did not say, when he was paid the 75 per cent., that he could not expect the attorney to do that work for 10 per cent., and whether he did not willingly accept the 75 per cent. *Held* proper cross-examination.

In *Miller v. Rambo*, 66 N. J. L. 191, 49 Atl. 453, a case which had been tried before and in which a plaintiff was a witness in his own behalf, having charged in the later trial that the defendant had made threats against him indicating ill-will, he was asked if he had so testified at the former trial, to which he replied he thought he had. It was held error to exclude a question

which required him to state what he had formerly testified to on that subject.

In *Woodrick v. Woodrick*, 141 N. Y. 457, 36 N. E. 395, an action for a limited divorce brought by the wife on grounds of cruelty, the defendant denied the charges in the complaint, and set up, by way of counter-claim, the adultery of the plaintiff, and prayed for a judgment of absolute divorce. The co-respondent was placed on the stand by the plaintiff and denied the acts of adultery alleged in the defendant's counter-claim. On cross-examination he was asked if he did not, on a certain occasion, admit to Robert Phillips that his relations with the plaintiff were illicit. The witness was allowed to answer against the objection of the plaintiff. The question was held competent as laying the foundation for the collateral impeachment of the witness.

It is proper, on cross-examination, to ask a witness concerning statements made at the time of his arrest, and which were testified to in his examination in chief. *People v. Baker*, 112 Mich. 211, 70 N. W. 731.

Where a witness testified that he was solvent at a given time, the opposite party were permitted to ask on cross-examination whether he had not stated during that time that he had no property his creditors could reach, and that it would do them no good to sue him. *Walley v. Deseret Nat. Bank*, 14 Utah 305, 47 Pac. 147.

Where a defendant had given a full account of the homicide on direct examination, it was competent to ask him on cross-examination concerning statements made by him before the coroner's jury. *State v. Punshon*, 133 Mo. 44, 34 S. W. 25.

<sup>15</sup> *Loveland v. Cooley*, 59 Minn. 259, 61 N. W. 138.

<sup>16</sup> *State v. Sorter*, 52 Kan. 531, 34 Pac. 1,036; *State v. Baldwin*, 36 Kan. 1.

allegations in his pleadings.<sup>17</sup>

C. INTRODUCTION OF WRITING. — By laying a proper foundation counsel may introduce a writing on cross-examination for the purpose of affecting the credibility of the witness. The proper course is to put the writing in the hands of the witness and ask him if he wrote or signed it; and questions founded upon the writing may then be asked.<sup>18</sup>

17. In *Hall v. Chicago R. I. & P. R. Co.*, 84 Iowa 311, 51 N. W. 150, Robinson, C. J., said: "During the trial the plaintiff, as a witness, stated on direct examination that the engineer obeyed his signal, and that he thought that the cars stopped. On cross-examination he was asked if he did not swear in the petition, and if it was not true, that the engineer did not stop. An objection to the question, as not proper on cross-examination, was sustained. We think the ruling was erroneous. In view of what the witness had testified to on direct examination, it was entirely proper to show on cross-examination that he had made contradictory statements in his petition or otherwise. The fact that he had stated in his original petition that the negligence of the defendant consisted in the failure of the engineer to stop would not prevent his amending his petition, and showing that the negligence of the defendant related to the starting of the train. He may not have known which theory of the case was correct, and was entitled to rely upon the one which the evidence supported; but it was the right of the defendant to show that the plaintiff had made contradictory statements in regard to the matter, in order that the jury might give no more than due weight to his testimony."

18. *Stamper v. Griffin*, 12 Ga. 450; *Romertze v. East River Nat. Bank*, 49 N. Y. 577; *McCullough v. McCullough*, 12 Ind. 487.

In *Gemmill v. State*, 16 Ind. App. 154, 43 N. E. 909, Gavin, C. J., said: "Exception is taken to the court's permitting parts of certain letters to be read to appellant while on the stand, and in allowing him to be asked, 'Did you write that language in that letter?' Counsel insist that it was not proper to thus put the letters to the jury by piecemeal, nor to al-

low a cross-examination based upon the contents of these letters, and that they did not respond to anything brought out upon the original examination. At § 463, 1 Greenl. Ev., it is said that on cross-examination counsel will not be permitted to represent, in the statement of a question, the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked him whether he wrote that letter, and his admitting that he wrote it. Again, at § 465, it is further stated: 'A witness cannot be asked upon cross-examination whether he has written such a thing, stating its particular nature or purport; the proper course being to put the writing into his hands, and to ask him whether it is his writing.' This rule, which has been abrogated by statute in England, was founded upon the decision of the law judges in the *Queen's Case*, 2 Brod. & B. 286, and has been approved in this country so far as it defines the nature of the question to be asked. While this is laid down as the ordinary course of procedure, yet the original opinion given by the judges to the house of lords, Greenleaf, Rapalje, and that the New York court of appeals recognizes that while the cross-examiner should ordinarily make first known to the jury the contents of the letter when he offers it on his side of the case, the trial court will, upon proper statement of the necessity therefor, in the furtherance of justice, permit the letter, if otherwise competent to be read immediately, and, pending the cross-examination, that questions may be asked founded upon it. Here the letters were submitted to appellant before he was interrogated concerning them, and he admitted writing

**7. Conclusiveness of Answers as to Irrelevant Matters.** — A. GENERALLY. — The general rule is that where a cross-examining party is permitted to ask questions in relation to matters irrelevant to the issues he must take the answers as conclusive and he cannot afterward contradict those answers by other witnesses.<sup>19</sup> This rule is

them. Counsel have not pointed out, nor have we observed, any respect wherein the extracts as to which he was particularly questioned were, in fact, garbled, incomplete, or wrested from their proper connection, so as to convey any false impression as to their meaning. The entire letters were subsequently offered and read in evidence. Under these circumstances, appellant was not subjected to any unfair treatment, nor was there any possibility of material wrong resulting to him from the mode of examination pursued."

19. *California*. — *Faulkner v. Rondoni*, 104 Cal. 140, 37 Pac. 883.

*Iowa*. — *Ross v. Hayne*, 3 Greene 211.

*Kentucky*. — *Crittenden v. Com.*, 82 Ky. 164.

*Maine*. — *Ware v. Ware*, 8 Greenl. 29; *State v. Benner*, 64 Me. 267; *Davis v. Roby*, 64 Me. 427.

*Missouri*. — *State v. Downs*, 91 Mo. 19.

*New Hampshire*. — *Combs v. Winchester*, 39 N. H. 13, 75 Am. Dec. 203.

*New York*. — *Lawrence v. Barker*, 5 Wend. 301; *Harris v. Wilson*, 7 Wend. 57; *Carpenter v. Ward*, 30 N. Y. 243; *Howard v. City Fire Ins. Co.*, 4 Denio 502.

*North Carolina*. — *State v. Elliott*, 68 N. C. 124; *Clark v. Clark*, 65 N. C. 655; *State v. Patterson*, 24 N. C. 346; *State v. Kirkman*, 63 N. C. 246; *State v. Davis*, 87 N. C. 514; *Kramer v. Electric Light Co.*, 95 N. C. 277.

*North Dakota*. — *State v. Pancoast*, 5 N. D. 514, 67 N. W. 1,052, 35 L. R. A. 518.

**Rule Stated.** — In *Com. v. Buzzell*, 16 Pick. (Mass.) 153, the court said: "The Lady Superior of the convent, a witness on the part of the government, testified on cross-examination, (no objection being made to the question put to her,) that the nuns were not accustomed to prostrate themselves to her or to the bishop. The

counsel for the prisoner afterwards put the same question, to a witness called by them, in order to contradict the Superior, but it was objected by the district attorney, on the ground that a witness is not to be contradicted in regard to matters irrelevant to the issue. The court observed that the statement by the Superior was made on cross-examination, as to a collateral point, not relevant to the issue, and therefore, according to a clear rule of law, the evidence offered to contradict it was inadmissible; that the only doubt in their minds arose from the circumstance that the cross-examination had proceeded without objection, but as to this it was sufficient to say, that if the party cross-examining asks questions in relation to irrelevant facts, in order to sift the witnesses, he must take the answers as conclusive; he cannot afterwards call other witnesses to disprove them. 1 Phillips on Ev. (6th ed.) 258, *cites* *Spenceley v. De Willott*, 7 East 109; *Harris v. Tippet*, 2 Campb. 637; *Odiorne v. Winkley*, 2 Gallison 53."

In *People v. Webb*, 70 Cal. 120, 11 Pac. 509, the court said: "On the trial of this case, after the prosecution had announced that the case was closed, the court permitted the district attorney to recall a witness for the defendant, who had been examined and cross-examined, for further cross-examination, in order to lay a foundation for impeaching him. On the cross-examination for that purpose, the witness was asked questions, which were answered without objections. But the subject matter of the cross-examination was collateral, and not relative to the issues being tried, and the prosecution was bound by the answers of the witness; as to them he could not be contradicted. It was therefore error to allow, against the objections and exceptions of the defendant, the testimony offered and given to contradict the witness."

strictly enforced, and it has been frequently held fatal error to permit such answers to be contradicted.<sup>20</sup>

"Undoubtedly a party may impeach the credit and contradict the testimony of an adverse witness by showing that, upon some matter which is relevant and material, he has at other times made statements which are inconsistent with his testimony. But it is equally well settled that a party cannot, by drawing out, on cross-examination, statements by a witness which are irrelevant and collateral, gain the right to contradict such testimony by showing inconsistent statements of the witness at other times." *Jordan v. McKinney*, 144 Mass. 438, 11 N. E. 702, citing *Farnum v. Farnum*, 13 Gray 508; *Kaler v. Builders' Ins. Co.*, 120 Mass. 333.

A party cannot cross-examine the witness as to any distinct collateral fact not brought out on the examination in chief for the purpose of contradicting such testimony by showing inconsistent statements made at other times. *Crittenden v. Com.*, 82 Ky. 164.

In *State v. Elliott*, 68 N. C. 124, a witness in a trial for murder was asked, on cross-examination, if she did not say on the day of the homicide that the deceased was sitting up, and that she didn't think he was hurt as bad as he pretended to be. Having denied making this statement, the state called a witness to contradict her, which was permitted against objection. "It is very clear that the state questioned Mrs. Beck as to a collateral matter, and by well established rule of the law of evidence, was bound by her answer." A new trial was granted.

In *Clark v. Clark*, 65 N. C. 655, it is said: "When the cross-examination, instead of being general, descends to particulars, then the party is bound by the answer, and cannot be allowed to go into evidence *aliunde* in order to contradict the witness, for it would result in an interminable series of contradictions in regard to matters collateral, and thus lead off the mind of the jury from the matter at issue."

A prosecutrix in an action for bastardy was asked if she had ever

had sexual intercourse with another person than the defendant. Having answered in the negative, her answer was conclusive, since the question was irrelevant. *State v. Patterson*, 74 N. C. 157.

In *People v. Dye*, 75 Cal. 108, 16 Pac. 587, it was said: "A party cannot cross-examine his adversary's witness upon irrelevant matters, for the purpose of eliciting something to be contradicted. And if such matters are drawn out, the court should stop the inquiry there. It is well settled that a witness cannot be impeached by contradicting him upon collateral matters."

A fact drawn out on the examination by the defendant's counsel, and not material itself to the issue joined in the action, is not open to contradiction. "The impeachment of the witness does not come within the rule quoted by the defendant's counsel, which is as follows: 'The credit of a witness may be impeached by proof that he has made either verbal or written statements out of court contrary to what he swears at the trial, provided he has been previously cross-examined as to such alleged statements, and provided that such statements are upon a point material to the question in issue.'" *Carpenter v. Ward*, 30 N. Y. 243.

In *Stoke v. People*, 53 N. Y. 164, 13 Am. Rep. 492, with a view to impair the credibility of the testimony of a witness she was asked by the prosecution, upon cross-examination, whether she had not left an employment, without knowledge or consent of her employer, and whether she did not take things not belonging to her when she left. It was held error to permit evidence that her answers were untrue. "Upon cross-examination the prosecution had the right, for the purpose of impairing the credit of the witnesses, to ask questions as to those collateral matters, but having asked and obtained answers, must abide by the answers given; other witnesses could not be called to prove such answers untrue."

<sup>20</sup>. *Morris v. Atlantic Ave. R.*

**The Reason of the Rule Is Obvious.**—The investigation might thus branch out into any number of immaterial issues upon the mere question of the credibility of the witness under examination.<sup>21</sup>

**B. MATTERS SHOWING WITNESS' TEMPER, DISPOSITION, ETC.** While the answers to collateral matters drawn out on cross-examination are generally conclusive on the cross-examining party, the rule is otherwise where the cross-examination is as to matters which, although collateral, tend to show the temper, disposition or conduct of the witness toward the cause or parties.<sup>22</sup> The answers

Co., 116 N. Y. 552, 22 N. E. 1,097; *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221; *People v. Hillhouse*, 80 Mich. 580, 45 N. W. 484.

21. *Hildeburn v. Curran*, 65 Pa. St. 59, when the court said: "The rule is well settled that if a witness is cross-examined to a fact purely collateral and irrelevant to the issue, and answers it without objection, he cannot be contradicted. The reason is obvious. The investigation might thus branch out into any number of immaterial issues upon the mere question of the credibility of a witness. *Griffith v. Eshelman*, 4 Watts 51; *Elliot v. Boyles*, 7 Casey 65."

22. *People v. Schuyler*, 106 N. Y. 298, 12 N. E. 783. In this case the defendant's wife was called as a witness in his behalf. "She had testified on her direct examination that the defendant came home the night before the crime, sick; that he undressed and went to bed and that she put a board at the foot of the bed so that he could press his feet against it with his head against the head-board, and that he lay there for hours." On cross-examination her attention was called to an occasion, the day after the misconduct, when the district attorney and certain other persons specified, were present, and she was asked if she did not say on that occasion that she had never seen anything strange or unusual in the conduct of her husband. Also if she did not say 'that he went to bed as usual the night before,' or that 'he went to bed and slept as usual?' She denied having said anything of the kind. Subsequently one of the persons named was called as a witness by the prosecution, and his attention having been called by the district attorney to the occasion re-

ferred to, he was asked, "Did she then say to us that Schuyler went to bed about 9 p. m. the preceding evening in his usual healthy condition and slept all night as far as she knew?" The purpose of the district attorney was to show that she had made statements out of court at variance with this evidence, and the object of her cross-examination was to show that she had stated out of court that, instead of going to bed in that unusual manner, he went to bed as usual the night before and slept as usual. After she had substantially denied making such statements or any statements of that kind, these witnesses were called for the purpose of contradicting her, and we think no error was committed in receiving their evidence."

In *Cornelius v. Com.*, 15 B. Mon. (Ky.) 539, a witness was introduced on the part of the commonwealth and gave important evidence against the accused. On cross-examination he was asked "If he had any ill-feeling towards the prisoner," to which he responded "That he had not." He was then asked "If he had not in the presence of certain parties stated that he would come to the court to testify against and hang the prisoner if he had to walk." He denied that he had made any such statement. In the progress of the trial the defendant introduced a witness and offered to prove by him that the prosecuting witness had made the statements attributed to him, but his testimony was rejected by the court. It was held as a general rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to dis-

of the witness as to those matters may be contradicted.<sup>23</sup> So where a witness has denied on cross-examination that he had expressed extreme feelings of hostility or the contrary toward one of the parties, it is proper to contradict him by other witnesses.<sup>24</sup>

**8. Discretion of Court.**—Where the limits as to relevancy on cross-examination are not specifically defined, the sound discretion of the trial judge must govern, keeping in view all the circumstances of the case.<sup>25</sup> And the ruling of the court will not be revised by

credit his testimony; and if such a question be put to a witness, his answer cannot be contradicted by the party who asked the question, but it is conclusive against him. But the question which is intended to ascertain the feelings of the witness towards the prisoner is not irrelevant. If a witness have expressed or entertained feelings of hostility towards the accused, the fact may have an important bearing in determining his guilt or innocence of the crime with which he stands charged, and therefore the feeling of the witness towards the accused is a proper subject of inquiry.

**23.** *State v. Patterson*, 24 N. C. 346; *State v. Kirkman*, 63 N. C. 246; *Combs v. Winchester*, 39 N. H. 13, 75 Am. Dec. 203; *Newcomb v. Griswold*, 24 N. Y. 298; *Dance v. McBride*, 43 Iowa 624.

**24.** *Arkansas*.—*Crumpton v. State*, 52 Ark. 273, 12 S. W. 563.

*Massachusetts*.—*Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137.

*New Hampshire*.—*Combs v. Winchester*, 39 N. H. 13, 75 Am. Dec. 203.

*New York*.—*People v. Brooks*, 131 N. Y. 321, 30 N. E. 189.

*North Carolina*.—*Kramer v. Electric Light Co.*, 95 N. C. 277; *State v. Patterson*, 24 N. C. 346; *State v. Kirkman*, 63 N. C. 246.

*Wisconsin*.—*Martin v. Barnes*, 7 Wis. 239.

**25.** *United States*.—*Johnston v. Jones*, 1 Black 209; *Blitz v. U. S.*, 153 U. S. 308.

*Alabama*.—*Tobias v. Treist*, 103 Ala. 664, 15 So. 914; *Stoudenmeier v. Williamson*, 29 Ala. 558; *Rhodes Furn. Co. v. Weeden*, 108 Ala. 352, 19 So. 318.

*Connecticut*.—*Dennehy v. O'Connell*, 66 Conn. 175, 33 Atl. 920; *State v. McGowan*, 66 Conn. 392, 34 Atl.

99; *State v. Ferguson*, 71 Conn. 227, 41 Atl. 769; *Steene v. Aylesworth*, 18 Conn. 244.

*Illinois*.—*McCarty v. Chicago, B. & Q. R. Co.*, 34 Ill. App. 273; *Spring Valley v. Gavin*, 81 Ill. App. 456.

*Indiana*.—*Gilliland v. State*, 13 Ind. App. 651, 42 N. E. 238; *Payne v. Goldback*, 14 Ind. App. 100, 42 N. E. 642; *Ledford v. Ledford*, 95 Ind. 283; *Oliver v. Pate*, 43 Ind. 132; *Wachstetter v. State*, 99 Ind. 290, 50 Am. Rep. 94; *Freeman v. Hutchinson*, 15 Ind. App. 639, 43 N. E. 16.

*Iowa*.—*Wallace v. Wallace*, 62 Iowa 651, 17 N. W. 905.

*Louisiana*.—*State v. Brown*, 4 La. Ann. 505; *Hall v. Chieftain*, 9 La. 318.

*Maine*.—*New Gloucester v. Bridg-ham*, 28 Me. 60; *Sturgis v. Robbins*, 62 Me. 289.

*Massachusetts*.—*Wallace v. Taun-ton St. R. Co.*, 119 Mass. 91; *Com. v. Shaw*, 4 Cush. 593; *Rand v. Newton*, 6 Allen 38; *Prescott v. Ward*, 10 Allen 203; *Com. v. Lyden*, 113 Mass. 452; *Conant v. Johnston*, 165 Mass. 450, 43 N. E. 192; *Mayhew v. Thayer*, 8 Gray 172; *Com. v. Savory*, 10 Cush. 535; *Hathaway v. Crocker*, 7 Metc. 262; *Winship v. Neale*, 10 Gray 382; *Miller v. Smith*, 112 Mass. 470.

*Michigan*.—*Wilbur v. Flood*, 16 Mich. 40.

*Minnesota*.—*Matthews v. Hershey Lumb. Co.*, 65 Minn. 372, 67 N. W. 1,008; *State v. McCarty*, 17 Minn. 54; *State v. King*, 88 Minn. 175, 92 N. W. 965.

*Mississippi*.—*Boles v. State*, 24 Miss. 445.

*Missouri*.—*State v. Soper*, 148 Mo. 217, 49 S. W. 1,007.

*Nebraska*.—*Barr v. Post*, 56 Neb. 698, 77 N. W. 123.

*New Hampshire*.—*Free v. Buck-ingham*, 59 N. H. 219; *Merrill v. Per-*



kins, 59 N. H. 343; *State v. Boston & M. R. R. Co.*, 58 N. H. 410; *Perkins v. Towle*, 59 N. H. 583; *Clement v. Brooks*, 13 N. H. 92; *Seavy v. Dearborn*, 19 N. H. 351; *Hersom v. Henderson*, 23 N. H. 498; *Gutterson v. Morse*, 58 N. H. 105; *Ordway v. Haynes*, 50 N. H. 159.

*New Jersey.*—*Jones v. Ins. Co.*, 36 N. J. L. 29, 13 Am. Rep. 405; *West v. State*, 22 N. J. L. 212; *Day v. Donahue*, 62 N. J. L. 380, 41 Atl. 934.

*New York.*—*LaBeau v. People*, 34 N. Y. 223; *Fry v. Bennett*, 3 Bosw. 200; *Plato v. Kelly*, 16 Abb. Pr. 188; *Lawrence v. Barker*, 5 Wend. 301; *Terry v. McNeil*, 58 Barb. 241; *Langley v. Wadsworth*, 99 N. Y. 61, 1 N. E. 106; *Ross v. Ackerman*, 46 N. Y. 210; *Pratt v. Peckham*, 44 Hun 247; *McGuire v. Hartford Fire Ins. Co.*, 7 App. Div. 575, 40 N. Y. Supp. 300; *Hay v. Douglas*, 8 Abb. Pr. N. S. 217; *Allen v. Bodine*, 6 Barb. 383; *People v. Braun*, 158 N. Y. 558, 53 N. E. 529.

*Ohio.*—*Wroe v. State*, 20 Ohio St. 460.

*Pennsylvania.*—*Germain Fruit Co. v. Roberts*, 8 Pa. Super. Ct. 500; *Clark v. Trinity Church*, 5 Watts & S. 266.

*Vermont.*—*Powers v. Leach*, 26 Vt. 270; *Stevens v. Beach*, 12 Vt. 585.

*Wisconsin.*—*Spear v. Sweeney*, 88 Wis. 545, 60 N. W. 1,060; *McNair v. Rewey*, 62 Wis. 167, 22 N. W. 339; *Norris v. Corgill*, 57 Wis. 251, 15 N. W. 148.

In *Oliver v. Pate*, 43 Ind. 132, the court said: "It is difficult, if not impossible, to lay down specific rules to control or limit the cross-examination of witnesses. The judge before whom the case is tried must, to a considerable extent, determine it, and in doing so, must be governed by the circumstances attending the examination."

In *People v. Durrant*, 116 Cal. 179, 48 Pac. 75, the witness having stated on cross-examination that she had seen the defendant since last September, was asked "that is, if you imagine you have." This question was objected to and sustained by the court. "It is right of a witness to be protected from irrelevant, improper or insulting questions, and

from harsh and insulting demeanor; to be detained only so long as the interests of justice require, to be examined only as to matters legal and pertinent to the issue. (Code Civ. Proc. § 2,066.) The protection which the code thus affords to witnesses could be more often extended by the judges with a salutary effect upon judicial proceedings. The witness, a lady, had testified courteously and positively that she had seen defendant after the date named. The interjection of counsel was not legitimate cross-examination, and justified the interposition of the court."

"There was no error of law in the referee's refusal to allow the plaintiff to be asked, on cross-examination, whether the spirit of Daniel Webster was present aiding him in the trial, and whether he had been assisted by departed spirits in obtaining information of the defense. Nor would it have been an error of law to allow these questions to be put. It was a question of fact how far the proposed inquiry could usefully go for the purpose of discovering the credit of the witness. His testimony or other evidence might have been of such character that light would be thrown upon it by a disclosure of his spiritualistic faith or practice; and his testimony in the case might have been such that there was no occasion to call for any disclosure on that subject." *Free v. Buckingham*, 59 N. H. 219.

A witness having voluntarily made a statement regarding an immaterial matter, and the statement not being objected to, the court may without error permit a cross-examination concerning the immaterial matter. *Cone v. Smyth*, 3 Kan. App. 607, 45 Pac. 247.

In *Blunt v. State*, 9 Tex. App. 234, counsel for the defense, with a view of showing the animus and ill-feeling of the prosecuting witness towards the defendant, asked the question, "Don't you love the defendant?" which the witness declined to answer, and the court declined to interfere and required him to answer. This court said: "A witness may be impeached by showing his bias. 'For this purpose it is admissible to prove near relationship, sympathy, hostilities

the reviewing courts, except upon a plain abuse of that discretion.<sup>26</sup>

**Habits.** — It is within the discretion of the trial court to permit

as evidenced by a quarrel, and prejudice as to the particular case, so far as is exhibited by declarations and acts.' 1 Whart. on Ev., §§ 561, 566. 'It is not irrelevant on cross-examination to inquire of the witness for the prosecution whether he has not expressed feelings of hostilities towards the prisoner.' 1 Greenl. on Ev., § 450. And, in general, it is the right of the defendant to show bias on behalf of the witness if he can. 'Great latitude is allowed in the questions which a party is permitted and entitled to ask on cross-examination; and he will seldom be stopped by the court unless the question be manifestly irrelevant to the case, and calculated neither to qualify the examination in chief nor to impeach the credit of the witness. . . . Generally, on cross-examination, a witness may be asked any question the answer to which may have a tendency to affect his credit. But he will not always be obliged to answer such questions; and, generally, he may be asked questions which affect his veracity or his memory: such as whether he has been convicted on a trial of a criminal charge; whether he is a relative or an intimate friend, or under any special obligation to the party who calls him; whether he be not identified or connected with him in interest; whether he has not been on terms of enmity with the adverse party; whether his memory is not defective generally, or as to the particular transaction. Such questions are within the circumference of the issue, although not within that inner circle to which the examination in chief is confined. When the cross-examination is rambling, prolix, or irrelevant, the court may and will properly interfere to stop it.'

"We do not think the question, 'Don't you love the defendant?' was the proper question to put to a witness in order to show his hostility or enmity. And where it was just as easy to ask a proper question, and one directly pertinent, we cannot say that the court erred in refusing to permit the one asked, especially when

the witness declined to answer it, because improper and impertinent."

In an action for personal injuries suffered while riding in a cab and owing to a defective highway, the driver of the cab was asked on cross-examination if a certain woman who was in the cab was a married woman. This was objected to. It was claimed competent to test the knowledge of the witness and to discredit him. *Held*, that the limits of such an examination rest within the discretion of the superior court and that this refusal is not an abuse of discretion. *Guertin v. Town of Hudson*, 71 N. H. 505, 53 Atl. 736.

A party was asked on cross-examination if he had not complained of one of his witnesses for having lost the verdict at a former trial. This question was properly excluded by the court in the exercise of this discretionary right to limit the cross-examination on collateral matters. *Dunn v. Altman*, 50 Mo. App. 231.

**26.** *Mayhew v. Thayer*, 8 Gray (Mass.) 172.

In *Ingram v. The State*, 67 Ala. 67, the court said: "Much latitude is allowed in the cross-examination of witnesses, and much must be left to the enlightened discretion of the court. No uniform, universal rule can be laid down. Much wider liberty of cross-examination is permissible when the witness betrays partizanship, or partiality, than when he narrates the facts with prompt indifference whether they favor the one side or the other. Hence, it must be a strong case to justify a reversal for too great latitude allowed in cross-examination. *Stoudenmeyer v. Williamson*, 29 Ala. 558. *In re Carmichael*, 36 Ala. 514."

In *Santa Ana v. Harlin*, 99 Cal. 538, 34 Pac. 224, where certain questions tending to test the witness' knowledge, judgment and bias were excluded by the trial court, it was said by Searls, C.: "Upon cross-examination, where great latitude is allowed for the purpose of testing witnesses, questions of this character are conceded on all hands to be

a witness to be cross-examined as to his habits.<sup>27</sup>

**Impartiality.** — While the extent of the cross-examination to show impartiality rests largely within the discretion of the court,<sup>28</sup> it has

allowable. The questions put upon cross-examination of defendant's witnesses and objected to were proper. Great liberality is properly extended in such cross-examinations, and for the purpose of testing the knowledge, judgment or bias of the witness the liberality is wisely exercised. In such cases, and for such purposes, much must be left to the discretion of the trial court, and it is only for an abuse of discretion that its action should be impugned."

Where a prosecuting witness has given materially different answers to questions on trial from those given at the preliminary hearing, the court's discretion determines the extent to which the defendant may be allowed, on the cross-examination of the witness, to go into the present surroundings of the witness for the purpose of showing the motives inducing the witness to change his testimony. *People v. Dillwood*, (Cal.), 39 Pac. 438.

The court said in *Long v. Booe*, 106 Ala. 570, 17 So. 716: "The witness, Root, was a youth under twenty-one years of age. His credibility was sharply in issue before the jury. It was, we think, within the discretion of the trial court to allow the plaintiff to draw from him on cross-examination the fact that his father had been in the employment of the defendant's father, he having testified for the defense. The matter was before the court below upon the manner of the witness in a much fuller light than it could be presented here, and we are not prepared to say but that the fact thus adduced tended to show relations between the families of the witness and defendant, when taken in connection with the witness' demeanor on the stand, from which the jury might have inferred a bias on the witness' part in favor of the defendant. The matter was in the discretion of the city court. *Miller v. Smith*, 112 Mass. 470; *Com. v. Lyden*, 113 Mass. 452; *Amos v. State*, 96 Ala. 120, 125; *Phoenix Ins. Co. v. Cope-land*, 86 Ala. 551, 558."

If the examination, or cross-examination, of a witness extends to immaterial matter, it is no matter of just exception that the presiding judge limits the inquiries of counsel as to what is immaterial. Because one inquiry of that character has been made and admitted, it is no ground for complaint that a second one of the same character was not allowed. There is more foundation for just exception in the admission rather than the exclusion of testimony of this description. *Sturgis v. Robbins*, 62 Me. 289.

It is within the court's discretion to refuse to allow the defendant to show on cross-examination of the plaintiff that the action was being prosecuted under a champertous agreement. *Lueck v. Heisler*, 87 Wis. 644, 58 N. W. 1,101.

27. *Johnston v. Farmers' F. Ins. Co.*, 106 Mich. 96, 64 N. W. 5.

In *State v. Grant*, 144 Mo. 56, 45 S. W. 1,102, the defendant was charged with having been drunk when the offense was committed. He claimed that he had taken but one drink and had started home. On his cross-examination he was asked as to his habits of taking home liquor when he went to town. *Held* incompetent.

28. In *Com. v. Gallagher*, 126 Mass. 54, the defendant called as a witness one Clark, whose evidence tended to confirm that of the defendant, and to contradict that of Sheridan, as to what transpired at the time of the taking. On the cross-examination of Clark the government asked him if he was not a friend of the defendant, to which he replied that he was not. He was then asked, "Did you not offer one Alley, or somebody else, forty dollars to go bail for the defendant in this case?" The defendant objected to this question, but the judge allowed it to be put, and the witness answered, "I offered Alley fifteen dollars if he would go on the defendant's bond."

It was held by Gray, C. J., that the cross-examination of the witness,

often been held error to too closely restrict it.<sup>20</sup> But such collateral

Clark, was within the discretion of the presiding judge.

29. In *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859, the court, Thornton, J., referring to certain questions asked by counsel for the defendant on cross-examination of the prosecuting witness, said: "These questions had a tendency to show feeling in the prosecution of the offense by the witness, and should have been allowed. Whatever weight the evidence might have was for the jury. The court below was not justified in not allowing these questions to be answered, unless it could be said, as a matter of law, that they had no tendency, if answered in the affirmative, to show bias on the part of the witness. That could not have been declared of the questions excluded. (See *Harper v. Lamping*, 33 Cal. 648; *People v. Blackwell*, 27 Cal. 67; *Jackson v. Feather R. W. Co.*, 14 Cal. 24; *Plet v. Bouchaud*, 4 Edw. 30.)"

In *Starks v. People*, 5 Denio 106, the court said: "How much, if anything, the evidence of the witness, Dutton, would have amounted to, is not for us to say, but it was clearly competent and should not have been rejected by the court. It tended more or less to show ill will or malice on the part of the witness towards the prisoner on trial, and was therefore pertinent and material. It is always competent to show that a witness is hostile to the party against whom he is called; that he has threatened revenge, or that a quarrel exists between them. A jury would scrutinize, more closely and doubtfully, the evidence of a hostile than of an indifferent or friendly witness. Hence it is always competent to show the relations which exist between the witness and the party against, as well as for whom, he was called. The evidence is material, as it goes directly to the credit of the witness in the particular case."

In *State v. Broadbent*, 27 Mont. 342, 71 Pac. 1, defendants were charged with grand larceny. The court refused to allow certain questions to be asked of the ex-convict, Hand, a witness for the state. The

evidence tended to show that he was friendly to the prosecution and hostile to the defendants, or one of them at least, that he was visited in the penitentiary by the prosecuting witness, Webster, and taken into the employ of the latter, and the questions were very proper as likely to induce evidence from him showing his relation to the prosecuting witness and his animus in the case. Nothing is more important in a felony case than that each party should be allowed to thoroughly cross-examine the adversary's witnesses. The court erred to the prejudice of the defendants.

In *State v. Baldwin*, 117 Cal. 244, 49 Pac. 186, the court said: "We think the court also erred in restricting defendant's right of cross-examination in several instances—notably in the examination of the girl complainant with reference to the circumstances of the alleged offense, and in the examination of her mother as to when she had examined her child's person previous to the occasion testified to. The testimony is not of a character to invite its recitation, and it is, therefore, not desirable nor is it necessary, to go into its details in order to show the materiality of the rulings of the court in this particular. It will be sufficient to say, in a general way, that in a case of this character the very widest latitude compatible with our somewhat technical and restricted rules of evidence should be allowed the defendant in his cross-examination of the witnesses of the people. More especially is this true with reference to the prosecuting witness and those who, by reason of blood or other circumstances, may be charged with a deep interest in the case. In this class of prosecutions the defendant, owing to natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence, that he should be given the full measure of every legal right in an endeavor to maintain his innocence."

In *Suit v. Bonnell*, 33 Wis. 180,

evidence should not be too remote or uncertain.<sup>30</sup>

## VI. MATTERS TENDING TO DEGRADE WITNESS.

### 1. Matters Not Incriminating. — A. MATERIALITY TO THE ISSUE.

a. *In General.* — A witness may, on cross-examination, be asked and be compelled to answer questions which have a direct tendency to degrade his character, where such questions are material to the issue.<sup>31</sup>

the court said: "It was clearly error for the court to rule out the question put by the defendant to the plaintiff's witness, Sheares, the object of which was to show that the witness was interested in the event of the suit. It is true that such interest does not disqualify the witness from testifying, but the fact may nevertheless be shown for the effect it may have upon his credibility. It may be shown for the purpose of better enabling the court or jury to determine the degree of credit to be given to his testimony, or to disregard it entirely, where, upon that fact alone, or taken in connection with others, the proofs are of a kind to produce such conviction." *Citing Phoenix Ins. Co. v. Sholes*, 20 Wis. 35; *Cornell v. Barnes*, 26 Wis. 473.

"Evidence irrelevant to the issue may be material as affecting the credibility of a witness, when it tends to show interest, prejudice, bias, or the relationship and feelings of the witness toward the party. It is the right of a party to show the state of feeling of an opposing witness, and this may be done by cross-examination or by independent testimony. For this purpose it is competent to inquire of the witness concerning acts, declarations and circumstances showing the existence of hostile feelings or prejudices, and the latitude of cross-examination is not restricted by the fact that the witness is a party testifying in his own behalf. The state of mind and feelings of a witness may materially affect his testimony, and the credit of a witness upon whose testimony in part the issue is to be determined is not a collateral and immaterial matter. The plaintiff had testified that the assault of November 14th, 1878, was the first time the defendant ever

struck her. On cross-examination, she was asked whether at any time prior to November 14, 1878, she had told anyone that the defendant had struck her, and that she was going to have him arrested. This question was objected to and excluded, as was also evidence that the plaintiff had made a similar statement in July or August before the alleged assault. The testimony was material as bearing upon the plaintiff's state of feeling toward the defendant. It tended to show that she had falsely charged the defendant with having assaulted her prior to the time of the assault complained of; and the fact that she had previously falsely charged him with assaulting her was a circumstance affecting the credibility of her testimony, which the defendant was entitled to have considered, and all the excluded evidence might tend to impeach the memory of the witness. How far justice requires a tribunal to go from the issue for the trial of collateral questions; how much time should be spent in the trial of such questions; what evidence may be excluded for its remoteness of time or place; and what evidence is otherwise too trivial to justify a prolongation of the trial — are often questions of fact to be determined at the trial. In this case the evidence appears to have been excluded, not on any such ground of fact, but because, as a matter of law, it was held to be irrelevant; and on that ground the ruling was erroneous." *Watson v. Twombly*, 60 N. H. 491.

30. *Gale v. New York & C. H. R. Co.*, 76 N. Y. 594.

31. *McC Campbell v. McC Campbell*, 20 Ky. L. Rep. 552, 46 S. W. 18; *Com. v. Savory*, 10 Cush. (Mass.) 535; *People v. Arnold*, 40 Mich. 710; *Shepherd v. Parker*, 36 N. Y. 517;

b. *Reason for Rule.*—Such a cross-examination is permitted upon the theory that where a man's life or liberty depends upon the testimony of another it is of the highest importance that they whom the law makes the exclusive judges of the facts and the credibility of the witnesses should know how far the witness is to

People *v.* Lohman, 2 Barb. (N. Y.) 216.

**Rule Stated.**—In *Carroll v. State*, 32 Tex. Crim. 431, 24 S. W. 100, the court said: "While the code declares that one may impeach his own witness in any way except by proving his bad character, it is silent as to the method by which one may attack the credibility of a witness offered by the opposite party. Turning to the common law rule, we find that of the various modes of impeaching a witness, this alone has been the subject of much opposition and discussion; that is, whether a witness can be compelled to answer a question degrading him, collateral to the main issue, but relevant to his credit. In other methods of impeachment the question is as to the application of the rule. In this the existence of the rule is denied. It seems, however, to be conceded that, if the question is relevant to the main issue in the case, the witness, upon cross-examination, is bound to answer, however degrading it may be to him. It is where the evidence is not relevant to the issue, but only goes to affect his credit, that the authorities cannot be reconciled. . . . Now, while it is true that the question 'has never been solemnly settled,' as stated by Mr. Greenleaf, yet eminent judges, at *nisi prius* trials, began at an early date to permit such questions to be asked, and compelled the witness to answer them. Lord Eldon, in speaking of this practice, thus states the law in his day: 'A party cannot be called upon to criminate himself. It used to be said a party could not be called upon to discredit himself, but in modern times courts have permitted questions to show from transactions not in issue that witnesses are of impeached character, and therefore not so credible.' So that it would seem that though the older authorities were against the practice, yet the current of authority soon changed in England and America. . . .

They ought to know his surroundings and status so as not to give to one belonging to the criminal class the same credit as he whose character is irreproachable. If, therefore, it should appear on cross-examination that the witness had a previous criminal experience, or spent a part of his life in jail, or was convicted or has suffered some infamous punishment, or had been in jail on a criminal charge, it would tend to shake or impair his credit, and the jury should have such information. While it may seem harsh to compel a witness to commit perjury or destroy his own standing before the court, it would seem absurd to place the feelings of a profligate witness in competition with the substantial rights of the parties in the case. But it is to be remembered, and all the authorities unite in the statement, that the examination must be kept within bounds by the court. . . . While, therefore, the method of impeachment contended for is one of the recognized modes we see no reason why it should be exclusive. We think the jury may reach in many cases a more satisfactory estimate of the witness' character from admissions drawn from his own lips upon cross-examination than by impeaching his general reputation by other witnesses."

In *The People v. Abbot*, 19 Wend. 192, the defendant was indicted under a charge of rape. On the trial the prosecutrix, on whom the rape was charged to have been committed, and who testified as a witness in support of the prosecution, on her cross-examination was asked whether she had not had previous criminal intercourse with other men before the act charged against the defendant. Upon objection the question was excluded by the trial court. It was held the question should have been allowed; it was a material issue in the case. In such cases even the witness' privilege does not excuse her from answering.

be trusted.<sup>32</sup>

c. *Transactions Must Not Be Too Remote.* — Such questions are to be permitted, however, only where the ends of justice clearly require it, and the inquiry relates to transactions comparatively recent and bearing directly on the present character of the witness, and is essential to the true estimation of his testimony. It should be the care of the trial judge to confine the inquiry to matters coming within this limitation, and promptly suppress inquiry into all matters not recent or relative to credit.<sup>33</sup>

d. *Limiting Inquiry to Reputation in Neighborhood.* — It has also been said that limiting the inquiry to the general reputation of the witness for truth and veracity in his neighborhood is as unsatisfactory in theory as it has been in practice.<sup>34</sup>

e. *Conclusiveness of Answer.* — And when a witness is asked a question which tends to disgrace him, which he answers, the cross-examining party is in general bound by the answer if collateral to the issue and only going to the credit of the witness.<sup>35</sup>

B. MATTERS IMMATERIAL TO THE ISSUE. — a. *In General.* — But where questions are immaterial to the issues, the witness will not be required to answer where the evident purpose of the questions is to degrade the witness or his family.<sup>36</sup> Nor is it proper to permit

32. *Real v. People*, 42 N. Y. 270; *Carroll v. State*, 32 Tex. Crim. 431, 24 S. W. 100.

33. *Carroll v. State*, 32 Tex. Crim. 431, 24 S. W. 100, holding that otherwise the witness box would become a source of scandal and offense.

34. *Carroll v. State*, 32 Tex. Crim. 431, 24 S. W. 100.

35. *Carroll v. State*, 32 Tex. Crim. 431, 24 S. W. 100.

36. It is error to permit a witness for the defendant, when being cross-examined as to her relation to the defendant, to be asked if she is not of illegitimate birth. *State v. Prater*, 52 W. Va. 132, 43 S. E. 230.

Where a defendant charged with murder was under cross-examination, it was held improper to ask him, "Do you not belong to the Jesse James gang?" *Clarke v. State*, 78 Ala. 474, 56 Am. Rep. 45. "It may be said to be a matter of history that such gang was composed of desperadoes and outlaws, with a career atrocious with robberies and murders. . . . The question related to a matter not pertinent to the issue, nor involved, directly or indirectly, in the offense for which the defendant was on trial, was only calculated to unduly preju-

dice him in the mind of the jury, and, on objection, should have been excluded."

In *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183, while upon the stand in his own behalf, a party was asked on cross-examination, "How many times have you been arrested?" This was objected to on the ground that it was incompetent to affect his credibility as a witness; that it tended to degrade the witness; that he was privileged from answering it as it had no direct bearing upon any issue in the case, and also upon the ground that better evidence of the fact existed. The court overruled the objection, and the answer was given: "Five times, I believe." In holding this to be error the court said: "It would not be competent to introduce evidence of particular facts to impeach the witness, but the authorities recognize a distinction between independent evidence introduced for the purpose of impeaching a witness, and the questions which are permitted, in the discretion of the court, to be put to a witness, tending to affect his credibility. . . . The party cannot avail himself of an error in allowing or refus-

questions imputing disgrace, asked for the mere purpose of discrediting the witness.<sup>37</sup>

b. *Reasons for Exclusion.*—Questions of this nature are excluded upon the ground that it would subject every witness, who in obedience of the mandate of the law enters a court of justice to testify on an issue in which he has no concern, to irresponsible

ing the privilege. But when the witness is also the party, I see no reason for the application of this rule. By taking the stand as a witness, while he may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his rights as a party, and it follows that his counsel, while he is in the witness box, has a right to speak for him, and that an error committed by the court against him may inure to his benefit as a party. Especially ought this protection to be accorded to persons on trial for criminal offenses, who often by a species of moral compunction are forced upon the stand as witnesses, and being there are obliged to run the gauntlet of their whole lives on cross-examination, and every immorality, vice or crime of which they may have been guilty, or suspected of being guilty, is brought out ostensibly to affect credibility, but practically used to produce a conviction for the particular offense for which the accused is being tried, upon evidence which otherwise would be deemed insufficient. Such a result is manifestly unjust, and every protection should be afforded to guard against it. . . . "I am of the opinion that the cross-examination of persons who are witnesses in their own behalf, when on trial for criminal offenses, should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses."

In *McMasters v. State*, (Miss.), 33 So. 2, a trial for murder, it was held error to permit the defendant's wife to be asked on cross-examination as to whether or not she was the mother of two children not born in wedlock.

Where a prostitute, who does not claim to have reformed, refuses to give her real name when testifying against a defendant, it is improper to compel her to do so, when she refuses on the sole ground of protect-

ing the good name of her family. *People v. Roosevelt*, 16 App. Div. 364, 44 N. Y. Supp. 1,003.

<sup>37</sup>. *Dodd v. Norris*, 3 Camp. 519; *MacBride v. MacBride*, 4 Esp. 243.

It is improper for the prosecution to cross-examine defendant to obtain evidence tending to degrade her moral character, where the question did not legitimately tend to impair her credibility. *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 52 Am. St. Rep. 655, 31 L. R. A. 294.

In *Lohman v. The People*, 1 N. Y. 379, upon the cross-examination the counsel proposed questions to the witness which she declined to answer upon the ground that they would tend to disgrace her. . . . The court refused to compel the witness to answer, and to this decision the defendant excepted. The court said: "It is hardly necessary to say that the answers sought to these questions would have disgraced the witness. She was therefore privileged from answering unless her answers were material to the issue. Her pregnancy was, it is true, one of the facts to be established by the prosecution, but whether induced by Cook or any other person was entirely immaterial. If her response had been in the affirmative to each of these interrogatories, it would not have been inconsistent with, or tended to disprove the fact of her pregnancy or the agency of the prisoner in procuring the miscarriage, any further than those answers affected her general character. The privilege of witnesses has been carried much farther in some of the cases, but all the authorities agree that where, as in this case, the object of the question is to impair the credibility of the witness, she could not be compelled to answer."

In *People v. Crapo*, 76 N. Y. 288, where a defendant was asked, "Were you ever arrested for bigamy?" the court said, "While the practice



accusation and inquisition in respect to every transaction of his life affecting his honor as a man or his character as a citizen.<sup>38</sup>

has obtained to some extent of allowing questions to a witness, the answers to which would tend to impeach his credibility, the courts have uniformly excluded questions which do not clearly have that effect. In *People v. Genung*, (11 Wend. 19), the question put to the prosecutor whether he had not frequently during the session of the court offered to the prisoner that if he would settle the subject-matter of the indictment he would leave the court and not appear as a witness, was held incompetent because it did not impair credibility. . . . No rule of law is violated in requiring that to entitle questions to be put to accused persons, which are irrelevant to the issue, and are calculated to prejudice him with the jury, they should at least be of a character which clearly goes to impeach his general moral character, and his credibility as a witness. The old rule, not to allow irrelevant questions to such persons, would be preferable and more in accordance with sound principles of justice; but it is unnecessary in this case to go beyond the requirement that the answer must tend directly to impeach him."

In *State v. Hill*, 52 W. Va. 296, 43 S. E. 160, the court said: "The law is that, where the question is relevant or material to the matter on trial, the witness must answer, however much it disgraces or discredits the character, because the demands of public justice require this. The witness can set up no privilege in that case. But where the question introduces matter not relevant to the issue on trial, but foreign or collateral to it, if the witness objects to answer, he will not be compelled to do so."

38. In *Great Western Tpke. v. Loomis*, 32 N. Y. 127, the judgment of the trial court was reversed by the general term on the ground that the defendant was not permitted on cross-examination of the plaintiff's principal witness to put questions irrelevant to the issue, but tending to degrade the witness, the avowed purpose being to show that the witness was unworthy of credit. The court

of appeals, in reinstating the judgment of the trial court, said of the ruling of the general term that if this ruling was to be sustained it would "embody in our system of jurisprudence a rule fraught with infinite mischief. It will subject every witness who, in obedience to the mandate of the law, enters a court of justice to testify on an issue in which he has no concern, to irresponsible accusation and inquisition in respect to every transaction of his life, affecting his honor as a man or his character as a citizen. . . . The interposition of the court has often been necessary to protect witnesses from the rigor of examinations, conducted on the supposition that they were entitled to such protection. . . . It is believed that the practice, on this subject, which has heretofore prevailed in this state, rests on sound principle, and is abundantly fortified by authority. Its propriety seems to have been always recognized in the English courts, and the judges have never hesitated, at *nisi prius*, to exercise a liberal discretion in the admission or exclusion of irrelevant inquiries tending to degrade the witness, according to the varying circumstances under which the offer was made. . . . That the witness was under no obligation to answer the questions propounded in the case at bar is settled by the decision of this court in the case of *Lohman v. The People*. It is there expressly adjudged that the party is not entitled to an answer to an inquiry tending to disgrace the witness, unless the evidence would bear directly upon the issue. . . . The witness was neither a stranger nor a volunteer. The facts to which he testified were not only probable in their nature, but within the personal knowledge of the party against whom he was called. No attempt was made to contradict him. There was nothing in his testimony or in the relations he sustained to the parties to deprive him of the benefit of the ordinary presumptions in favor of good character and good faith. If the disparaging questions had all been answered in the affirma-

c. *Privilege Personal to Witness.*—This privilege, however, like the privilege of refusing to answer incriminating questions, is personal to the witness, and a party cannot insist upon it if the witness does not object to answering the question.<sup>39</sup>

d. *Authorities Permitting Such Questions.*—There are on the other hand authorities permitting questions as to immaterial matters which merely degrade the witness, on the theory that the answers to such questions tend to degrade the witness morally, and thereby impeach his credit.<sup>40</sup>

tive the jury would not have been justified in discrediting his evidence on the facts material to the issue. But they were wholly irrelevant, and were properly excluded on the trial."

39. *State v. Hill*, 52 W. Va. 296, 43 S. E. 160.

40. *Childs v. State*, 58 Ala. 349; *Ingram v. State*, 67 Ala. 67.

**Rule Stated.**—In *People v. Gay*, 7 N. Y. 378, the court said: "A party may upon the cross-examination of a witness introduced by his adversary, ask him collateral questions upon matters entirely disconnected with the issue, the answers to which may tend to degrade and discredit him, and the witness may in general do as he pleases about answering them. If he does answer them, and his answers are of a character to degrade him or to produce an unfavorable impression upon the minds of the jury in regard to his character for truthfulness, he stands to some extent impeached and discredited. The facts so drawn out on cross-examination are entirely immaterial to the question at issue, and are only admissible upon the ground that as their usual if not necessary concomitant is a depraved moral standard, the evidence given by the witness, which is pertinent to the issue, is less reliable, and when weighed against other evidence in the case, the jury might be justified in disregarding it altogether; and this I understand to be the principle upon which evidence of reputation is received of the character of a witness. If a witness' conduct has been such as to fix upon him the judgment of the community in which he resides and where he is known a particular character in any respect, that judgment is presumed to be correct until the contrary is proved. If it be that

he is immoral or habitually guilty of conduct inconsistent with honesty or morality, and the judgment be true, it needs no argument to show that evidence derived from such a witness is not to be relied upon. The source is polluted. The only security for its truth is the chance, in the mind of the witness, of escape from detection in case he swears falsely. It is bereft of the highest sanction and greatest safeguard—a good conscience and an honest purpose. In both cases, where the witness impeaches himself by admitting his own delinquencies on the stand, and where impeaching evidence is produced against him by evidence of general reputation, the result is that his character is affected unfavorably."

In *Baker v. Trotter*, 73 Ala. 277, it was proposed on cross-examination to ask a witness if some two years previously in the circuit court of Pike county, in which county he formerly lived, his character was not shown to be that of a hog thief. This was objected to and ruled out. In holding this to be error the court said: "It was not proposed to prove that he had been guilty of the crime, or had been convicted of it. That would have required the production of the record; and, if shown, would have rendered the witness incompetent. *Sylvester v. The State*, 71 Ala. 17; *Anderson v. The State*, 72 Ala. 187. The fact sought to be proved was the character he bore in another county, this to affect his credibility, not his competency. For this purpose, and on cross-examination, it was admissible. *Childs v. The State*, 58 Ala. 249; *Ingram v. The State*, 67 Ala. 67. If there was danger of the testimony exerting an improper influence on the jury, that was a subject for a charge limiting its effect

C. DISCRETION OF COURT. — The application of this rule rests largely in the discretion of the trial court.<sup>41</sup> Generally, questions, the tendency of which is merely to degrade the witness, will not be admitted unless the ends of justice demand it. And the ruling of the trial court will not be reviewed except for an abuse of discretion.<sup>42</sup>

And although the witness does not object, it seems that it is still within the discretion of the court on its own motion to reject questions coming within this rule.<sup>43</sup>

to the credibility. It could not bear on the liability of the defendants, unless knowledge of such bad reputation was, in some legitimate mode, carried home to them."

In a prosecution for murder, it was held competent to ask the defendant on cross-examination if he had not been arrested for abducting a child. *Jones v. State*, (Tex. Crim.), 71 S. W. 962.

A defendant charged with murder, having taken the witness stand in his own behalf, it was held proper to ask him, "why he played off crazy at the time of his arrest." *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357.

Where a defendant testifies that his business was that of a laundryman, it is proper to ask him if he had not been running an opium dive instead of a laundry. *Bow v. People*, 160 Ill. 438, 43 N. E. 593.

41. *Penny v. Rochester R. Co.*, 7 App. Div. 595, 40 N. Y. Supp. 172.

In *Murphy v. Backer*, 67 Minn. 510, 70 N. W. 799, where a plaintiff attempted to recover the usurious interest paid to defendant, on cross-examination the defendant was asked as to his having made certain other usurious loans to other persons.

The defense being an alibi, the defendants testified as to their whereabouts from 7 p.m. of the evening on which the murder took place. On cross-examination they were asked as to where they were from noon of the day preceding the evening of the crime. *Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349.

42. *Le Beau v. The People*, 34 N. Y. 223, wherein a witness for the purpose of showing illicit intercourse was asked on cross-examination whether or not she was in the habit of having sexual intercourse with others than her husband before she

had connection with the prisoner, the court said: "This question was, . . . I think, properly overruled. It went back more than two years prior to the commission of this offense, and could have little or no bearing upon the case. It could have added nothing to the depravity of her moral character, as already proved, and would have no tendency to impeach her credibility before the jury more than it was already impeached. Her loose conduct with other men two years before would have thrown no light upon her purpose and conduct upon the occasion in question. The admissibility of this testimony, and also that offering to show her illicit connection with other named persons, has been lately held in this court to rest in the discretion of the court at the trial—only to be reviewed for abuse. . . . Though I wish to say that, in my opinion, as a general rule, evidence, on cross-examination, tending to impeach the credibility of a witness, should be rejected with very great caution. Its exclusion can rarely be proper."

43. *State v. Hill*, 52 W. Va. 296, 43 S. E. 160, wherein the court said: "It may be a question merely intended to embarrass the witness, worry the witness, exposing indecent things in court, tending to corrupt morals, and answering no fairly useful purpose on the trial. It almost invariably wounds the feelings of the witness and his family. It removes the mantle of oblivion and forgiveness, by reopening the pages of years past, and exposing acts done in the infirmity of human nature amid the temptations that beset life. If this door is opened wide, the witness stand will be a terror; men will suppress evidence from fear of it, to the injury of public justice; and it will threaten

**2. Incriminating Questions.** — A. GENERALLY. — It is a well settled rule that a witness will not be compelled to answer questions on cross-examination which will incriminate him.<sup>44</sup>

**Exposure to Fine or Forfeiture.** — And the rule also applies with

both the worthy and unworthy witness, and be a cross upon which attorneys too zealous in their cause will crucify witnesses to suit their own ends. It would tend to disorder in courts. Rarely, very rarely, should it be tolerated. The rule that a witness can only be impeached by evidence of general reputation as regards truth and veracity, would tend to forbid on cross-examination such discrediting questions."

44. *Cates v. Hardacre*, 3 Taunt. 424; *Rex v. Slaney*, 5 Car. & P. 213; *Maloney v. Bartley*, 3 Camp. 210; *Claridge v. Hoare*, 14 Ves. 59; *Paxton v. Douglas*, 19 Ves. 225.

*United States.* — *U. S. v. Dickinson*, 2 McLean 325, 25 Fed. Cas. No. 14,958; *Neal v. Coningham*, 1 Cranch C. C. 76, 17 Fed. Cas. No. 10,067; *U. S. v. Moses*, 1 Cranch C. C. 170, 27 Fed. Cas. No. 15,824; *U. S. v. Strother*, 3 Cranch C. C. 432, 28 Fed. Cas. No. 16,412.

*Connecticut.* — *Benjamin v. Hathaway*, 3 Conn. 528.

*Indiana.* — *Lister v. Baker*, 6 Blackf. 439.

*Iowa.* — *Hunt v. McCalla*, 20 Iowa 20; *Printz v. Cheeney*, 11 Iowa 469.

*Louisiana.* — *Planter's Bank v. George*, 6 Mart. 679.

*Maryland.* — *Roddy v. Finnegan*, 43 Md. 490.

*Massachusetts.* — *Com. v. Willard*, 22 Pick. 476; *Faunce v. Gray*, 21 Pick. 243; *Com. v. Savory*, 10 Cush. 535; *Mayo v. Mayo*, 119 Mass. 290; *Foster v. Pierce*, 11 Cush. 437, 59 Am. Dec. 152; *Com. v. Price*, 10 Gray 472, 71 Am. Dec. 668.

*Michigan.* — *People v. Arnold*, 40 Mich. 710; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321.

*Missouri.* — *State v. Marshall*, 36 Mo. 400.

*New Hampshire.* — *Amherst v. Hollis*, 9 N. H. 107; *State v. K.*, 4 N. H. 562; *Janvrin v. Scammon*, 29 N. H. 280; *Copp v. Upham*, 3 N. H. 159.

*New York.* — *Mauran v. Lamb*, 7 Cow. 174; *People v. Rector*, 19 Wend.

568; *Burns v. Kempshall*, 24 Wend. 360; *Bank of Saline v. Henry*, 2 Denio 155; *Curtis v. Knox*, 2 Denio 341; *Maine v. People*, 9 Hun 113; *Cloyes v. Thayer*, 3 Hill 564; *People v. Herrick*, 13 Johns 82, 7 Am. Dec. 364.

*North Dakota.* — *State v. Pancoast*, 5 N. D. 514, 67 N. W. 1,052, 35 L. R. A. 518.

*Ohio.* — *Warner v. Lucas*, 10 Ohio 336.

*Pennsylvania.* — *Nass v. Vanswearingen*, 7 Serg. & R. 192.

*Wisconsin.* — *State v. Hopkins*, 23 Wis. 309.

A witness having testified in chief, was asked on cross-examination "If he was not engaged at the time or shortly before the commencement of that fight, some distance off, playing cards with a negro fellow?" The question was objected to and the court refused to admit the witness to answer. The reason assigned by the court was that an affirmative answer involved the degradation and perhaps the punishment of the witness. It was held that while a witness cannot be compelled to testify to any fact which might subject him to punishment or to a penalty, or which would render him infamous, still there was no punishment or penalty affixed by law for simply playing cards or even for playing cards with a negro. It was also held that the limits of this rule had not been clearly drawn in this state; that it must be determined by policy and principle and largely by the sound discretion of the court. *Sodusky v. McGee*, 5 J. J. Marsh. (Kv.) 621.

*Burger v. State*, 83 Ala. 36, 3 So. 319, *Stone, C. J.*: "The criminal court committed no reversible error in allowing the witness, Henry Davis, to be asked on cross-examination if he did not tell the officer, in reply to an inquiry, that he did not know where the defendant was. Much latitude must be allowed on cross-examination, and much must be entrusted to the enlightened discretion of the

equal force to questions which expose the witness to a fine or forfeiture,<sup>45</sup> although on this question there are authorities to the effect that a witness is not excused as to fines and forfeitures. A public officer before whom proof was taken of the execution of an instrument is a competent witness to prove that it was done out of the state, but he is not bound to answer any question which may impeach his conduct as a public officer.<sup>46</sup>

B. FACTS FORMING LINKS IN CHAIN OF EVIDENCE. — And it has been settled and is the received doctrine that a witness is entitled to decline answering not only questions which directly incriminate him, but also any questions which may apply to facts forming links in the chain of incriminating evidence.<sup>47</sup>

C. DANGER OF INCRIMINATION MUST BE REAL. — To come within this rule the questions must be of such a character as to elicit answers which will directly implicate the witness, and not indirectly and by inference;<sup>48</sup> and accordingly a witness is not excused from

presiding judge. *Ingram v. State*, 67 Ala. 67; *Sylvester v. State*, 71 Ala. 17; *De Armand v. State*. *ib.* 351. Any testimony, tending to show bias or partiality of the witness to the party in whose behalf he has testified, is admissible on cross-examination. Even questions which call for incriminating answers may be allowed by the court on cross-examination; but if the witness is unwilling to answer such question he must not be forced to do so. Witnesses cannot be required to criminate themselves, if they claim their constitutional exemption. What we have said relates to ordinary witnesses. If defendants in criminal prosecutions elect to make statements, or testify in their own behalf, rules somewhat different are applied. *Clark v. State*, 78 Ala. 474."

45. See cases cited in preceding note.

46. *Higdon v. Heard*, 14 Ga. 255; *Wilkins v. Malone*, 14 Ind. 153; *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498.

47. *Foster v. People*, 18 Mich. 266.

48. *Osborn v. London Dock Co.*, 10 Exch. 698; *Fernandez, ex parte*, 10 C. B. N. S. 3; *Richman v. State*, 2 Greene (Iowa) 532.

In *Com. v. Kimball*, 24 Pick. (Mass.) 366, the first exception taken was that certain witnesses were called and questioned whether they had purchased spirituous liquors of the defendant, and though the question was objected to they were required to

answer it. It was objected to on the ground that it would tend to subject the witness to a criminal prosecution, and to bring them into disgrace. The court said: "We think it must be understood from the bill of exceptions that the objection, though said to be made in behalf of the witnesses, was in effect made by themselves, and therefore if they ought not to have been required to answer, the objection was improperly overruled. It was also contended on the part of the government, that whether the objection was rightly or wrongly overruled, it affected the rights of the witnesses only, and the defendant could take no advantage of it. But we think it would be difficult to maintain this position. If the evidence was incompetent and the objections seasonably taken by the proper party and by law ought to have been sustained, it could not be held that the verdict was supported by legal evidence. But we are of the opinion that the objection was properly overruled, and that the answer to the question had no tendency to charge the witness with a crime or to constitute a link in the chain of evidence, tending to that result. The distinctions between questions, the answers to which would tend to criminate the witness, and those which a witness may be required to answer, are extremely nice and refined, and the cases depend much upon their own circumstances.

answering questions which "may tend" to incriminate him.<sup>49</sup>

D. PRIVILEGE PERSONAL TO WITNESS. — The privilege to refuse to answer incriminating questions is one personal to the witness and must be claimed by him, and he should make his objection to the court;<sup>50</sup> the objection cannot be made by a party.<sup>51</sup>

E. QUESTION FOR COURT. — It is for the trial court to determine whether a witness is privileged from testifying to facts on cross-examination which will incriminate him, and it must appear to the court that there is real danger from all the circumstances.<sup>52</sup> And if the court is satisfied that the answers to the questions objected to will have the effect of incriminating the witness, it is the duty of the court to allow the privilege without exacting from the witness how he would be incriminated by the answer which the truth might oblige him to give.<sup>53</sup>

The mere statement of a witness on oath that the answer to the

What crime would the answer of the witness tend to fix on him? Not drunkenness, for *non constat*, because he buys, he will drink to excess. The fact of buying is not made criminal by the statute. Nor is it a question the answer to which would disparage the character. The cases commonly put to illustrate that rule are the questions whether the witness has been set in the pillory or sent to the state prison, or convicted of a felony. Suppose a murder, arson or burglary committed in a house of ill-fame; could no witness be asked respecting it, because it would lead to the question whether he was there for an improper purpose? The question must be of a fact which directly implicates his own character, not indirectly and by inference."

49. *Bull v. Loveland*, 10 Pick. (Mass.) 9.

In *Macbride v. Macbride*, 4 Esp. 243, the defendant proposed to ask one of the witnesses if she did not live in a state of concubinage with the plaintiff. Lord Alvanley interposed and prevented the putting of the question. He observed, "I do not go so far as others may. I will not say that a witness shall not be asked what may tend to disparage him. I think those questions only should not be asked which have the direct and immediate effect to disgrace or disparage the witness."

50. *England*. — *Rex v. Adey*, 1 M. & Rob. 94; *Marston v. Bownes*, 1 Ad. & E. 31.

*Connecticut*. — *Treat v. Browning*, 4 Conn. 408, 10 Am. Dec. 156.

*Illinois*. — *Looney v. People*, 81 Ill. App. 370.

*Massachusetts*. — *Foster v. Pierce*, 11 Cush. 437, 59 Am. Dec. 152; *Mayo v. Mayo*, 119 Mass. 290; *Com. v. Price*, 10 Gray 472, 71 Am. Dec. 668.

*New York*. — *Ward v. People*, 6 Hill 144; *Cloyes v. Thayer*, 3 Hill 564; *Burns v. Kempshall*, 24 Wend. 360.

*Wisconsin*. — *State v. Hopkins*, 23 Wis. 309.

51. *San Antonio St. Ry. Co. v. Muth*, 7 Tex. Civ. App. 443, 27 S. W. 752.

52. *Valliant v. Dodemead*, 2 Atk. (Eng.) 524; *Warner v. Lucas*, 10 Ohio 336.

53. In *People v. Mather*, 4 Wend. (N. Y.) 230, the court said: "Where a witness claims to be excused from answering the question because the answer may disgrace him, or render him infamous, the court must see that the answer may, without the intervention of other facts, fix on him moral turpitude. Where he claims to be excused from answering because his answer will have a tendency to implicate him in a crime or misdemeanor, or will expose him to a penalty or forfeiture, then the court are to determine whether the answer he may give to the question can criminate him directly or indirectly, by furnishing direct evidence of his guilt, or by establishing one of many facts, which together may con-

question asked will tend to criminate him will not suffice to protect him from answering, if, from all the circumstances surrounding the case, the court is satisfied that the answer will have no such effect as that claimed by the witness.<sup>54</sup>

It is customary practice with the court, although it is discretionary, to advise a witness that he is not bound to incriminate himself where it appears necessary to protect the rights of the witness.<sup>55</sup>

F. LOSS OF PRIVILEGE. — a. *Conviction Barred by Limitation.* Where the witness is protected from conviction by the statute of limitations he can make no claim of privilege, but he is bound to answer the questions.<sup>56</sup>

b. *Waiver.* — Where a witness voluntarily waives his privilege on cross-examination and gives evidence as to a part of a transaction which might incriminate him, he must give an entire account of

stitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result; and if they think the answer *may* in any way criminate him, they must allow his privilege, without exacting from him to explain how he would be criminated by the answer which the truth may oblige him to give. If the witness was obliged to show how the effect is produced the protection would at once be annihilated. The means which he would be in that case compelled to use to obtain protection would involve the surrender of the very object for the security of which the protection was sought."

54. *Chesapeake Club v. State*, 63 Md. 446.

55. *Mayo v. Mayo*, 119 Mass. 290, wherein the court said: "If, after having advised him generally, it appears to the presiding justice that the witness intends to insist upon the privilege, but does not fully understand his rights, it is incompetent for him to instruct the witness fully as to them, otherwise the witness might be entrapped into a position where his privilege as a witness would be entirely defeated through his ignorance, and he would be obliged fully to criminate himself. *Foster v. Pierce*, 11 Cush. 437; *Commonwealth v. Price*, 10 Gray 472. In the case at bar, therefore, it was competent for the presiding justice, after the witness had made some answers tending to criminate her, if he was satisfied that she had answered ignorantly and

in misapprehension of her rights and duty of the court, to instruct her more fully and to advise her that she was not obliged to answer further. And it necessarily followed that such answers already given should be stricken out."

56. *Williams v. Farrington*, 2 Cox Ch. 202; *Davis v. Reid*, 5 Sim. 443; *Rex v. Hulme*, L. R. 5 Q. B. 377; *Rex v. Skeen*, 8 Cox C. C. 143; *Wolfe v. Goulard*, 15 Abb. Pr. (N. Y.) 336; *Floyd v. State*, 7 Tex. 251.

In *Weldon v. Burch*, 12 Ill. 374, an action of trespass for an assault and battery in which the plaintiff was forcibly taken from his house by ten or twelve persons in disguise and carried some distance and much maltreated, several persons residing in the neighborhood were called as witnesses. On cross-examination these witnesses refused to answer certain questions on the ground that they might subject themselves to indictment and punishment. It was claimed that the offense was barred by the statute of limitations, lapse of time had secured a perfect defense to any attempt to prosecute them criminally. "The reason of the rule that a party shall not be compelled to give testimony that may tend to subject him to a criminal prosecution, had no application to these witnesses. They could not, therefore, claim the benefit of the rule."

In *Close v. Olney*, 1 Denio (N. Y.) 319, a witness called to establish the defense of usury, declined to testify

the transaction, and he cannot claim his privilege when asked further questions, the answering of which would incriminate him.<sup>57</sup>

on the grounds that his evidence might expose him to an indictment. It appeared that the statute of limitation had barred all prosecutions. It was held, "Where the statute has barred a prosecution for the offense and all suits to enforce a penalty, the court must see that the witness cannot be prejudiced, and in such a case he is not left to judge whether he can safely testify or not, but the court is bound to pronounce against his claim to exemption."

**57. England.**—*East v. Chapman*, 1 Mood. & M. 47; *Ewing v. Osbaldistor*, 6 Sim. 608; *Dixon v. Vale*, 1 Car. & P. 278.

**Connecticut.**—*Norfolk v. Gaylord*, 28 Conn. 309.

**Iowa.**—*State v. Fay*, 43 Iowa 651.

**Maryland.**—*Roddy v. Finnegan*, 43 Md. 490.

**Massachusetts.**—*Foster v. Pierce*, 11 Cush. 437, 59 Am. Dec. 152; *Brown v. Brown*, 5 Mass. 320.

**New Hampshire.**—*State v. Foster*, 23 N. H. 348, 55 Am. Dec. 191; *Coburn v. Odell*, 30 N. H. 540.

**New York.**—*People v. Carroll*, 3 Park. Crim. Rep. 73; *People v. Lohman*, 2 Barb. 216.

**Vermont.**—*Chamberlain v. Wilson*, 12 Vt. 491, 36 Am. Dec. 356.

**Wisconsin.**—*State v. Hopkins*, 23 Wis. 309.

"The rule that a witness is not obliged to criminate himself is well established. It is contended, however, that if the witness waives that privilege when testifying to one fact in the cause, he cannot claim it while testifying to any other fact material to the issue. If he consents to testify to one matter tending to criminate himself, he must testify fully in all respects relative to that matter so far as material to the issue. If he waives the privilege, he does so fully in relation to that act. But he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act, of which he has spoken, even though they may be material to the issue. His consent to speak of one criminal act cannot deprive him of

that protection which the law affords him so far as respects other criminal acts not connected with it." *Low v. Mitchell*, 18 Me. 372.

In *Clark v. Reese*, 35 Cal. 89, it was said by the court: "It is provided by section four hundred and eight of the Practice Act that a witness need not 'give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed.' His privilege, therefore, would not shield him from answering the question.

"When the defendant became a witness in his own behalf he subjected himself to all the rules regulating the examination and cross-examination of witnesses. His privilege was no greater than that of any other witness. He dropped, for the time being, the character of a party, and took on that of a witness. On the cross-examination the plaintiff's counsel asked him the question: 'Did you ever call Mrs. Clark your "Dear Carrie" or your "dear child?"' To which he replied: 'I refuse to answer; when a man takes personal liberties with a woman, he should not come on the stand and swear to it.' No one hearing this remark could doubt that he meant to be understood as having taken personal liberties with the plaintiff. The counsel then asked him: 'Did you ever take improper liberties with Mrs. Clark?' And after the witness stated that he did not understand the question, it was put in unmistakable language. The witness declined to answer, and the court held that he must answer or be committed for contempt. . . . Thereupon the defendant answered the question in the affirmative. Was this question admissible? Had the witness, claiming privilege, refused to answer the first question proposed, on the ground that his reply would establish one fact in a transaction tending to degrade his character, the inquiry would be different from the one before us.



But it is unquestionably true that where the witness has not actually admitted incriminating facts he may stop short at any point and determine that he will go no further in that direction. He may decide that his protection does not require him to avoid answer-

But in advance of any question tending to implicate him in a transaction of that character, he volunteers a statement by which he insinuates that he had taken personal liberties with the plaintiff. The plaintiff was clearly entitled to have direct answers, and a full explanation of the matter indirectly alluded to by the witness."

In *State v. K.*, 4 N. H. 562, the court said: "The witness is not to be compelled to answer any question, if the answer will tend to expose him to a criminal charge. But if he state a particular fact in favor of the respondent, he will be bound, on his cross-examination, to state all the circumstances relating to that fact, although in so doing he may expose himself to a criminal charge. We shall not compel the witness to state that he knows the respondent to be innocent, if a full account of his knowledge on that subject will tend to furnish evidence against himself. But if he choose to testify that fact, we shall permit the attorney general to inquire how the witness knows that fact, and compel him to answer the question. It is clearly inadmissible to permit a witness to give a partial account of his knowledge of a transaction, suppressing all the circumstances, whether the evidence is to be used in favor of or against the state."

In *Foster v. Pierce*, 11 Cush. (Mass.) 437, 59 Am. Dec. 152, the court said: "The general principle of law, that a witness is not bound to criminate himself, is not controverted. But the question is at what stage of the case is he to claim his privilege? Can the witness proceed to state material facts bearing upon the case, and favorable to one party, and when cross-examined by the opposite party in reference to the same subject, decline answering by reason of his privilege not to criminate himself? In the case of *Dixon v. Vale*, 1 Car. & P. 278, it was ruled by Best, C. J., that if a witness, being cautioned that

he is not obliged to answer a question which may criminate him, still does answer such question, he can afterward take the objection to any further question relative to the whole transaction. In *East v. Chapman*, 2 Car. & P. 570, Abbott, C. J., says upon a similar objection taken to answering further questions: 'You might have objected to giving any evidence, but having given a long history of what passed, you must go on, otherwise the jury will only know half the matter.' It is said in 1 Greenl. Ev., § 451, where the witness, after being advertised of his privilege, chooses to answer, he is bound to answer everything relating to the transaction.

"The latter proposition would fully embrace the present case, as the presiding judge in the bill of exceptions states that from the beginning of his evidence the witness had fully understood his privilege, as was apparent to the court. This being so, it was unnecessary for the court further to state the same to him. With this knowledge of his rights, having chosen to answer in part, he must answer fully. In the case of *Brown v. Brown*, 5 Mass. 230, a libel for divorce, the counsel proposed that a witness should be allowed to testify that he knew the party to have committed the crime of adultery, but without naming the person with whom the adultery was committed, but the court said they should inquire of the witness with whom it was committed.

It would seem quite reasonable to go somewhat further than the present case requires, and adopt the broad principle that the witness must claim his privilege in the outset, when the testimony he is about to give will, if he answers fully all that appertains to it, expose him to a criminal charge, and if he does not, he waives it all together. In *Chamberlain v. Wilson*, 12 Vt. 491, the principle is directly held that if a witness submit himself to testify about the very matter tending to criminate himself, with-

ing concerning some facts, when as to others the tendency is or seems to him more direct or incriminating.<sup>58</sup>

**The Reason of This Rule** is that a witness cannot arbitrarily waive and in part reserve his privilege, revealing only so much of the truth as will benefit one of the parties, and asserting his privilege when interrogated as to facts which would cut the other way.<sup>59</sup>

**Trial De Novo.**—The mere fact, however, that a witness has waived his right to claim the privilege of refusing to answer incriminating questions on the one trial does not operate to preclude him from claiming the privilege upon a subsequent trial *de novo*.<sup>60</sup>

**c. Accomplices.**—Where an accomplice becomes a state's witness he waives any right to refuse to answer questions which will incriminate him;<sup>61</sup> although it is held that where the questions are extended to collateral matters the accomplice is not bound to answer where

out claiming his privilege, he must submit to a full cross-examination. If he states a particular fact in favor of the party calling him, he will be bound on his cross-examination to state all the circumstances relating to that fact, although in so doing he may expose himself to a criminal charge. *State v. K.*, 4 N. H. 562."

58. *Foster v. People*, 18 Mich. 266.

59. *Georgia R. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 794.

60. *Georgia R. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 794, holding also that the fact that the witness was a party made no difference in this respect. The court said: "There is, however, no necessity or reason for extending this rule [having reference to the right of the witness to claim his privilege] to cover a case where a witness voluntarily testifies as to privileged matters upon one trial, and subsequently, at a second and entirely different trial, claims his privilege of giving no testimony whatever in regard thereto. . . . A party often waives at one trial what he has an undoubted right to object to at a subsequent hearing of the same case."

61. *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321.

See also *Com. v. Price*, 10 Gray (Mass.) 472, 71 Am. Dec. 668, where the court said: "If a witness consents to testify at all, so as to criminate himself as well as the defendant, in the matter on trial, he must answer all questions legally put to him concerning that matter. He cannot be

allowed to state such facts only as he pleases to state, and to withhold other facts. *Foster v. Pierce*, 11 Cush, 437, and cases there cited. *Low v. Mitchell*, 18 Maine 374. If he could be allowed to do so, injustice might be done to the defendant, either by the keeping back of testimony which would tend directly to his acquittal, or which would so discredit the witness as to induce the jury wholly to disregard his previous testimony."

In *Foster v. People*, 18 Mich. 266, an accomplice on cross-examination admitted that he had made an affidavit for continuance, in which he swore that, as he had been advised by counsel, and believed, he had a good defense upon the merits; and it was held that he could be asked and compelled to answer what that defense was. The court said: "It would certainly lead to most startling results if an accomplice, who has made out a clear showing of a prisoner's guilt, and has, in doing so, criminated himself to an equal degree, could refuse to have his veracity, or fairness, or bias, or corruption, tested by a cross-examination, and yet be allowed to stand before court and jury on the same footing with any other witness who has been perfectly candid, but who may have been convicted of a similar felony. It is perfectly evident that where a witness who has undertaken to give a full account of a transaction, and has not spared himself from conclusive accusation, then turns round and refuses to answer further, his motive

he might expose himself to a penal liability or to any kind of punishment; and accordingly he cannot be asked on cross-examination as to other offenses in which he was not concerned with the prisoner on trial.<sup>62</sup>

G. EVIDENCE GIVEN UNDER MISAPPREHENSION. — Where a witness gives testimony on cross-examination under a misapprehension as to his privilege from answering incriminating questions, and as to having to answer fully and minutely as to any incriminating evidence given in part, it is proper for the court to stop the cross-examination and cause the answers to be stricken from the record.<sup>63</sup>

H. INFERENCE FROM CLAIM OF PRIVILEGE. — a. *In General.* Where a witness has declined to answer a question on cross-examination on the ground that the answer thereto will incriminate him, no inference of the truth of the fact is proper to be drawn from that circumstance.<sup>64</sup>

b. *Answering in Part.* — But where a witness waives his constitutional privilege and takes the stand in his own behalf, and after testifying in part refuses to submit to a full cross-examination within proper limits, all his conduct and demeanor are proper matters for comment by counsel and court, as well as for the consideration of the jury.<sup>65</sup>

must be something more than to save himself from the criminal exposure, and it is of great importance to learn why such a course is adopted. If, in those cases where cross-examination is most desirable, to test the credit of a man who is seeking to save his own liberty, by swearing away that of another, it can be completely prevented at the option of the witness himself, it would be difficult to justify the rule which allows co-defendants to be used by the prosecution at all, when they cannot be received for the defense. I cannot conceive that the law will tolerate such a state of things. When a man has voluntarily admitted his guilt, he has done all that he can to criminate himself, and his protection from further disclosure on the same subject is no protection whatever, because it cannot undo what makes the whole mischief."

62. In *State v. Staples*, 47 N. H. 113, 90 Am. Dec. 565, the state offered a witness admitted to be an accomplice of the respondent in the agreement charged in the indictment where evidence is offered and received only under the implied condition of making a full confession of

the whole truth. The respondent's counsel on cross-examination proposed to ask witness "If she had not about the time of the commission of the offense charged in the indictment, committed other larcenies, and if she had not charged innocent persons with other larcenies and confessed this fact?" The court said: "It will be readily seen that those inquiries extended to collateral matters, and beyond the issue directly before the court. Now, where it reasonably also appears that the answer of the witness will have a tendency to expose her to a penal liability, or to any kind of punishment, or to a criminal charge, the authorities are clear that the witness is not bound to answer. Nor is the witness bound to testify to any particular fact which would be but a single link in a chain of evidence which is to convict the witness. Against such inquiries the law gives the witness the full privilege of protection."

63. *Mayo v. Mayo*, 119 Mass. 290.

64. *Beach v. U. S.*, 46 Fed. 754; *Com. v. Harlan*, 110 Mass. 411.

65. *State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88.

In *State v. Garrett*, 44 N. C. 357,

**3. Exposure to Civil Liability.** — A witness will not be excused from answering proper questions on cross-examination merely because he may subject himself to a civil liability.<sup>66</sup> And he may likewise be compelled on cross-examination to give evidence which may affect his interest;<sup>67</sup> although there are some early cases hold-

the question was whether the attorney general, after having asked the defendant's witness a question tending to his disparagement or disgrace, and which he, on that account, refused to answer, had the right in his argument to the jury to infer from his silence that the witness was unworthy of credit. The court said: "There is no subject connected with the examination of witnesses on a *nisi prius* trial, whether civil or criminal, upon which there seems to have been more diversity of opinion and practice in the English courts, than upon the one now under consideration. Judges of great eminence have refused to permit a question tending to degrade a witness to be put to him. Others have permitted the question to be put, but have advised the witness that he is not bound to answer it; while most, but not all of them, have held that no inference to the discredit of the witness could be drawn from his refusal to answer. In this state we consider it settled that such a question may be asked. . . . It has been decided in this state, as we have already seen, that the witness cannot claim the only complete and effectual protection of not having the disparaging question put to him, and we are inclined to think with the very eminent judges who decided *State v. Patterson*, that it follows as a necessary consequence that the witness is bound to answer. But if that be not so, and it is admitted that the witness may refuse to answer, we yet hold that such refusal is a proper subject of comment to the jury."

**66.** *Alabama.* — *Alexander v. Knox*, 7 Ala. 503.

*Connecticut.* — *Benjamin v. Hathaway*, 3 Conn. 528.

*Kentucky.* — *Gorham v. Carroll*, 13 Litt. 221; *Black v. Crouch*, 3 Litt. 226; *Com. v. Thurston*, 7 J. J. Marsh. 62.

*Louisiana.* — *Planter's Bank v. George*, 6 Mart. 679.

*Maine.* — *Lowney v. Perham*, 20 Me. 235.

*Maryland.* — *Hays v. Richardson*, 1 Gill & J. 366; *Taney v. Kemp*, 4 Har. & J. 282.

*Massachusetts.* — *Com. v. Willard*, 22 Pick. 476; *Faunce v. Gray*, 21 Pick. 243; *Bull v. Loveland*, 10 Pick. 9.

*Mississippi.* — *Judge of Probate v. Green*, 2 Miss. 146.

*New Hampshire.* — *Copp v. Upham*, 3 N. H. 159.

*New York.* — *Mauren v. Lamb*. 7 Cow. 174.

*North Carolina.* — *Harper v. Burrow*, 28 N. C. 30.

*Pennsylvania.* — *Nass v. Van Swearingen*, 7 Serg. & R. 192.

*Tennessee.* — *Zollicoffer v. Turney*, 6 Yerg. 297.

*Vermont.* — *Ward v. Sharp*, 15 Vt. 115.

In *Com. v. Thruston*, 7 J. J. Marsh. (Ky.) 62, the defendant was indicted for importing slaves into the state in violation of the statute, and a verdict and a judgment having been rendered in his favor, the commonwealth complained that the circuit court erred in refusing to compel a witness to testify to facts against the accused, which the witness said on his oath would operate to his own prejudice. It was held that an affirmative answer to the question could not subject the witness to punishment for a crime, although it may have subjected him to a civil action, and a witness will not be excused merely because he may subject himself to a civil suit.

**67.** *Baird v. Cochran*, 4 Serg. & R. 397, when it was said: "The court think it better to determine the main question, whether a witness may be compelled to give a question which may affect his interest. It is a question of considerable importance, which often occurs, has never been decided upon by this court, and is now open to consideration, on principle. From the nature of society it would seem that every man

is bound to declare the truth, when called upon in a court of justice, except the disclosure will tend to convict him of some crime, or render him subject to some penalty. In such cases, the preservation of liberty requires that a man should not be compelled to accuse himself. Perhaps, too, there may be cases where he shall not be obliged to give evidence of a matter which may degrade him in the public opinion, though it be not punishable by law. With these exceptions, every man may be compelled on a bill filed against him in equity, to declare the truth, although it affect his interest. Why then should he not be compelled at law, except where he is a party to the suit? The court in which he is examined will take care to protect him to questions put through impertinent curiosity, and confine his evidence to those points which are really material to the questions in litigation. So far, his neighbor has an interest in his testimony, and no farther ought he to be questioned. The party to a suit may object to a witness who is called to prove a thing which promotes his own interest; because in such case his veracity may be suspected; but no objection lies if he swears against his interest. . . . All the objection is on the part of the witness, who claims to be exempt from testifying, as a personal privilege. Our constitution protects him no further than in not being obliged to *accuse* himself, which plainly refers to something criminal, penal, or infamous, and not merely to a matter of interest. There is no act of assembly to protect him. Neither is he protected by considerations drawn from general policy and the good of society. On the contrary, the general welfare will be best promoted by considering the disclosures of truth as a debt which every man owes to his neighbor, which he is bound to pay when called on, and which he in turn is entitled to receive."

In *Bull v. Loveland*, 10 Pick. (Mass.) 9, the court said: "In this case the general question has been argued at some length, whether a witness, without his own consent, can be called to testify to any fact pertinent to the issue between other parties, where such testimony may tend

to charge him with a debt, or subject him to pecuniary loss or ability, but where it does not tend to expose him to punishment, or subject him to any penalty or forfeiture.

"This question has been the subject of much discussion and difference of opinion among eminent judges, and those of the greatest experience in *nisi prius* trials, both in England and in the United States.

In the case of the United States *v.* Grundy, 3 Cranch 344, it seems to be taken for granted by Marshall, C. J., that a man in a civil case is not bound to testify against his interests. But that was before the discussions in England and the opinion of the judges in the House of Lords, growing out of questions raised in Lord Melville's trial. Besides, the question was not argued, and it arose where the witness was called to testify to a fact which would have rendered a ship forfeited, under the registry acts of the United States, in which, at the time of the forfeiture, he himself claimed an interest.

"In *Webster v. Lee*, 5 Mass. 334, it was stated by Parsons, C. J., in giving the opinion of the court, that a witness may, *if he consents*, testify against his own interests. Although this expression implied that his consent was requisite, yet the case did not call for the expression of an opinion upon the question whether he could be compulsorily required to testify against his will.

"In a later case, however, *Appleton v. Boyd*, 7 Mass. 131, the same point again came before the same eminent judge at *nisi prius*, upon which he ruled that a witness cannot be required, without his consent, to testify against his own pecuniary interest. This point among others was reserved, but it was not argued or noticed by the counsel on either side. In giving the opinion the court cited no authority; and in noticing this point, seemed to take the rule for granted, and considered rather, whether from the facts reported, the witness had an interest in the question, and whether by law it would excuse him from giving his testimony. . . . On the whole we think the weight of authority is in favor of the rule that a witness may pertinent be called and examined in a

ing to the contrary.<sup>68</sup>

## VII. CROSS-EXAMINATION OF PARTY.

**1. Civil Actions. — A. GENERALLY. —** As has been shown in previous sections, the same general rules apply upon the cross-examination of a party as in the case of other witnesses, although, as it is also shown, the tendency of the courts is to allow greater liberty as to inquiry concerning matters not mentioned on the direct examination, and it is generally conceded that a party to an action taking the witness stand is subjected to a thorough and rigid cross-examination.<sup>69</sup>

**B. INCRIMINATING QUESTIONS. —** It has been held that where a party testifies in his own behalf he waives the right to refuse on cross-examination to answer questions which might tend to incriminate him in regard to any matter about which he has testified in his examination in chief,<sup>70</sup> although there is authority to the

matter to the issue, where his answers will not expose him to a criminal prosecution, or tend to subject him to a penalty or forfeiture, although they may otherwise adversely affect his pecuniary interest, and that the witness was properly called and examined in the present case."

68. *Starr v. Tracy*, 2 Root (Conn.) 528; *Appleton v. Boyd*, 7 Mass. 131.

69. *Reese v. Bald Mt. Consol. Gold Mining Co.*, 133 Cal. 285, 65 Pac. 578; *Hayward v. People*, 96 Ill. 492.

A defendant testifying in his own behalf may be asked on cross-examination any question, the answer to which might corroborate plaintiff's testimony or contradict the defendant's. *McManus v. Mason*, 43 W. Va. 196, 27 S. E. 293.

The plaintiff sought to recover goods sold to defendant, claiming that she made fraudulent representations to him to the effect that she had means of her own to meet her obligations. It was held competent on cross-examination of the defendant, who testified that she had \$1,000.00 of her own means, to ask her from whom she received the money. *Van Sciver Co. v. McPherson*, 199 Pa. St. 331, 49 Atl. 73.

In *McGraw v. Friend & T. Lumb Co.*, 133 Cal. 589, 65 Pac. 1051, an ac-

tion to require damages for personal injuries, the plaintiff on cross-examination was asked if he had not testified by deposition that he was in the habit of going to a hotel situated in the vicinity of the accident, nearly every day. This question was held not irrelevant, as it tended to show the familiarity of the plaintiff with the place of the accident.

70. *Chicago City R. Co. v. Canevin*, 72 Ill. App. 81.

*Andrews v. Frye*, 104 Mass. 234, wherein the court said: "The defendants at the trial introduced evidence tending to show, as the plaintiffs admit, that the plaintiffs had not been appointed town agents. But this was not all. One of the plaintiffs, having offered himself as a witness in their behalf, was asked by the defendants on cross-examination whether the plaintiffs had a license to sell intoxicating liquors, and declined to answer the question upon the ground that it might have a tendency to criminate himself. This refusal to answer, like any other refusal to produce evidence in his own power, was competent evidence against him and his partner. A party offering himself as a witness in his own behalf stands differently in this respect from a third person brought into court to testify in a case in which he has no interest."

contrary.<sup>71</sup>

C. **PREJUDICIAL QUESTIONS.** — Although a party taking the stand in his own behalf subjects himself to a rigid cross-examination, yet it is fatal error where the cross-examination is perverted to the extent of prejudicing him before the jury.<sup>72</sup>

D. **DISCRETION OF COURT.** — As in the case of the cross-examination of other witnesses, the latitude allowed upon the cross-examination of a party rests in the sound discretion of the trial court, and is subject to review only upon an abuse of that discretion.<sup>73</sup>

2. **Criminal Prosecution.** — A. **GENERALLY.** — Under the old common law rule an accused person was not permitted to be a witness in his own behalf; but under the modern practice an accused may take the stand as a witness for himself, although his neglect or refusal to testify does not create a presumption against him.<sup>74</sup> There is authority, however, to the contrary.<sup>75</sup>

B. **LIMITS.** — When an accused avails himself of the privilege conferred by the statute to become a witness in his own behalf he subjects himself voluntarily to the situation of any other witness; and if he is compelled to answer disparaging questions or to give evidence to the issue which is injurious to himself it is in conse-

71. A party testifying in his own behalf is not compelled on cross-examination to answer questions which might tend to criminate him or to bring infamy, disgrace or public contempt on himself or his family, (although he involuntarily testified concerning these matters on his direct examination), and this notwithstanding the fact that at a previous trial of the case he had waived his privilege of remaining silent. *Georgia R. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 794.

72. *Dodge v. Weill*, 81 Hun 113, 30 N. Y. Supp. 681; *Hood v. Chicago & N. W. R. Co.*, 95 Iowa 331, 64 N. W. 261.

Where the defendant in taking the witness stand in his own behalf subjects himself to a rigid examination, it is error to permit the examination to extend so far as to prejudice the defendant before the jury, where there was no other object in the cross-examination. *Gifford v. People*, 87 Ill. 210.

In *Hannah v. McKellip*, 49 Barb. (N. Y.) 342, it is held that a judge may permit counsel to ask a party examined as a witness on his cross-examination whether or not he has sworn falsely at other trials or on

other occasions, for that would be as to an act of his own which he might be able to explain; but the court has not the right to allow the adverse party to affect the credit of a witness by proving by him on his cross-examination that he has been accused by third persons of swearing falsely, for that would be mere hearsay evidence, and not proof of acts of the witness for which he is himself responsible.

73. *Bassett v. Glass*, 65 Kan. 500, 70 Pac. 336. The latitude allowed in the cross-examination of a party as a witness, tending to test his veracity, or on matters directly connected with the subject of his examination in chief, rests in the sound discretion of the trial court, and will not be controlled on appeal, except in cases of abuse of discretion.

74. *People v. Tyler*, 36 Cal. 522; *Long v. State*, 56 Ind. 182, 26 Am. Rep. 19; *Com. v. Scott*, 123 Mass. 239, 25 Am. Rep. 87; *Brandon v. People*, 42 N. Y. 265, N. Y. Code Crim. Proc., §393; *Ruloff v. People*, 45 N. Y. 213; *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121.

75. *State v. Cleaves*, 59 Me. 298, 8 Am. Rep. 422.

quence of his election which he has made to testify in his own behalf, which involves a waiver on his part at the time of the constitutional exemption. If he accepts the privilege given by the statute he takes it with its attendant dangers.<sup>76</sup> And under this rule

**76. California.**—*People v. Fong Ching*, 78 Cal. 169, 20 Pac. 396; *People v. Rodrigo*, 69 Cal. 601, 11 Pac. 481.

**Massachusetts.**—*Com. v. Lananan*, 13 Allen 563; *Com. v. Price*, 10 Gray 472, 71 Am. Dec. 668; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Bonner*, 97 Mass. 587.

**Michigan.**—*Leland v. Kauth*, 47 Mich. 508, 11 N. W. 292.

**Missouri.**—*State v. Miller*, 100 Mo. 606, 13 S. W. 832.

**New York.**—*Connors v. People*, 50 N. Y. 240; *People v. Casey*, 72 N. Y. 393; *Real v. People*, 42 N. Y. 270; *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128; *People v. Giblin*, 115 N. Y. 196.

**Ohio.**—*Wroe v. State*, 20 Ohio St. 460.

**Washington.**—*State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

While great latitude is allowed on cross-examination of the accused, when offering himself as a witness in his own behalf, yet the general scope of such a cross-examination is well defined, and the courts will not allow any transgression of the well understood limitations. The *People v. Stephenson*, 91 Hun 613, 36 N. Y. Supp. 595, where a police captain was accused of bribery, and was asked on cross-examination as to the length of time he had been on the police force; the amount of his salary from time to time; how much he had when he went on the force; how much he had at the time of the trial, and how much he had inherited, etc., etc. It was held prejudicial error.

In *People v. Tice*, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669, the boundaries of a cross-examination of a defendant in a criminal action are held to be that he may be required to answer questions affecting his credibility, and as to matters relative to the issue, although having no relation to his testimony on direct examination. The opinion also refers to the

discretion to be exercised by the trial court on such a cross-examination, and concedes that it may properly restrict it, but denies that it may extend it beyond relevant matters or matters affecting credit.

In *State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88, the questions presented were whether a person who is sworn as a witness at his own request could be compelled to answer questions upon his cross-examination as to facts tending to convict him, in relation to which he was not interrogated on his direct examination, and whether upon being permitted to refuse to answer such questions on the ground that his answers might tend to criminate him, such refusals may be commented upon by the state's counsel and be considered by the jury. The court said: "If the ruling that the prisoner had the right to decline answering had been correct, we should agree with his counsel that the subsequent ruling could not be sustained. But the first ruling was not correct. The respondent, by electing to testify in his own favor, waived his constitutional privilege. If he refuses to testify at all, the statute protects him from adverse comment or inference; but, if he avails himself of the statute, he waives the constitutional protection in his favor, and subjects himself to the peril of being examined as to any and every matter pertinent to the issue. If the respondent had not seen fit to make himself a witness in his own cause, the fact that he did not choose to testify could not have been commented upon by the state's counsel, nor would the jury have been at liberty to draw any inference detrimental to him from his silence. But, when he made himself a witness-in-chief, he subjected himself to the government's right of cross-examination. His object in taking the witness stand was to show himself innocent of this offense by testifying that he had not kept liquor for sale



the accused as a witness may be asked any questions on cross-examination on matters pertinent to the issue, or calculated to test his accuracy, veracity or credibility.<sup>77</sup> But it is also held that the

within the year; and putting himself in such a position, and declining to testify except to such matters as would tend to exculpate himself, refusing to answer the most direct, competent and material inquiry raised by the case, was a matter of great significance, which it was the right, if not the duty, of the state's counsel and of the court to bring prominently to the attention of the jury. Upon the whole, we are unable to reach any other conclusion than that the respondent's testimony, so far as it went—and not less the fact that it went no further—his refusal to submit to a full cross-examination, within proper limits, after waiving his constitutional privilege, and all his conduct and demeanor, were proper matters for comment by counsel and court, as well as for the consideration of the jury."

Where a defendant in a criminal case is testifying in his own behalf, it is proper on cross-examination, for the purpose of affecting his credibility, to ask him regarding certain instruments found in his possession, and which would tend to connect him with the crime of counterfeiting. *People v. Giblin*, 115 N. Y. 196, 21 N. E. 1,062, 4 L. R. A. 757.

When a defendant takes the witness stand as a witness in his own behalf, he subjects himself to a rigid cross-examination, the same as other witnesses. It is therefore competent to ask him as to specific immoral acts it is claimed he has committed. *People v. Conroy*, 153 N. Y. 174, 47 N. E. 258.

A defendant in a criminal action becoming a witness in his own behalf, completely waives the protection afforded him by the declaration of rights providing that a witness cannot be required to give evidence against himself. *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189.

In *Com. v. Mullen*, 97 Mass. 545, the court said: "The statute which allows a defendant in a criminal case, at his own request and not otherwise,

to testify in his own behalf, (St. 1866, c. 260) expressly provides that 'he shall be deemed a competent witness.' That is, competent not for a special purpose, or to give evidence only which shall operate in his own favor, but competent to testify to any facts relevant and material to the issue. Like all other witnesses, he is to tell the truth and the whole truth concerning any matter proper to be inquired about. If he offers himself as a witness, he waives his constitutional privilege of refusing to furnish evidence against himself, and may be interrogated as a general witness in the cause."

*77. Alabama.*—*Rains v. State*, 88 Ala. 91, 7 So. 315.

*Arkansas.*—*Baker v. State*, 58 Ark. 513, 25 S. W. 603.

*Illinois.*—*Spies v. People*, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

*Indiana.*—*Parker v. State*, 136 Ind. 284, 35 N. E. 1,105; *Thomas v. State*, 103 Ind. 419, 2 N. E. 808.

*Iowa.*—*State v. Helm*, 97 Iowa 440, 66 N. W. 751; *State v. Fay*, 43 Iowa 651.

*Kansas.*—*State v. Snyder*, 8 Kan. App. 686, 57 Pac. 135.

*Louisiana.*—*State v. Callian*, 109 La. 346, 33 So. 363.

*Maine.*—*State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *State v. Withan*, 72 Me. 531.

*Massachusetts.*—*Com. v. Lananan*, 13 Allen 563; *Com. v. Clark*, 145 Mass. 251, 13 N. E. 888; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346.

*Michigan.*—*People v. Bussey*, 82 Mich. 49, 46 N. W. 97; *State v. Hicks*, 79 Mich. 457, 44 N. W. 931; *State v. Glover*, 71 Mich. 303, 38 N. W. 874; *People v. Sutherland*, 104 Mich. 468, 62 N. W. 566.

*Mississippi.*—*State v. Nichols*, 29 Miss. 357.

*Minnesota.*—*State v. Klitzke*, 46 Minn. 343, 49 N. W. 54.

*Missouri.*—*State v. Clinton*, 67 Mo. 380, 29 Am. Rep. 506; *State v.*

Rugan, 68 Mo. 214; *State v. Testerman*, 68 Mo. 408; *State v. Cox*, 67 Mo. 392; *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 315; *State v. Blitz*, 171 Mo. 530, 71 S. W. 1,027.

*Nebraska*.—*Reed v. State*, (Neb.), 92 N. W. 321.

*Nevada*.—*State v. Cohn*, 9 Nev. 179.

*New York*.—*Connors v. People*, 50 N. Y. 240; *People v. McKane*, 143 N. Y. 455, 38 N. E. 950; *People v. Casey*, 72 N. Y. 393; *Ruloff v. State*, 45 N. Y. 213; *Fralich v. People*, 65 Barb. 48; *McGarry v. People*, 2 Lans. 227.

*North Carolina*.—*State v. Allen*, 107 N. C. 805, 11 S. E. 1,016.

*Oregon*.—*State v. Weaver*, 35 Or. 415, 58 Pac. 109.

*Pennsylvania*.—*Com. v. Mozier*, 135 Pa. St. 221, 19 Atl. 943.

*South Carolina*.—*State v. Merriam*, 34 S. C. 16, 12 S. E. 619.

*Texas*.—*Payne v. State*, 40 Tex. Crim. 290, 50 S. W. 363; *Holly v. State*, 39 Tex. Crim. 301, 46 S. W. 39; *Warren v. State*, 53 Tex. Crim. 298, 26 S. W. 1,082.

*Texas*.—*Jackson v. State*, 33 Tex. Crim. 281, 26 S. W. 194, 47 Am. St. Rep. 30; *Hutchins v. State*, 33 Tex. Crim. 298, 26 S. W. 399.

*Utah*.—*People v. Larsen*, 10 Utah 143, 37 Pac. 258.

In *Brandon v. People*, 42 N. Y. 265, the court said: "The defendant, however, appeared before the court below in a double capacity, that of an accused party on trial, and that of a witness. As an accused party on trial, she was entitled to the application of the rule that her character could not be attacked unless she herself opened the question. . . . She, however, chose to avail herself of the statute of 1869, which permitted her to make herself a 'competent witness' in the case. She was not compelled to take this position, the statute declaring that the failure to testify should not create any presumption against her. She elected, however, to make herself a witness. She became and was a competent witness. For this purpose she left her position as a defendant, and while upon the stand was subject to the same rules, and called upon to submit to the same tests, which could by law be applied to other witnesses. Her

statements were made to the jury under the solemnity of an oath. In theory of law, this gave greater weight to her narration than if she had placed her simple declaration before the jury, unaccompanied by her oath. She cannot claim the advantages of the position of a witness, and at the same time avoid its duties and responsibilities."

In *State v. Pancoast*, 5 N. D. 514, 67 N. W. 1,052, 35 L. R. A. 518, the court said: "It is also well established, that, when a defendant in a criminal case voluntarily takes the witness stand in his own behalf, he thereby subjects himself to the same rules of cross-examination that govern other witnesses, with the exception that his privileges are to some extent curtailed, in that he is not only required to answer any relevant and proper question on cross-examination that may tend to convict him of the offense for which he is being tried, but he must also answer any such relevant and proper question that may tend to convict him of any collateral offense, when such answer also tends to convict him of the offense for which he is being tried or bears upon any of the issues involved in such case."

In *Com. v. Van Horn*, 188 Pa. St. 143, 41 Atl. 469, the defendant, having been thoroughly examined by his counsel, with a view to showing that he was insane, and having given perfectly rational answers and a clear account of the facts, as he claimed they occurred, it was held competent for the state's attorney to ask him if he claimed now to be insane.

In *Crockett v. State*, 40 Tex. Crim. 173, 49 S. W. 392, the defendant was accused of violating the local option law. On his cross-examination it was held proper to ask him if he had not been indicted for assault with intent to commit murder.

In *State v. Anderson*, 126 Mo. Supp. 542, 29 S. W. 576, where defendant had taken the stand in his own behalf, it was held competent on cross-examination to permit him to be asked as to matters not testified to in chief, for purposes of impeachment.

In *The State v. Wells*, 54 Kan. 160, 37 Pac. 1,005, the defendant was charged with having murdered Loren E. Warren, and was convicted of

cross-examination must be limited to matters pertinent to the issue,

murder in the second degree. Allen, J., said: "Having testified in his own behalf, counsel for the state, on cross-examination, asked him with reference to his occupation, his past life, and particular difficulties and quarrels he had had, and with reference to his having carried and used dangerous weapons at other times. It is insisted that such examination is improper, and that it was, at least, the imperative duty of the court to instruct the jury that the evidence given by the defendant in answer to these questions could be used only for the purpose of affecting his credibility. . . . A defendant who takes the stand and testifies as a witness in his own behalf may be cross-examined upon matters affecting his character and credibility the same as other witnesses; and the facts developed on cross-examination, even though they incidentally tend to show that the defendant is guilty of other offenses than that for which he is on trial, become proper evidence in the case, to be considered by the jury so far as they tend to prove any issue in the case."

In *State v. Harvey*, 131 Mo. 339, 32 S. W. 1,110, the defendant was charged with arson. He claimed an alibi, stating that he was not present at the time and place that the fire occurred. It was held competent on cross-examination to ask him where he was and what he was doing at that time.

A defendant testifying in his own behalf may be asked as to his motives for particular acts relevant to the issues. *Linnehan v. State*, 120 Ala. 293, 25 So. 6.

In *People v. Dole*, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50, the defendant, under indictment for forgery, testified in his own behalf to the effect that he had received the check (which it was claimed he had forged) in a poker game. On cross-examination it was held proper to ask him whether he had made that same statement when arrested, or since that time, after finding for what he was charged. This was held admissible on the ground that it might aid the jury in determining whether

his conduct was consistent with his testimony.

In *Ellis v. State*, 152 Ind. 326, 52 N. E. 82, it was held proper to ask an accused on cross-examination as to prosecutions against him for offenses committed by him prior to the one for which he was then being tried.

In *State v. Clark*, 100 Iowa 47, 69 N. W. 257, the defendant testified that he was drunk when the alleged assault was committed, that he remembered nothing about it, that he did not remember having a razor with him. On cross-examination it was held proper to ask him if he had not stated to a certain party on the morning after the assault that he had borrowed the razor with which the assault was made.

When a defendant charged with crime takes the witness stand in his own behalf, he is subject to attack the same as other witnesses, hence it is proper to show his bad reputation. *State v. McLain*, 92 Mo. App. 456.

When a defendant chooses to testify in his own behalf, it is proper on cross-examination to ask him how many times he has been arrested and what for. *Williams v. U. S.*, (Ind. Ter.), 69 S. W. 871.

In *Craft v. State*, (Tex. Crim.), 31 S. W. 367, where a defendant under a charge for murder was asked on cross-examination whether he had not before been indicted for murder, to which he answered "No." The prosecuting attorney then related the circumstances of the alleged murder and asked the defendant whether or not he recollected it, to which the defendant said that he did and that his brother was the person who had been indicted. Held, proper cross-examination.

In *Mirando v. State*, (Tex. Crim.), 50 S. W. 714, it was held, that when a defendant offers himself as a witness in his own behalf he is subject to the same rules on cross-examination that govern all witnesses. Therefore, the state's attorney had the right to ask the defendant whether he had not been indicted and whether the indictment was not dismissed because he had turned state's evidence.

or such as may be proved by other witnesses.<sup>78</sup>

**Cross-Examination Limited to Examination in Chief.**—On the other hand, there is authority that the right of cross-examination of an accused is confined to matters referred to in his examination in chief, and that he cannot be required to testify as to other facts, although material to the issue, or as to events in his past life for the purpose of affecting his credibility or character.<sup>79</sup>

**Statutes.**—In some jurisdictions the cross-examination of an accused person is by express statute confined to matters referred to

**78. Alabama.**—*Clarke v. State*, 78 Ala. 474, 56 Am. Rep. 45; *Cotton v. State*, 87 Ala. 103, 6 So. 372; *Clarke v. State*, 87 Ala. 71, 6 So. 368; *Norris v. State*, 87 Ala. 85, 6 So. 371; *Smith v. State*, 79 Ala. 21.

**California.**—*People v. Hamblin*, 68 Cal. 101, 8 Pac. 687; *People v. Johnson*, 57 Cal. 571; *People v. Bishop*, 81 Cal. 113, 22 Pac. 447.

**Massachusetts.**—*Com. v. Sullivan*, 150 Mass. 315, 23 N. E. 47.

**Michigan.**—*People v. Pinkerton*, 79 Mich. 110, 44 N. W. 180.

**Minnesota.**—*State v. Curtis*, 39 Minn. 357, 40 N. W. 263.

**Mississippi.**—*Bailey v. State*, 67 Miss. 333, 7 So. 348.

**New York.**—*People v. Hovey*, 29 Hun 382; *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183; *People v. Crapo*, 76 N. Y. 288, 32 Am. Rep. 302; *People v. Reavey*, 38 Hun 418; *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128.

**North Carolina.**—*State v. Lawhorn*, 88 N. C. 634.

**Wisconsin.**—*Yanke v. State*, 51 Wis. 464, 8 N. W. 276.

**79. Mitchell v. State**, 94 Ala. 68, 10 So. 518; *State v. Anderson*, 126 Mo. 542, 29 S. W. 576; *State v. Chamberlin*, 89 Mo. 120, 1 S. W. 145; *State v. Saunders*, 14 Or. 300, 12 Pac. 441.

A defendant charged with murder, testifying in his own behalf, is privileged from answering questions on cross-examination as to another murder which it was claimed he had committed. *Howard v. Com.*, 22 Ky. L. R. 1,845, 61 S. W. 756.

In *State v. O'Hara*, 17 Wash. 525, 50 Pac. 477, 94 Am. St. Rep. 864, Dunbar, J., said: "The appellant was indicted for the crime of arson, and on trial was convicted and sen-

tenced to the penitentiary. The state offered in evidence some letters and a trespass notice purporting to have been written and signed by the defendant. These were admitted over the objection of the defendant, and were filed as exhibits in the case. After the state had rested, and the defendant was introduced as a witness in his own behalf, upon cross-examination, over his objections, he was compelled to testify that the letters and notice above referred to had been written by him. This is alleged as error by the appellant, and we think it unquestionably was error on the part of the court, and was a violation of section 9 of article 1 of the constitution, which provides that no person shall be compelled in any criminal case to give evidence against himself. The state had not been able to identify the handwriting of the defendant, and, had it not been for the testimony of the defendant above referred to, the identification could not have been made. The testimony was, therefore, against the interests of the defendant."

The Bill of Rights declares that no one shall be compelled to give evidence against himself; therefore where defendant has taken the stand in his own behalf he cannot be compelled on cross-examination to admit the commission of other offenses which might subject him to punishment. *Saylor v. Com.*, 17 Ky. L. Rep. 100, 30 S. W. 390.

In the cross-examination of a defendant, it is improper to extend the examination to other crimes than that under which he was charged. *State v. Carson*, 66 Me. 116, the court held the defendant "Would not be required to be prepared to vindicate himself against any alleged crime which may

in his examination in chief.<sup>80</sup>

And sometimes there are statutes which expressly forbid the cross-examination of an accused person while making his statement to the jury.<sup>81</sup>

**Discretion of Court.**— Other courts hold that the range of the cross-examination of an accused person as to irrelevant matters rests in the sound discretion of the trial court.<sup>82</sup>

be insinuated in the form of cross-examination and of which he has no previous notice."

80. In *People v. Goodwin*, 132 Cal. 368, 64 Pac. 561, defendant was charged with seduction under promise of marriage. It was held no error to ask the defendant on cross-examination if certain letters were in his handwriting, where the identity of the letters as those of the defendant were fully established before such questions were asked. It was also competent to ask the defendant whether he began the correspondence between the prosecutrix and himself. The defendant having denied that he had committed the crime at a certain time and place, and having testified that he was not at such place at the time alleged, questions as to where he was on other days in the same month were properly allowed to test the memory of the witness.

In *People v. Roemer*, 114 Cal. 51, 45 Pac. 1,003, the defendant charged with murder was asked by his counsel upon direct examination if he had ever been charged with killing anybody, and answered that he had not. Upon cross-examination he was asked, after the proper foundation had been laid, whether he had not stated that he had been accused of the murder of a man, but that they could not prove it against him. The question is not permissible generally upon cross-examination. But in this case the defendant had opened the door and invited the inquiry by his own testimony, and it became permissible to refute that testimony by direct evidence to the contrary, or to impeach it by showing contrary declarations made by him. (Civ. Code Proc. [Cal.] § 2,052.)

81. **As in Georgia.**— *Hackney v. State*, 101 Ga. 512, 28 S. E. 1,007, wherein it was held that the defendant in a criminal case may refuse to

answer any question or refuse to submit to a cross-examination, and he will not be held to waive such right by making answers to questions put by the presiding judge.

82. *Hanoff v. State*, 37 Ohio St. 178.

In *State v. Pfefferle*, 36 Kan. 90, the information contained five counts, in each of which it was charged that O. Pfefferle and August Gutekunst sold intoxicating liquors at stated times without having a permit to do so. The defendant, Gutekunst, voluntary became a witness in behalf of Pfefferle and himself, and upon cross-examination he was asked if he was not an old saloonkeeper, and if he had not been tried and convicted in that court several times for the sale of liquor. Other questions of like import were asked, and the witness, over the objection of the defendant, admitted that he had been engaged in the sale of liquor and had recently been tried and convicted of its unlawful sale. The court said: "By taking the witness stand, Gutekunst changed his *status*, for the time being, from defendant to witness, and was entitled to the same privileges and subject to the same treatment, and to be contradicted, discredited and impeached, the same as any other witness. But if a different rule applies to the defendant who becomes a witness, as some authorities seem to hold, it would not avail the appellant, as the defendant Gutekunst has not appealed and is not complaining, and therefore stands in the same relation to the appellant as any other witness. Although there is some diversity of judicial opinion concerning how far a witness may be cross-examined upon matters not relevant to the issue, with a view of discrediting him, yet we think the limits of cross-examination for such a purpose rests largely in the discretion of the courts

**Claim of Privilege by Counsel.**—A privilege of an accused party when testifying may be claimed by his counsel.<sup>83</sup>

### VIII. CROSS-EXAMINATION ON WRITTEN INSTRUMENTS.

Cross-examination may be had upon the contents of a written instrument which the witness has used on direct, for the purpose merely of refreshing his memory,<sup>84</sup> and the cross-examiner is entitled to inspection of it for that purpose.<sup>85</sup> Where cross-examination is

and there is abundant authority for allowing the questions asked in this case. . . . These authorities show that for the purpose of impairing his credibility, a witness may be cross-examined as to specific facts tending to disgrace or degrade him, although such facts are irrelevant and collateral to the main issue. The range of cross-examination and the extent to which such questions should be allowed depend upon the appearance and conduct of the witness and all the circumstances of the case, and necessarily must be regulated by a sound judicial discretion. It is only where there has been an abuse of the exercise of this discretion by the court, resulting to the prejudice of the party complaining, that error will lie. We cannot say that the cross-examination went beyond the proper limits in this case, or that the court abused its discretion in allowing the questions objected to."

83. *People v. Brown*, 72 N. Y. 571, 28 Am. Rep. 183.

84. Where material testimony of a witness is declared by the witness to rest upon memoranda made by him but not produced in court, it is error to narrowly limit the cross-examination of the witness in respect to the memoranda. *State v. Shew*, 8 Kan. App. 679, 57 Pac. 137.

Where a witness has used a memorandum to refresh his recollection while testifying, the adverse party is entitled to cross-examine the witness thereon. But no such right exists where the witness did not use the memorandum while undergoing examination, but referred to it at the close of his examination. *State v. Rathbun*, 74 Conn. 524, 51 Atl. 540.

85. *Acklen v. Hickman*, 63 Ala. 498; *Stoudenmire v. Harper*, 81 Ala. 242, 1 So. 857; *Little v. Lichkoff*, 98

Ala. 321, 12 So. 429; *Chattanooga R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. 853; *Duncan v. Seeley*, 34 Mich. 369; *People v. Lyons*, 49 Mich. 78, 13 N. W. 365; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419, 47 N. W. 330.

In *Simmons v. McCarthy*, 128 Cal. 455, 60 Pac. 1,037, the court stated the rule to be that, before a witness could be cross-examined as to the contents of a written instrument, it should be first shown to the witness, and if it was counsel's purpose to offer the instrument in evidence he must submit it to the witness, but it would seem from this case that this rule will not be enforced where counsel cross-examines the witness from memory alone, and not from the instrument.

Where the testimony in chief, of a witness is based upon and inseparable from a writing or memorandum, the opposite party is entitled to such writing or memorandum as a part of the cross-examination. *Mt. Terry Min. Co. v. White*, 10 S. D. 620, 74 N. W. 1,060.

It is not error to exclude a document as a part of the cross-examination of a witness which has no place in cross-examination, although the purpose for which it is offered might warrant its reception on direct examination. *Dr. Blair Med. Co. v. U. S. Fidelity & Guaranty Co.*, (Iowa), 89 N. W. 20.

Where a witness is asked on cross-examination if he had signed a verdict as a member of a coroner's jury, and the verdict is produced and read to the witness as a part of the question, and he examines it before making his answer, his answer may properly be allowed to stand. . . . Exhibiting the original verdict of a coroner's jury to a witness, and inquiring of the witness if his name

appearing thereto was in his handwriting, does not involve an effort to prove the contents of the written record by parol. *People v. Donovan*, 43 Cal. 162.

Where a paper is put into a witness' hand on cross-examination, the adverse party has the right to examine the paper, only where something comes of the questions asked on cross-examination. *Reg. v. Dunscombe*, 8 Car. & P. 369.

In an action for libel, the fact, unknown to the defendant when the publication complained of was made, that others have published the same libel, or that suits have been begun against others for its publication, is not admissible in evidence because elicited on an improper cross-examination of the plaintiff, in reference to a letter written by him referring to the publication by the others, which has been introduced by the defendant as a part of a correspondence between the plaintiff and the defendant, which had been previously introduced in part by the plaintiff. *Palmer v. Matthews*, 162 N. Y. 100, 56 N. E. 501. "If it be assumed that the defendant had a right to introduce this letter in evidence as a part of the whole correspondence between the parties, still, it having been introduced by them, they could not properly cross-examine the plaintiff as to evidence so introduced, especially when its effect was to call out that which was utterly inadmissible and highly improper. Indeed, the examination which elicited this evidence was not a cross-examination at all. The proof thus obtained was procured from the plaintiff by compulsion. That this evidence was in no sense obtained by a proper cross-examination is quite manifest."

In *Tribune Assn. v. Follwell*, 107 Fed. 646, an action of libel for charging the plaintiff with having robbed his employer, one of the defendant's witnesses, who represented the plaintiff's employer during the time of his employment, to whom the plaintiff made his reports and who saw the checks given to the plaintiff and went over and audited the statements made by the plaintiff of his expenditures; and who had stated on cross-examination that the statements were in

court, producing one, with a book before him, was asked on cross-examination to refresh his recollection and state what balance, if any, appeared thereby to have been in the plaintiff's hands on a certain date belonging to his employer, to which he answered that "according to the book" plaintiff had a certain apparent balance. The objection was made that the witness could not refresh his recollection as he used the word "according;" but it was held that as it appeared that the figures in the book were the witness' made in pencil at the time he was going over the plaintiff's accounts, and representing what he believed was the correct balance, it was proper to permit the answer to stand.

Where the defendant on cross-examination of the plaintiff's witnesses presents a paper to the witness and asks him to identify certain items in it, but does not offer the paper or the items in evidence, it is error to permit the plaintiff, on re-examination, to introduce the paper in evidence in explanation of the items in question against the defendant's objection. *People v. Van Ewan*, 111 Cal. 144, 43 Pac. 520.

In *Fishel v. Goddard*, 30 Colo. 147, 69 Pac. 607, the defendant on cross-examination was required to produce his books of account. It appeared that previous to the trial a notice had been served upon him by plaintiff for the production of certain books, which, it was claimed, was insufficient; but it was held that the question whether or not the court erred in requiring him to produce his books, or whether the notice mentioned was sufficient upon which to base an order to that effect, was immaterial; that the order was interlocutory, and even if erroneous, as claimed, was not prejudicial to the defendant.

In an action of ejectment in which the defendant claimed under the will of a former owner, it is not error to refuse to permit a witness to be asked on cross-examination whether such owner had died intestate or testate, since the defendant could not introduce the will on cross-examination. *Sain v. Baker*, 128 N. C. 256, 38 S. E. 858.

had upon the contents of a written instrument,<sup>86</sup> the instrument should be introduced as part of the cross-examination,<sup>87</sup> although

86. A witness cannot be asked on cross-examination as to the contents of a written instrument which is shown to the witness. The instrument is the best evidence of its own contents. *Noble v. White*, 103 Iowa 352, 72 N. W. 556.

In *Schattman v. American Cr. & Ind. Co.*, 34 App. Div. 392, 54 N. Y. Supp. 225, counsel for defendant, on cross-examination of one of the plaintiffs, read a statement from a daily newspaper and asked him if the statement therein was not substantially a correct statement of the facts reported. The court said: "We think that this method of examining a witness was entirely improper. The effect was to get before the jury the contents of a newspaper article, and under the guise of a cross-examination to obtain from a witness a statement of his inability to deny the truth of that article, when it was apparent that most of the facts stated in the article were not within the knowledge of the witness, and could not, therefore, be either denied or admitted. Counsel, on cross-examination, could have asked the witness whether certain facts were or were not true, but it was entirely irregular and improper to read what purported to be a newspaper article, and which did not, in fact, purport to be a declaration of the witness, and ask him whether that article was true. The direct examination of the witness had not been directed to any of the facts contained in this newspaper article. He had not testified on his direct examination as to this settlement with his debtor, or as to the facts commented upon in this newspaper article. The question that was involved in reading this statement in the newspaper was not strictly a cross-examination as to any evidence given by the witness upon his direct examination; and such a method of getting a newspaper article before the jury is entirely irregular, and not to be encouraged. While we recognize that the extent and method of cross-examination are largely discretionary with the trial court, and an appellate

court is not justified in interfering except where there is a plain abuse of such discretion, we think that it is entirely improper to allow, upon cross-examination, reading to a witness, in the presence of the jury, a newspaper article which does not purport to be a statement of the witness, which does not directly relate to any testimony given by the witness upon direct examination, and which is largely made up of facts which are not within the knowledge of the witness, and which relate to the acts and declarations of others."

In *Metropolitan L. Ins. Co. v. Mitchell*, 72 Ill. App. 621, an action on a policy of life insurance to which the defense was that the insured had misrepresented the condition of his health at the time of his application, a witness was called to identify a part of the papers pertaining to the application, and while he was not asked as to other things appearing on the same page, to-wit: his own report of the examination, it was held to be relevant to show on the cross-examination that he made the examination of the applicant and to have his report thereof identified.

87. *O'Riley v. Clampet*, 53 Minn. 539, 55 N. W. 740.

If on cross-examination a witness admits a writing as his he cannot be questioned by counsel whether statements such as the counsel may suggest are contained in it, but the whole paper must be read in evidence. *Queen's Case*, 2 Brod. & B. 286, 6 Eng. C. L. 112.

In *Kitchen v. Cape Girardeau & S. L. R. Co.*, 59 Mo. 514, it was held that the defendant could not while cross-examining the plaintiff as a witness read to him his deposition previously taken and ask him if all the statements contained there were true, although at the same time disclaiming any intention thereby to impeach the credibility of the witness. Whether the deposition might have been used to save time in asking questions was a matter purely within the discretion of the court.

Where a witness on cross-examin-



it has been held enough to put in the instrument at a subsequent stage of the trial.<sup>88</sup>

It is competent for a witness on cross-examination to use, for the purpose of explaining his testimony, an unofficial map, not made by an order in the case, and not offered as substantive evidence.<sup>89</sup>

## IX. RE-CROSS-EXAMINATION.

**1. In General.** — Where new matter has been brought out on re-direct examination, re-cross-examination should be allowed.<sup>90</sup> But if no new matter was brought out on the re-direct examination, re-cross-examination is a matter wholly discretionary with the trial court.<sup>91</sup>

**2. Limits of Re-Cross-Examination.** — Re-cross-examination should be limited to matters brought out on the re-direct.<sup>92</sup> The fact that a question excluded on re-cross-examination was germane to the cross-examination is immaterial, if it in fact was not germane to the re-direct.<sup>93</sup>

A re-cross-examination of a witness upon matters as to which he has already been interrogated is purely discretionary with the trial court, and its refusal cannot be the subject of exception unless it appear that the discretion was abused.<sup>94</sup>

ation is presented with a written statement and asked whether the signature subscribed to it is his, which he admits, it is proper for the court to refuse to reject a question asking him as to the contents of the statement; if desired to be used the statement itself should be put in evidence. *Momence Stone Co. v. Groves*, 197 Ill. 88, 64 N. E. 335.

88. *Foss Schneider Brew. Co. v. McLaughlin*, 5 Ind. App. 415, 31 N. E. 838.

89. *Andrews v. Jones*, 122 N. C. 666, 30 S. E. 19.

90. *Wood v. McGuire*, 17 Ga. 303; *State v. Haab*, 105 La. 230, 29 So. 725.

91. *State v. Hoppiss*, 27 N. C.

406; *Atlantic & D. R. Co. v. Reiger*, 95 Va. 418, 28 S. E. 590.

92. *State v. Southern*, 48 La. Ann. 628, 19 So. 668.

Whether or not the re-cross-examination of a witness who has been recalled to correct a point in his testimony shall be restricted to the point corrected is discretionary with the court. *Thornton v. Thornton*, 39 Vt. 122.

93. *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884.

94. *Knight v. Cunningham*, 6 Hun (N. Y.) 100.

Re-cross-examination stands in the same relation to the re-direct that cross-examination does to direct. *Wood v. McGuire*, 17 Ga. 303.

## CRUELTY.—See Animals; Divorce; Infants.

# CUMULATIVE EVIDENCE.

BY CHARLES A. ROBBINS.

## I. WHAT EVIDENCE IS CUMULATIVE, 915

1. *In General*, 915
2. *Admissions and Declarations*, 916
  - A. *Of a Party*, 916
  - B. *Of a Prosecuting Witness*, 922
  - C. *Threats of Deceased Person*, 922
  - D. *Written and Oral Admissions*, 923
  - E. *Admissions and Direct Evidence*, 923
3. *Direct and Circumstantial or Opinion Evidence*, 923
  - A. *In General*, 923
  - B. *Alibi*, 924
4. *Lost Instruments*, 924
5. *Evidence Upon Point Not Before Controverted*, 924
6. *On Point Testified to by a Party*, 925
7. *Discretion of Trial Court*, 926

## II. CONTINUANCE FOR CUMULATIVE EVIDENCE, 926

1. *In General*, 926
2. *Uncontroverted Point*, 927
3. *When Irreconcilable Conflict in Evidence*, 928
4. *Available Witnesses Interested*, 928
5. *Evidence Cumulative in Part Only*, 929
6. *Alibi*, 929

## III. ADMISSION AND REJECTION ON THE TRIAL, 929

1. *In General*, 929
2. *Limiting Number of Witnesses*, 930
  - A. *Opinion Evidence*, 930
  - B. *Character Evidence*, 931
  - C. *In General*, 932

D. *Practice*, 933

E. *Judicial Discretion*, 933

3. *Order of Proof*, 934

#### IV. NEW TRIALS, 937

1. *The General Rule*, 937

2. *Negligence of Moving Party*, 941

3. *Impeaching and Contradictory Evidence*, 943

4. *Evidence Cumulative in Part Only*, 943

5. *Limitations Upon the General Rule*, 944

6. *Similarity of Rules in Civil and Criminal Actions*, 946

#### V. REVIEW IN EQUITY, 946

#### CROSS-REFERENCES.

Competency; Corroboration; Cross-Examination;  
Depositions; Direct Examination; Documentary Evidence;  
Elections; Expert and Opinion Evidence;  
Fraud;  
Objections;  
Rebuttal; Relevancy.

#### I. WHAT EVIDENCE IS CUMULATIVE.

1. **In General.** — Cumulative evidence is additional evidence of the same kind to the same point.<sup>1</sup> It has been said that if new evidence tends to prove an issue or ultimate fact to which evidence was

1. *United States*. — Aikin *v.* Bemis, 3 Woodb. & M. 348, 1 Fed. Cas. No. 109.

*Arkansas*. — Robins *v.* Fowler, 2 Ark. 133.

*California*. — Williamson *v.* Tobey, 86 Cal. 497, 25 Pac. 65; Kenezleber *v.* Wahl, 92 Cal. 202, 28 Pac. 225.

*Connecticut*. — Waller *v.* Graves, 20 Conn. 305; Andersen *v.* State, 43 Conn. 514, 21 Am. Rep. 669; Hart *v.* Brainerd, 68 Conn. 50, 35 Atl. 776.

*Georgia*. — Moore *v.* Ulm, 34 Ga. 565; Roe *v.* Doe, 37 Ga. 459; Perry *v.* Houseley, 40 Ga. 657; O'Shields *v.* State, 55 Ga. 696; Brinson *v.* Faircloth, 82 Ga. 185, 7 S. E. 923.

*Illinois*. — Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100; Fletcher *v.* People, 117 Ill. 184, 7 N. E. 80.

*Indiana*. — Humphries *v.* Marshall, 12 Ind. 609; Houston *v.* Bruner, 39 Ind. 376; Shirel *v.* Baxter, 71 Ind. 352; Lefever *v.* Johnson, 79 Ind. 554; Kochel *v.* Bartlett, 88 Ind. 237; Hines *v.* Driver, 100 Ind. 315; De Hart *v.* Aper, 107 Ind. 460, 8 N. E. 275; Westbrook *v.* Aultman Miller Co., 3 Ind. App. 83, 28 N. E. 1,011; Richter *v.* Meyers, 5 Ind. App. 33, 31 N. E. 582; Offutt *v.* Gowdy, 18 Ind. App. 602, 48 N. E. 654; Hammond *v.* Evans, 23 Ind. App. 501, 55 N. E. 784.

adduced on the trial, it is cumulative;<sup>2</sup> but, by the overwhelming weight of authority, evidence is not cumulative if it tends to prove a distinct fact, whether ultimate or merely probative, or, though it tends to prove the same fact, if it is of a different kind or character.<sup>3</sup>

## 2. Admissions and Declarations. — A. OF A PARTY. — Evidence

*Iowa.* — *German v. Maquoketa Sav. Bank*, 38 Iowa 368; *First Nat. Bank v. Charter Oak Ins. Co.*, 40 Iowa 572; *Able v. Frazier*, 43 Iowa 175; *Wayt v. Burlington, C. R. & M. R. Co.*, 45 Iowa 217; *State v. Whitmer*, 77 Iowa 557, 42 N. W. 442; *Bogges v. Read*, 83 Iowa 548, 50 N. W. 43; *Stone v. Moore*, 83 Iowa 186, 49 N. W. 76; *Murray v. Weber*, 92 Iowa 757, 60 N. W. 492; *Names v. Dwelling House Ins. Co.*, 95 Iowa 642, 64 N. W. 628; *Means v. Yeager*, 96 Iowa 694, 65 N. W. 993; *Bullard v. Bullard*, 112 Iowa 423, 84 N. W. 513.

*Kansas.* — *State v. Tyson*, 56 Kan. 686, 44 Pac. 609; *Brown v. Wheeler*, 62 Kan. 676, 64 Pac. 594.

*Kentucky.* — *Lewis v. Com.*, 93 Ky. 238, 19 S. W. 664.

*Maine.* — *Glidden v. Dunlap*, 28 Me. 379; *Berry v. Ross*, 94 Me. 270, 47 Atl. 512.

*Minnesota.* — *Nininger v. Knox*, 8 Minn. 140; *Layman v. Minneapolis St. R. Co.*, 66 Minn. 452, 69 N. W. 329.

*Mississippi.* — *Vardeman v. Byrne*, 7 How. 365; *Newcomb v. State*, 37 Miss. 383; *Louisville, N. O. & T. R. Co. v. Crayton*, 69 Miss. 152, 12 So. 271.

*Missouri.* — *State v. Stumbo*, 26 Mo. 306; *Howland v. Reeves*, 25 Mo. App. 458; *State v. Soper*, 148 Mo. 217, 49 S. W. 1,007; *St. Joseph Folding Bed Co. v. Kansas City, F. S. & M. R. Co.*, 148 Mo. 478, 50 S. W. 85.

*New Jersey.* — *Dundee Mfg. Co. v. Van Riper*, 33 N. J. L. 152; *Corkery v. Central R. Co.*, (N. J.), 43 Atl. 655; *Hoban v. Sandford & Stillman Co.*, 64 N. J. L. 426, 45 Atl. 819.

*New York.* — *Guyot v. Butts*, 4 Wend. 579; *People v. Superior Court*, 5 Wend. 114; *S. C. 10 Wend. 285*; *Brisbane v. Adams*, 1 Sandf. 195; *Leavy v. Roberts*, 2 Hilt. 285; *Cole v. Van Keuren*, 51 How. Pr. 451; *People v. Leighton*, 1 N. Y. Crim. Rep. 468; *People v. Shea*, 16

Misc. 111, 38 N. Y. Supp. 821; *People v. O'Connor*, 37 Misc. 754, 76 N. Y. Supp. 511.

*North Carolina.* — *State v. Starnes*, 97 N. C. 423, 2 S. E. 447.

*Ohio.* — *Hurd v. French*, 1 Cin. Super. Ct. Rep. 365.

*Oklahoma.* — *Twine v. Kilgore*, 3 Okla. 640, 39 Pac. 388.

*Oregon.* — *State v. Hill*, 39 Or. 90, 65 Pac. 518.

*Pennsylvania.* — *Ruddy v. Ruddy*, 6 Kulp 279.

*Tennessee.* — *McGavock v. Brown*, 4 Humph. 251.

*Texas.* — *Houston & T. C. R. Co. v. Forsyth*, 49 Tex. 171.

*Vermont.* — *Clark v. Gallagher*, 74 Vt. 331, 52 Atl. 539.

*Virginia.* — *St. John v. Alderson*, 32 Gratt. 140.

*West Virginia.* — *Grogan v. Chesapeake & O. R. Co.*, 39 W. Va. 415, 19 S. E. 563.

*Wisconsin.* — *Finch v. Phillips*, 41 Wis. 387.

2. *Doe v. Babineau*, 11 New Bruns. (Can.) 89.

Newly discovered evidence that the defendant's wagon had a broken shaft upon the day after the plaintiff claimed that the defendant had run into him, and of admissions on the part of the defendant that he had run into the plaintiff, were held to be cumulative of the direct testimony of the plaintiff to the collision. *Shute v. Jones*, 24 N. Y. Supp. 637.

3. *United States.* — *Aikin v. Bemis*, 3 Woodb. & M. 348, 1 Fed. Cas. No. 109.

*Connecticut.* — *Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 669; *Knowles v. Northrop*, 53 Conn. 360, 4 Atl. 269.

*Georgia.* — *Irwin v. Morell*, Dud. 72; *Lane v. Holliday*, 27 Ga. 339; *Moore v. Ulm*, 34 Ga. 565; *Holdridge v. Hamilton*, 37 Ga. 676; *Hughes v. Coursey*, 46 Ga. 115; *Long v. State*, 54 Ga. 564; *Hart v. Jackson*, 77 Ga. 493, 3 S. E. 1; *Dale v. State*, 88 Ga. 552, 15 S. E. 287.

*Idaho*. — Flannagan *v.* Newberg, 1 Idaho 78; Twin Sprgs. Placer Co. *v.* Upper Boise Hyd. Min. Co., (Idaho), 59 Pac. 535.

*Illinois*. — Wilder *v.* Greenlee, 49 Ill. 253; Protection L. Ins. Co. *v.* Dill, 91 Ill. 174.

*Indiana*. — Harris *v.* Rupel, 14 Ind. 209; Dennis *v.* State, 103 Ind. 142, 2 N. E. 349.

*Iowa*. — Alger *v.* Merritt, 16 Iowa 121; Able *v.* Frazier, 43 Iowa 175; Boggess *v.* Read, 83 Iowa 548, 50 N. W. 43; Mally *v.* Mally, 114 Iowa 309, 86 N. W. 262.

*Kansas*. — Olathe *v.* Horner, 38 Kan. 312, 16 Pac. 468; State *v.* Tyson, 56 Kan. 686, 44 Pac. 609.

*Massachusetts*. — Gardner *v.* Gardner, 2 Gray 434.

*Minnesota*. — Layman *v.* Minneapolis St. R. Co., 66 Minn. 452, 69 N. W. 329.

*Mississippi*. — Vardeman *v.* Byrne, 7 How. 365.

*Missouri*. — Howland *v.* Reeves, 25 Mo. App. 458; Longdon *v.* Kelly, 51 Mo. App. 572.

*Nebraska*. — Lincoln *v.* Holmes, 20 Neb. 39, 28 N. W. 851.

*New York*. — Adams *v.* Bush, 23 How. Pr. 262; Raphelsky *v.* Lynch, 43 How. Pr. 157, 12 Abb. Pr. (N. S.) 224; Wilcox Silver Plate Co. *v.* Barclay, 48 Hun 54; Cole *v.* Fall Brook Coal Co., 61 Hun 623, 16 N. Y. Supp. 789, 57 Hun 585, 10 N. Y. Supp. 417; People *v.* Shea, 16 Misc. 111, 38 N. Y. Supp. 821.

*Tennessee*. — Demonbreun *v.* Walker, 4 Baxt. 199.

*Texas*. — Houston & T. C. R. Co. *v.* Forsyth, 49 Tex. 171; Wolf *v.* Mahan, 57 Tex. 171; Galveston, H. & S. A. R. Co. *v.* Matula, 79 Tex. 577, 15 S. W. 573; Day *v.* Goodman, (Tex.), 17 S. W. 475; Riozas *v.* State, 36 Tex. Crim. App. 182, 36 S. W. 268.

*Vermont*. — Kirby *v.* Waterford, 14 Vt. 414; Perkins *v.* Dana, 19 Vt. 589; Bradish *v.* State, 35 Vt. 452; Gilman *v.* Nichols, 42 Vt. 313; Clark *v.* Gallagher, 74 Vt. 331, 52 Atl. 539.

*West Virginia*. — Grogan *v.* Chesapeake & O. R. Co., 39 W. Va. 415, 19 S. E. 563.

*Wisconsin*. — Wilson *v.* Plank, 41 Wis. 94; Finch *v.* Phillips, 41 Wis. 387; Smith *v.* Grover, 74 Wis. 171,

42 N. W. 112; Bigelow *v.* Sickles, 75 Wis. 427, 44 N. W. 761.

But see State *v.* Hollier, 49 La. Ann. 371, 21 So. 633; Rinehart *v.* State, 23 Ind. App. 419, 55 N. E. 504; Shute *v.* Jones, 24 N. Y. Supp. 637.

**Statements of the Rule.** — "The courts have sometimes used expressions seeming to warrant the inference that proof which goes to establish the same issue that the evidence on the first trial was introduced to establish, is cumulative. If the evidence newly discovered, as well as that introduced on the trial, had a direct bearing on the issue, it may be cumulative; but we are not to look at the effect to be produced as furnishing a criterion by which all doubts in relation to this kind of evidence are to be settled; the kind and character of the facts make the distinction. It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so dissimilar in kind as to afford no pretense for saying they are cumulative." Marcy, J., in Guyot *v.* Butts, 4 Wend. (N. Y.) 580.

To same effect see St. John *v.* Alderson, 32 Gratt. (Va.) 140.

"By cumulative evidence is meant additional evidence of the same general character, to the same fact or point which was the subject of proof before. . . . There are often various distinct and independent facts going to establish the same ground, on the same issue. Evidence is cumulative which merely multiplies witnesses to any one or more of these facts before investigated, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject." Waller *v.* Graves, 20 Conn. 305.

To same effect see Finch *v.* Phillips, 41 Wis. 387.

Evidence is not cumulative "where it is of an entirely different character and species from that given on the former trial, and tending to support

the same point in a separate and distinct way." *Schlencker v. Risley*, 4 Ill. 483, 38 Am. Dec. 100.

"The meaning of the rule cannot be to exclude, as cumulative, newly discovered evidence of subordinate points or facts bearing on that general question. For in such a view, no new trial for new evidence could ever be obtained, all new evidence relating, as it must, if it be pertinent, to the general ground or general fact put in issue before. But it must mean that new evidence to a subordinate point or fact is not competent when that subordinate point or particular fact was before gone into, because it is then cumulative or additional as to that fact." *Woodbury, J., in Aikin v. Bemis*, 3 Woodb. & M. 348, 1 Fed. Cas. No. 109.

To same effect see *Bogges v. Read*, 83 Iowa 548, 50 N. W. 43; *Leavy v. Roberts*, 2 Hilt. (N. Y.) 285.

"If the new evidence be specifically distinct and bear upon the issue, though it may be intimately connected with some part of the testimony at the trial, it is not cumulative." *Alger v. Merritt*, 16 Iowa 121.

**Distinguished From Corroborative Evidence.**—"Cumulative evidence is evidence of the same kind as that already given to the same point. Evidence of any disputed fact having been offered by showing particular circumstances, any evidence which only shows the same circumstances is purely cumulative. Evidence which would tend to establish the disputed fact by other circumstances is not cumulative, but corroborative, in the sense in which that word is used by counsel. All cumulative evidence is necessarily corroborative, but all corroborative evidence need not be cumulative." *Louisville, N. O. & T. R. Co. v. Crayton*, 69 Miss. 152, 12 So. 271.

**Illustrations of Evidence Not Cumulative.**—Where, on the question of the originality of an invention, there was evidence that a similar device was in use in a certain town, evidence of the use of another similar device in another town was not cumulative. *Aikin v. Bemis*, 3 Woodb. & M. 348, 1 Fed. Cas. No. 109.

Where, on an issue as to whether

goods were sold by the plaintiff to the defendant or to his father, the defendant introduced a ledger kept at the place of business containing entries of purchases in the name of the father, newly discovered evidence that other goods sold to the defendant by others had been entered on the ledger as sold to the father was held not to be cumulative. *Wilcox Silver Plate Co. v. Barclay*, 48 Hun (N. Y.) 54.

Where the defendant signed an article published in a newspaper, and the question was whether the article as prepared by another and signed by the defendant contained the words objected to, and the person who prepared the article said that, as published, it did not look like the one prepared by him, evidence of the editor of the paper that he inserted the words in question was held not to be cumulative. *Waller v. Graves*, 20 Conn. 305.

Where, in an action on a note alleged to have been made by a deceased person, the only evidence of its genuineness was that of experts, newly discovered evidence of payments made by the deceased to the holder and corresponding with indorsement on the note was not cumulative. *Humphries v. Marshall*, 12 Ind. 609.

Evidence of the payment of a note is not cumulative of evidence of the release of a surety by the conduct of the holder. *Longdon v. Kelly*, 51 Mo. App. 572.

Where there was direct evidence on the issue as to whether or not a draft was paid in full in cash, evidence that the depositor drew a check against the draft at the time was held not to be cumulative. *German v. Maquoketa Sav. Bank*, 38 Iowa 368.

Where on the issue of the legal settlement of a pauper there was evidence on the trial as to his residence after 1801, and a settlement under an act passed that year, newly discovered evidence of his residence prior to that year, and a settlement under an earlier act, was not cumulative. *Kirby v. Waterford*, 14 Vt. 414.

Where there was evidence on the trial of ten distinct breaches of the condition of a jail bond, evidence of

two other distinct breaches was held not to be purely cumulative. *Perkins v. Dana*, 19 Vt. 589.

**Judgment.**—A judgment is not cumulative of parol evidence of the facts adjudicated. *Lane v. Holliday*, 27 Ga. 339.

**Identity of Person.**—On the question of the identity of the defendant, evidence of special marks and peculiarities of his person is not cumulative of testimony of the opinions of witnesses as to his identity. *Dale v. State*, 88 Ga. 552, 15 S. E. 287.

Upon the question of the identity of a person seen at a certain place, where two witnesses testified that the person was one H., and H. denied it, evidence of a third person who knew H. that it was not he was held not cumulative. *State v. Tyson*, 56 Kan. 686, 44 Pac. 609.

**Confessions.**—Where, in a prosecution for homicide, there was evidence tending to show that the defendant did not do the shooting, and that one B. did it, it was held that evidence that one M., a witness, had confessed to having done the shooting was cumulative to the evidence that the defendant did not do it. *People v. Shea*, 16 Misc. 111, 38 N. Y. Supp. 821.

But, on the other hand, it was held that newly discovered evidence of a confession by a witness on whose testimony the defendant was convicted that he himself committed the crime was not cumulative. *Dennis v. State*, 103 Ind. 142, 2 N. E. 349.

See also *Connolly v. Connolly*, 32 Gratt. (Va.) 657; *Cole v. Cole*, 50 How. Pr. (N. Y.) 59.

**Conspiracy.**—Newly discovered evidence of a conspiracy between one of the parties to the action and his witnesses to falsify a material instrument is not cumulative, where there was no such evidence introduced on the trial. *Raphelsky v. Lynch*, 43 How. Pr. (N. Y.) 157, 12 Abb. Pr. (N. S.) 224.

**Other Parts of Conversation.** Evidence explaining and adding to conversations from which alleged misrepresentations were inferred, and proving other parts of such conversations, and altering the effect, was held not to be cumulative, where the defendant had before offered no evi-

dence on that point. *Simmons v. Fay*, 1 E. D. Smith (N. Y.) 107.

**Contributory Negligence.**—On the issue of the contributory negligence of a deceased person killed in a collision with a street car, newly discovered evidence that the deceased looked for approaching cars before driving upon the track is not cumulative, where no such evidence was introduced in behalf of the plaintiff on the trial. *Layman v. Minneapolis St. R. Co.*, 66 Minn. 452, 69 N. W. 329.

**Physical Injuries.**—Where there was evidence on the part of both parties as to the extent of the plaintiff's injuries, the newly discovered evidence of physicians that the plaintiff could not have been compressed to the extent testified to by him and live, and that the plaintiff was now an able-bodied man, was held to be cumulative. *Cole v. Fall Brook Coal Co.*, 57 Hun 585, 10 N. Y. Supp. 417.

Where there was testimony as to the extent of the plaintiff's injuries, and the plaintiff testified that he was totally incapacitated to perform physical labor, evidence that the plaintiff worked the day after trial was held to be cumulative. *Tripler v. Ehehalt*, 5 Rob. (N. Y.) 609.

See also *Cole v. Fall Brook Coal Co.*, 61 Hun 623, 16 N. Y. Supp. 789.

Where the plaintiff offered evidence to show that hernia was produced by the injury complained of, newly discovered evidence of his treatment for hernia before the injury is not cumulative. *Grogan v. Chesapeake & O. R. Co.*, 39 W. Va. 415, 19 S. E. 563.

**Disease.**—Where the defense was that deceased was not strangled but died in a fit, and there was evidence of his having before had a single fit, evidence that he was afflicted with fits, and that the complaint was hereditary in the family, was held not to be cumulative. *Riojas v. State*, 36 Tex. Crim. App. 182, 36 S. W. 268.

Where, on the question of whether a horse was affected with a spavin at the time of its sale, a witness testified to having examined the horse several days after it was driven to the purchaser's home and discovered evidence of an injury from which the spavin developed, it was

of declarations or admissions of a party inconsistent with the case made by him is not cumulative where no such evidence has been adduced.<sup>4</sup> But where evidence of a party's admissions has been

held that evidence of an expert who examined the horse while it was being driven to the buyer's home, and very soon after the sale, was not merely cumulative. *Finch v. Phillips*, 41 Wis. 387.

**Insanity.**—Evidence of the imbecile condition of the defendant at the time of the trial is cumulative of evidence to show such condition before the trial on the issue of his insanity. *Newcomb v. State*, 37 Miss. 383.

Evidence of similar acts and declarations on the part of a testator to acts and declarations proved on the trial on the issue of his insanity is cumulative. *Irwin v. Morrell*, Dud. (Ga.) 72.

A continuance will not ordinarily be granted to obtain the testimony of witnesses to facts indicating insanity where there is much evidence of similar facts. *State v. Gould*, 40 Kan. 258, 19 Pac. 739; *Frizzell v. State*, 30 Tex. App. 42, 16 S. W. 751.

But it has been held that additional facts tending to prove insanity are cumulative in a modified sense only. *Anderson v. State*, 43 Conn. 514, 21 Am. Rep. 669.

But see *People v. McDonell*, 47 Cal. 134.

**Unchastity.**—Where there is evidence on the trial of acts of unchastity with various men on the part of a prosecuting witness, evidence of similar acts of unchastity with other men is cumulative. *State v. Hollier*, 49 La. Ann. 371, 21 So. 633; *Rinehart v. State*, 23 Ind. App. 419, 55 N. E. 504; *Eddingfield v. State*, 12 Ind. App. 312, 39 N. E. 1,057.

See also *Reed v. Clark*, 47 Cal. 194.

In an action for malicious prosecution for adultery, evidence of an act of adultery by the plaintiff about the time of the act charged, and in another place in the county than that charged, is not cumulative where there was no such evidence on the trial. *Bigelow v. Sickles*, 75 Wis. 427, 44 N. W. 761.

On the issue of the lewdness of

the plaintiff in an action of slander, newly discovered evidence of particular acts of lewdness on the part of the plaintiff is not cumulative of evidence of other acts offered on the trial. *Bogges v. Read*, 83 Iowa 548, 50 N. W. 43.

**Ill-treatment.**—On the issue of general ill-treatment, evidence of a single act of ill-treatment was held to be cumulative of evidence of other acts. *Harris v. Rupel*, 14 Ind. 209.

**Evidence Held Cumulative.**—On the issue of the capacity of a boy to write a certain paper, evidence of his school fellows as to his capacity is cumulative to that of his teachers and medical men upon the same question. *Gardner v. Gardner*, 2 Gray (Mass.) 434.

Where there was evidence that the deceased had a razor in his hand at the time of the homicide and that a razor was found at the place it occurred, evidence of the deceased's ownership of the razor was held to be cumulative. *Lewis v. Com.*, 93 Ky. 238, 19 S. W. 664.

Where there was testimony of the working qualities of a machine from the observation of a witness who saw the machine while at work in the field, newly discovered evidence of its qualities as determined by an examination made by him since the trial is cumulative. *Westbrook v. Aultman, Miller & Co.*, 3 Ind. App. 83, 28 N. E. 1,011.

Where, on the question of the soundness of a horse at the time of the sale, there was evidence of its being tied in a creek as for a founder, newly discovered evidence of its death having been caused by over-driving was held to be cumulative. *Stewart v. Hamilton*, 19 Tex. 96.

4. *California.*—*Kenezleber v. Wahl*, 92 Cal. 202, 28 Pac. 225.

*Georgia.*—*Mills v. May*, 42 Ga. 623.

*Idaho.*—*Flannagan v. Newberg*, 1 Idaho 78.

*Indiana.*—*Bronson v. Hickman*, 10 Ind. 3; *Houston v. Bruner*, 39 Ind. 376; *Humphreys v. Klick*, 49



offered, evidence of the same or similar admissions is cumulative.<sup>8</sup>

Ind. 189; *Kochel v. Bartlett*, 88 Ind. 237; *Rains v. Ballou*, 54 Ind. 79; *Blackburn v. Crowder*, 110 Ind. 127, 10 N. E. 933.

*Iowa*.—*Alger v. Merritt*, 16 Iowa 121; *Wayt v. Burlington, C. R. & M. R. Co.*, 45 Iowa 217; *Murray v. Weber*, 92 Iowa 757, 60 N. W. 492; *Bullard v. Bullard*, 112 Iowa 423, 84 N. W. 513.

*Kansas*.—*Klopp v. Jill*, 4 Kan. 482.

*Kentucky*.—*Adams Oil Co. v. Stout*, 19 Ky. L. Rep. 758, 41 S. W. 563.

*Maine*.—*Warren v. Hope*, 6 Greenl. 479; *Strout v. Stewart*, 63 Me. 227.

*Massachusetts*.—*Gardner v. Mitchell*, 6 Pick. 114, 17 Am. Dec. 349; *Chatfield v. Lathrop*, 6 Pick. 417; *Watts v. Howard*, 7 Metc. 478.

*Mississippi*.—*Kane v. Burrus*, 2 Smed. & M. 313.

*Nevada*.—*Gray v. Harrison*, 1 Nev. 502; *Wall v. Trainor*, 16 Nev. 131.

*New York*.—*Guyot v. Butts*, 4 Wend. 579; *Tripler v. Ehehalt*, 5 Rob. 609.

*Ohio*.—*Hurd v. French*, 1 Cin. Super. Ct. Rep. 365.

*Texas*.—*Houston & T. C. R. Co. v. Forsyth*, 49 Tex. 171; *Halliday v. Lambricht*, (Tex. Civ. App.), 68 S. W. 712.

*Virginia*.—*Preston v. Otey*, 88 Va. 491, 14 S. E. 68.

*Wisconsin*.—*Wilson v. Plank*, 41 Wis. 94; *Goldsworthy v. Linden*, 75 Wis. 24, 43 N. W. 656; *Keeler v. Jacobs*, 87 Wis. 545, 58 N. W. 1,107.

See also *Myers v. Brownell*, 2 Aik. (Vt.) 407, 16 Am. Dec. 729; *Smith v. Shultz*, 2 Ill. 490, 32 Am. Dec. 33.

But see *Andis v. Richie*, 120 Ind. 138, 21 N. E. 1,111; *Richardson v. Huff*, 19 Ky. L. Rep. 1,428, 43 S. W. 454; *Jackson v. Ft. Covington*, 61 Hun 622, 15 N. Y. Supp. 793; *Huster v. Wynn*, 8 Okla. 569, 58 Pac. 736; *Long v. Granberry*, 2 Tenn. Ch. 85; *Burson v. Dosser*, 1 Heisk. (Tenn.) 754; *Smith v. Watson*, 82 Va. 712, 1 S. E. 96.

The rule is the same whether the admissions be made before or after the trial. *Com. v. Yot Sing*, 2 Kulp (Pa.) 349.

**Admissions.**—Where in an action

for seduction under promise of marriage the plaintiff testified to conversations on the subject of marriage, the newly discovered evidence of third persons who heard such conversations was held not to be cumulative of the testimony of the plaintiff, her testimony being in the nature of *res gestae*. *Kochel v. Bartlett*, 88 Ind. 237.

But where in an action for the price of a mule the defendant testified that he had returned the mule to the plaintiff in satisfaction of his claim, the newly discovered evidence of the fact that the plaintiff had offered to sell the mule to various persons was held to be cumulative. *Hart v. Jackson*, 77 Ga. 493, 3 S. E. 1.

Where no attempt was made on the trial to prove admissions of the party except evidence of his acquiescence in statements made by his wife in his presence, newly discovered evidence of other distinct admissions is not cumulative. *Goldsworthy v. Linden*, 75 Wis. 24, 43 N. W. 656.

**Admissions in Account Books.** Newly discovered evidence of a book of accounts showing entries inconsistent with the case of the party who kept it, is not cumulative. *Blackburn v. Crowder*, 110 Ind. 127, 10 N. E. 933.

**Admissions in Depositions.** Where, on the question as to when a marriage was celebrated, the wife testified that it took place at a certain time and another person that it took place at a later time, it was held that a new trial should be granted where a deposition of the wife in another case was discovered fixing the time at the later date, and attaching a certified copy of the marriage license. *Halliday v. Lamp-right*, (Tex. Civ. App.) 68 S. W. 712.

Evidence of the admissions made by a party in a deposition since destroyed is not cumulative of direct evidence on the fact in issue. *Hurd v. French*, 1 Cin. Super. Ct. Rep. (Ohio) 365.

5. *Arkansas*.—*Bourdon v. Mason*, 5 Ark. 256.

Though the distinction appears to have been overlooked in some cases, it has been held that evidence of distinct admissions of distinct probative facts is not cumulative of evidence of other admissions offered in support of a general issue.<sup>6</sup>

**B. OF A PROSECUTING WITNESS.**—Evidence of admissions or declarations by a prosecuting witness, when admissible in behalf of a defendant, seems not to be cumulative where no such evidence has been offered,<sup>7</sup> but is cumulative to evidence of similar admissions or declarations.<sup>8</sup>

**C. THREATS OF DECEASED PERSON.**—So, in a prosecution for homicide, evidence of threats of the deceased is cumulative of evi-

*Georgia.*—Perry v. Houseley, 40 Ga. 657; Gardner v. Lamback, 47 Ga. 133; Hawkins v. Kermode, 85 Ga. 116, 11 S. E. 560.

*Illinois.*—Smith v. Belt, 31 Ill. App. 96.

*Indiana.*—Zoucker v. Wiest, 42 Ind. 169; Cox v. Harvey, 53 Ind. 174; Shirel v. Baxter, 71 Ind. 352; Lefever v. Johnson, 79 Ind. 554; Hines v. Driver, 100 Ind. 315; Cooper v. Ellis, 3 Ind. App. 142, 29 N. E. 444; Richter v. Meyers, 5 Ind. App. 33, 31 N. E. 582; Brittenham v. Robinson, 18 Ind. App. 502, 48 N. E. 616; Offutt v. Gowdy, 18 Ind. App. 602, 48 N. E. 654; Hammond v. Evans, 23 Ind. App. 501, 55 N. E. 784.

*Iowa.*—Wilhelm v. Thorington, 14 Iowa 537.

*Kansas.*—Brown v. Wheeler, 62 Kan. 676, 64 Pac. 594.

*Maine.*—Glidden v. Dunlap, 28 Me. 379; Berry v. Ross, 94 Me. 270, 47 Atl. 512.

*Massachusetts.*—Chatfield v. Lathrop, 6 Pick. 417.

*Nebraska.*—Scofield v. Brown, 7 Neb. 221.

*New York.*—Brisbane v. Adams, 1 Sandf. 195; Wilson v. Heath, 68 Hun 209, 22 N. Y. Supp. 833.

*Oklahoma.*—Twine v. Kilgore, 3 Okla. 640, 39 Pac. 388.

*Tennessee.*—McGavock v. Brown, 4 Humph. 251.

*Texas.*—Gulf, C. & S. F. R. Co. v. Marchand, 24 Tex. Civ. App. 47, 57 S. W. 860; Bridges v. Williams, (Tex. Civ. App.), 66 S. W. 484.

*Virginia.*—Tate v. Tate, 85 Va. 205, 7 S. E. 352.

*Wisconsin.*—Gans v. Harmison, 44 Wis. 323.

Admissions contained in letters are cumulative of similar admissions contained in other letters. Hammond v. Evans, 23 Ind. App. 501, 55 N. E. 784.

Where admissions made by a deceased person in letters were in evidence, the discovery of books of account of such deceased person containing similar admissions was held not to require the granting of a new trial. Bridges v. Williams, (Tex. Civ. App.), 66 S. W. 484.

6. Means v. Yeager, 96 Iowa 694, 65 N. W. 993; Keeler v. Jacobs, 87 Wis. 545, 58 N. W. 1,107.

*Contra.*—Wilson v. Heath, 68 Hun 209, 22 N. Y. Supp. 833.

7. Com. v. Yot Sing, 7 Kulp (Pa.) 349.

But see Higginbotham v. State, (Tex. Crim. App.), 20 S. W. 360; Sweat v. State, 90 Ga. 315, 17 S. E. 273.

Evidence of a statement made by the prosecuting witness, in contemplation of death, inconsistent with his testimony upon the trial, is not cumulative. Fletcher v. People, 117 Ill. 184, 7 N. E. 80.

But evidence of declarations of the prosecuting witness inconsistent with his testimony has been held cumulative of testimony directly contradicting him. People v. Loui Tung, 90 Cal. 377, 27 Pac. 295.

8. People v. Hong Quin Moon, 92 Cal. 41, 27 Pac. 1,096; Lathrop v. People, 197 Ill. 169, 64 N. E. 385; Harper v. State, 101 Ind. 109; State v. Starnes, 97 N. C. 423, 2 S. E. 447.

See also Long v. State, 54 Ga. 564.

dence of similar threats,<sup>9</sup> but is not cumulative where there was no evidence of such threats on the trial.<sup>10</sup>

D. WRITTEN AND ORAL ADMISSIONS. — Evidence of oral admissions may be cumulative to evidence of written admissions, and *vice versa*.<sup>11</sup>

E. ADMISSIONS AND DIRECT EVIDENCE. — Direct evidence of the making of a contract or the execution of an instrument or the doing of an act is not cumulative to evidence of admissions to prove the same fact.<sup>12</sup>

3. **Direct and Circumstantial or Opinion Evidence.** — A. IN GENERAL. — Direct evidence of a fact, before attempted to be proved by circumstantial evidence,<sup>13</sup> or by the opinions of witnesses as to the genuineness of a writing or signature,<sup>14</sup> is not cumulative; nor, in general, is circumstantial evidence cumulative of direct evidence to establish the same fact.<sup>15</sup>

9. *People v. Demasters*, 109 Cal. 607, 42 Pac. 236; *Brown v. State*, 51 Ga. 502; *Milam v. State*, 108 Ga. 29, 33 S. E. 818; *Adams v. People*, 47 Ill. 376; *Kinney v. People*, 108 Ill. 519; *State v. Kearley*, 26 Kan. 77.

10. *State v. Bailey*, 94 Mo. 311, 7 S. W. 425.

11. *Brown v. Wheeler*, 62 Kan. 676, 64 Pac. 594.

Admissions drawn from a written account tendered are cumulative of similar admissions drawn from an oral statement of the account. *Cook v. St. Louis & K. R. Co.*, 56 Mo. 380.

It has been held that a written receipt is cumulative of parol evidence of the same fact evidenced thereby. *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49.

12. Where it was attempted to be shown by the admissions of a party that money had been paid him, the direct testimony of a person that he saw the money paid is not cumulative. *St. John v. Alderson*, 32 Gratt. (Va.) 140. And see cases cited in note 4.

13. *Waller v. Graves*, 20 Conn. 305; *Dundee Mfg. Co. v. Van Riper*, 33 N. J. L. 152.

The testimony of one who saw the act committed is not cumulative where no such direct evidence was offered on the trial. *Thompson v. State*, 25 Tex. App. 161, 7 S. W. 589; *West v. State*, 2 Tex. App. 209.

14. *Humphries v. Marshall*, 12

Ind. 609; *Platt v. Munroe*, 34 Barb. (N. Y.) 291.

**Forgery.** — Where the only evidence of the genuineness of a magistrate's certificate was that of the opinion of persons as experts, newly discovered evidence that the magistrate was, at the time it was alleged to have been made, absent in another state, and of witnesses who saw the certificate made by another person, is not cumulative. *Knowles v. Northrop*, 53 Conn. 360, 4 Atl. 269.

Where the only evidence of forgery offered on the trial is the opinion of experts and the absence of the person whose signature is in question at the time fixed in the testimony, the newly discovered evidence of the person who committed the forgery or of one who saw it committed is not cumulative. *Cole v. Cole*, 50 How. Pr. (N. Y.) 59; *Vardeman v. Byrne*, 7 How. (Miss.) 365.

15. *Stineman v. Beath*, 36 Iowa 73; *German v. Maquoketa Sav. Bank*, 38 Iowa 368.

Where, on the issue as to the purchase of land, the plaintiff testified that he had purchased the land in controversy with the proceeds of other land sold by him, the testimony of the purchaser of such other land that the price paid by him for it was less than that alleged to have been paid by the plaintiff for the land in controversy is not cumulative of evidence in direct contradiction of the

B. ALIBI. — So evidence of an alibi seems not to be cumulative of other evidence upon the controverted fact, and *vice versa*.<sup>16</sup>

4. **Lost Instruments.** — Though the cases are not entirely harmonious,<sup>17</sup> the weight of authority seems to be that a newly discovered written instrument is not cumulative to secondary evidence to establish its execution or contents.<sup>18</sup> But the discovery of a written memorandum from which a witness may refresh his recollection and testify to the same facts more clearly and positively than before does not relieve against the objection that such new testimony would be cumulative.<sup>19</sup>

5. **Evidence Upon Point Not Before Controverted.** — Where, upon the trial, one party has introduced evidence to establish a point, and the other party has offered no evidence upon it, newly discovered

plaintiff's testimony. *Mally v. Mally*, 114 Iowa 309, 86 N. W. 262.

Where the plaintiff claimed to have loaned the defendant a certain sum of money derived from a certain source, newly discovered evidence that the sum derived from such source was much less than the sum claimed to have been loaned was held not to be cumulative. *Dierolff v. Winterfield*, 26 Wis. 175.

16. **Alibi.** — See *Knowles v. Northrop*, 53 Conn. 360, 4 Atl. 269; *Wolf v. Mahan*, 57 Tex. 171; *State v. Stowe*, 3 Wash. St. 206, 28 Pac. 337, 14 L. R. A. 609.

Newly discovered evidence by which to prove an alibi is not cumulative, where the defendant was surprised at the time named by the prosecuting witness as the time of an alleged seduction, and no such evidence was offered on the trial. *Sargent v. —*, 5 Cow. (N. Y.) 106.

But newly discovered evidence that the plaintiff was not present at the place where the defendant claimed an agreement was made between them, was held cumulative of direct evidence on the part of the plaintiff that he did not make the agreement. *Adams v. Bush*, 23 How. Pr. (N. Y.) 262.

Where a witness testified that he commenced work on a mining claim at a certain date, and witnesses for the other party testified that he did not begin work until later, newly discovered evidence that the former witness was seen in other localities several days after he claimed to have

commenced work is not cumulative. *Twin Sprgs. Placer Co. v. Upper Boise Hyd. Min. Co.*, (Idaho), 59 Pac. 535.

17. Where a party testified that he drew money from a bank, evidence of the finding of the check with the canceling marks of the bank was held to be cumulative. *Oakley v. Sears*, 7 Rob. (N. Y.) 111.

18. *Mercer v. King*, 19 Ky. L. Rep. 781, 42 S. W. 106.

**Lost Instruments.** — Where, on the issue of the genuineness of a lost note, the only testimony is the opinion of experts who had seen it, and that of a co-maker who was under indictment for forging the note, it was held that the note itself, being found, was not cumulative. *Platt v. Munroe*, 34 Barb. (N. Y.) 291.

On the issue of the execution of a bond which has been lost, the newly discovered evidence of the bond itself is not cumulative of testimony of its execution from the personal opinion and recollection of witnesses. *Winfield Bldg. & L. Assn. v. McMullen*, 59 Kan. 493, 53 Pac. 481.

Where, in an action on an insurance policy, the principal question was whether it was payable to the plaintiff, newly discovered evidence of the finding of the policy made payable to another and receipted by such other person is not cumulative. *Protection L. Ins. Co. v. Dill*, 91 Ill. 174.

19. *Kuhlman v. Burns*, 117 Cal. 469, 49 Pac. 585; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790.

evidence to controvert that point is not cumulative.<sup>20</sup> Nor is one held to have offered evidence upon a point because he touched upon it incidentally in the cross-examination of an adversary witness.<sup>21</sup>

But evidence to prove a fact not disputed by the other party is cumulative.<sup>22</sup>

**6. On Point Testified to by a Party.**— Though the only evidence offered to prove a fact was the testimony of a party to the action, additional testimony to prove the same probative fact may be cumulative within the meaning of the term as used in the law of new trials.<sup>23</sup>

20. *Irwin v. Morell*, Dud. (Ga.) 72; *Powell v. Jones*, 42 Barb. (N. Y.) 24; *Simmons v. Fay*, 1 E. D. Smith (N. Y.) 107; *Day v. Goodman*, (Tex.), 17 S. W. 475; *Halstead v. Horton*, 38 W. Va. 727, 18 S. E. 953.

See also *Coker v. Merritt*, 16 Fla. 416.

But see *McDaniels v. Van Fosen*, 11 Iowa 195.

Where, on the issue of the execution of a deed, one party introduced evidence that the maker was hundreds of miles away from the place named at the time it was alleged to have been made, and the other party introduced no direct evidence upon that point, newly discovered evidence that the maker was at the place named is not cumulative. *Wolf v. Mahan*, 57 Tex. 171.

**Physical Injuries.**— Where the plaintiff introduced evidence tending to show total physical disability from the injury complained of, and the defendant offered no evidence of the extent of the plaintiff's injuries, newly discovered evidence that the defendant engaged in physical labor soon after the trial, and exhibited great agility and physical strength, was held not to be cumulative. *Cole v. Fall Brook Coal Co.*, 61 Hun 623, 16 N. Y. Supp. 789.

Where, in an action for personal injuries, the plaintiff introduced evidence of having been injured by falling upon a walk at a certain place, and the defendant introduced no evidence upon that point, newly discovered evidence that plaintiff was not injured at the place testified to was held not to be cumulative. *Lincoln v. Holmes*, 20 Neb. 39, 28 N. W. 851.

**Forgery.**— The confession of one who forged a will is not cumulative evidence where there was no evidence of forgery on the probate of the will. *Connolly v. Connolly*, 32 Gratt. (Va.) 657.

21. "To our minds, it would be a harsh and unjust application of the rule to say that evidence shall be no ground for a new trial because cumulative of evidence incidentally favorable to the party on cross-examination. In many cases, such evidence, because of its meagerness, would not be relied upon. The natural meaning or understanding of cumulative evidence, as applied to new trials, is, evidently, that to be added to evidence before used by the party to establish the same particular fact; that is, the party shall not make one attempt to establish the fact by evidence, and, failing, have a new trial to make another attempt by additional evidence." *White v. Nafus*, 84 Iowa 350, 51 N. W. 5.

22. *Helfrich Saw and Plan. Mill Co. v. Everly*, (Ky.), 32 S. W. 750.

23. *Howard v. State*, 36 Fla. 21, 17 So. 84.

*Indiana.*— *Atkisson v. Martin*, 39 Ind. 242; *Fox v. Reynolds*, 24 Ind. 46; *Winsett v. State*, 57 Ind. 26; *Schnurr v. Stults*, 119 Ind. 429, 21 N. E. 1,089; *Richter v. Meyers*, 5 Ind. App. 33, 31 N. E. 582; *Watts v. Moffett*, 12 Ind. App. 399, 40 N. E. 533.

*Kansas.*— *Mitchell v. Stillings*, 20 Kan. 276; *State v. Rohrer*, 34 Kan. 427, 8 Pac. 718.

*Louisiana.*— *State v. Hendrix*, 45 La. Ann. 500, 12 So. 621.

*Minnesota.*— *Mininger v. Knox*, 8 Minn. 140.

**7. Discretion of Trial Court.**—In doubtful cases the discretion of the trial court in passing upon the cumulative character of evidence will not be interfered with.<sup>24</sup>

## II. CONTINUANCE FOR CUMULATIVE EVIDENCE.

**1. In General.**—As a general rule, it is not error to overrule a motion for the continuance of an action to enable a party to procure evidence cumulative to that actually introduced on the trial,<sup>25</sup> or to evidence that was available or might have been pro-

*Missouri.*—State *v.* Myers, 115 Mo. 394, 22 S. W. Rep. 382.

*New York.*—Shute *v.* Jones, 24 N. Y. Supp. 637.

See also State *v.* Allen, 171 Mo. 562, 71 S. W. 1,000.

But see Smith *v.* Grover, 74 Wis. 171, 42 N. W. 112; Kochel *v.* Bartlett, 88 Ind. 237.

**Corroborating Party.**—Where the prosecution produced evidence of a conversation between the defendant and another person in the presence of a third person, and defendant denied such conversation, evidence of the third person denying the conversation is cumulative. State *v.* Myers, 115 Mo. 394, 22 S. W. 382.

Where the defendant, testifying in his own behalf, denied the making of a certain written statement, and witnesses for the plaintiff testified that the statement was taken down in shorthand and typewritten, and then signed by the defendant, it was held that the newly discovered testimony of the stenographer that the alleged statement was not so taken by him was cumulative. Chicago & N. W. R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1,095, 88 Am. St. Rep. 68.

<sup>24</sup> Kenezleber *v.* Wahl, 92 Cal. 202, 28 Pac. 225; Oberlander *v.* Fixen, 129 Cal. 690, 62 Pac. 254; Alger *v.* Merritt, 16 Iowa 121; State *v.* Boyce, 24 Wash. 514, 64 Pac. 719.

**Presumptions in Favor of Trial Court.**—Where the trial court has ordered a new trial for newly discovered evidence, it will be presumed that such evidence was not cumulative. Hobler *v.* Cole, 49 Cal. 250.

Where the trial court has overruled a motion for a new trial on the ground of newly discovered evidence,

such evidence will be presumed to have been cumulative.

*Arkansas.*—Burriss *v.* Wise, 2 Ark. 33.

*Indiana.*—Simpson *v.* Wilson, 6 Ind. 474; Swift *v.* Wakeman, 9 Ind. 552; Larrimore *v.* Williams, 30 Ind. 18; Atkinson *v.* Saltsman, 3 Ind. App. 139, 29 N. E. 435.

*Kansas.*—Clark *v.* Hall, 10 Kan. 81; Kirby *v.* Childs, 10 Kan. 639; Thorn *v.* Davis, 16 Kan. 22.

*Washington.*—McKilver *v.* Manchester, 1 Wash. Ter. 255.

It is said that the appellate court would be less inclined to set aside an order allowing a new trial than one refusing it. Butts *v.* Christy, 23 Ky. L. Rep. 2,355, 67 S. W. 377.

<sup>25</sup> *Kansas.*—State *v.* Gould, 40 Kan. 258, 19 Pac. 739.

*Kentucky.*—Wilkerson *v.* Com., 88 Ky. 29, 9 S. W. 836; Howard *v.* Com., 15 Ky. L. Rep. 873, 26 S. W. 1; Hatfield *v.* Com., 21 Ky. L. Rep. 1,461, 55 S. W. 679; Smith *v.* Com., 13 Ky. L. Rep. 612, 17 S. W. 868.

*Louisiana.*—State *v.* Nash, 45 La. Ann. 1,137, 13 So. 732, 734; State *v.* Rodrigues, 45 La. Ann. 1,040, 13 So. 802.

*Mississippi.*—Wells *v.* State, (Miss.), 18 So. 117; Trim *v.* State, (Miss.), 33 So. 718.

*Texas.*—Frizzell *v.* State, 30 Tex. App. 42, 16 S. W. 751; Harvey *v.* State, 35 Tex. Crim. App. 545, 34 S. W. 623; Steel *v.* State, (Tex. Crim. App.) 30 S. W. 1,064; Bonners *v.* State, (Tex. Crim. App.), 35 S. W. 650; Kirk *v.* State, (Tex. Crim. App.), 37 S. W. 440; Shackelford *v.* State, (Tex. Crim. App.), 53 S. W. 884; Speights *v.* State, (Tex. Crim. App.) 54 S. W. 595; Hamilton *v.* State, (Tex. Crim. App.) 58 S. W.

cured.<sup>20</sup> Especially is this true where the moving party has not exercised reasonable diligence to procure the desired evidence.<sup>27</sup>

**2. Uncontroverted Point.**—Nor is a party entitled to a continuance to procure evidence on a point not controverted by the other party.<sup>28</sup>

93; *Grimsinger v. State*, (Tex. Crim. App.), 69 S. W. 583; *Kelly v. State*, (Tex. Crim. App.), 71 S. W. 756; *Knowles v. State*, (Tex. Crim. App.), 72 S. W. 398.

*Washington.*—*State v. Boyce*, 24 Wash. 514, 64 Pac. 719.

See also *Kendall v. Com.*, 14 Ky. L. Rep. 15, 19 S. W. 173.

**Texas Rule.**—But the rule does not apply to an application for a first continuance in Texas. *Pinckord v. State*, 13 Tex. App. 468; *Hyden v. State*, 31 Tex. Crim. App. 401, 20 S. W. 764; *Carter v. State*, 37 Tex. Crim. App. 403, 35 S. W. 378; *Burnley v. State*, (Tex. App.), 14 S. W. 1,008; *Porter v. State*, (Tex. Crim. App.), 32 S. W. 692; *Clark v. State*, (Tex. Crim. App.), 33 S. W. 224; *Davis v. State*, (Tex. Crim. App.), 65 S. W. 918.

Where there are four witnesses present by whom the desired facts may be proved, it is ordinarily not error to refuse a continuance to obtain the testimony of other witnesses to such facts. *Jackson v. State*, 31 Tex. Crim. App. 552, 21 S. W. 367.

**26. Criminal Actions**, see *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782; *Helm v. State*, 67 Miss. 562, 7 So. 487; *Fisher v. State*, 4 Tex. App. 181; *Jackson v. State*, 31 Tex. Crim. App. 552, 21 S. W. 367; *Roberts v. State*, (Tex. App.), 16-S. W. 255; *Higginbotham v. State*, (Tex. Crim. App.), 20 S. W. 360; *Cauthern v. State*, (Tex. Crim. App.), 65 S. W. 96; *Parker v. State*, (Tex. Crim. App.), 65 S. W. 1,066; *Hargrove v. State*, (Tex. Crim. App.), 65 S. W. 1,070; *People v. Garns*, 2 Utah 260.

**Civil Actions**, see *McKichan v. McBean*, 45 Ill. 228; *Jarvis v. Shacklock*, 60 Ill. 378; *Dunn v. People*, 109 Ill. 635; *West Chicago Park Com'rs v. Barber*, 62 Ill. App. 108; *Avery v. Wilson*, 26 Iowa 573; *Penoyer v. Phillips*, 10 N. Y. St. 783; *Dimmery v. Wheeling & E. G. R. Co.*, 27 W. Va. 32, 55 Am. Rep.

592; *Tompkins v. Burgess*, 2 W. Va. 187.

See also *Livingston v. Cooper*, 22 Fla. 292.

But see *Owens v. Starr*, 2 Litt. (Ky.) 230; *Harrison v. Waymouth*, 3 Rob. (La.) 340; *Hewlett v. Henderson*, 9 Rob. (La.) 379.

**The Affidavit for a Continuance** should show that there are no other available witnesses by whom the same facts can be proved. *Pierce v. Payne*, 14 Cal. 419; *Pope v. Dalton*, 31 Cal. 218; *Eames v. Hennessy*, 22 Ill. 629; *Hodges v. Nash*, 141 Ill. 391, 31 N. E. 151; *S. C. 43 Ill. App. 638*; *Thompson v. Abbott*, 11 Iowa 193; *Bartholow v. Campbell*, 56 Mo. 117; *Leabo v. Goode*, 67 Mo. 126; *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

**Written Evidence.**—A case will not be continued to permit a party to obtain receipts of payment where such payments may be otherwise proved by available evidence. *Anderson v. Citizens' Nat. Bank*, (Tex.), 5 S. W. 503.

**27. Outcall v. Johnston**, 9 Colo. App. 519, 49 Pac. 1,058; *Helm v. State*, 67 Miss. 562, 7 So. 487; *State v. Robinson*, 106 Tenn. 204, 61 S. W. 65; *Speights v. State*, (Tex. Crim. App.), 54 S. W. 595; *Wilkerson v. State*, (Tex. Crim. App.), 57 S. W. 956.

**28. Dacey v. People**, 116 Ill. 555, 6 N. E. 165; *Chambers v. Beahan*, 57 Ill. App. 285; *Mitchell v. Com.*, (Ky.), 1 S. W. 9; *Tate v. State*, 35 Tex. Crim. App. 231, 33 S. W. 121; *Brittain v. State*, (Tex. Crim. App.), 40 S. W. 297; *Sisk v. State*, (Tex. Crim. App.), 42 S. W. 985; *Bolton v. State*, (Tex. Crim. App.), 43 S. W. 1,010; *Bryant v. State*, (Tex. Crim. App.), 47 S. W. 373.

A continuance will not be granted to obtain additional evidence of threats against the defendant made by the deceased where there is already uncontroverted evidence of

**3. When Irreconcilable Conflict in Evidence.** — It has been held, however, that where there was an irreconcilable conflict in the evidence offered on the trial, and where the evidence for which the continuance was sought was of an important character, the overruling of the motion was error.<sup>29</sup>

**4. Available Witnesses Interested.** — The continuance should be granted where without the continuance the only available witness is the moving party himself,<sup>30</sup> or some person who is interested in the action adversely to him,<sup>31</sup> or persons who will be impeached,<sup>32</sup> or where the only available witnesses for the defendant in a criminal prosecution are his relatives.<sup>33</sup>

such threats. *Henderson v. Com.*, 12 Ky. L. Rep. 908, 15 S. W. 782.

29. *Corbin v. People*, 131 Ill. 615, 23 N. E. 613.

But see *Clement v. Newton*, 78 Ill. 427.

Objections to granting a new trial for cumulative evidence do not apply with equal force to the granting of a continuance for such evidence. *Dillingham v. Ellis*, 86 Tex. 447, 25 S. W. 618.

**For Direct Evidence.** — Where there is circumstantial evidence that the prosecuting witness himself committed the crime of which the accused is charged, a continuance should be granted to procure the testimony of absent witnesses who saw the act committed. *Thompson v. State*, 25 Tex. App. 161, 7 S. W. 589.

30. *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933; *Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218; *Naines v. State*, 26 Tex. App. 14, 9 S. W. 51; *Burnly v. State*, (Tex. App.), 14 S. W. 1,008.

But see *State v. Primeaux*, 39 La. Ann. 673, 2 So. 423.

**Evidence to Corroborate Defendant.** Where the evidence of the guilt of an accused person is circumstantial, a continuance should ordinarily be granted to procure the testimony of witness to corroborate the defendant. *Maines v. State*, 26 Tex. App. 14, 9 S. W. 51.

See also *Phipps v. State*, 34 Tex. Crim. App. 560, 31 S. W. 397.

Where a party to an action is the only available witness present, he is entitled to a continuance to procure the testimony of disinterested witness; but if such party, instead of

moving for a continuance, elects to testify in his own behalf, a new trial will not be granted to obtain the testimony of such witnesses. *Fox v. Reynolds*, 24 Ind. 46.

31. *Fox v. Reynolds*, 24 Ind. 46; *Maynard v. Cleveland*, 76 Ga. 52; *Espy v. State Bank*, 5 Ind. 274; *Perkins v. State*, 1 Tex. App. 114.

**Interested Witness.** — Where the only witness to a fact is one who is interested in seeing the accused convicted, it is error to refuse the latter a continuance to obtain the testimony of other witnesses. *Perkins v. State*, 1 Tex. App. 114.

But in a prosecution for incest it was held not to be error to refuse a continuance to obtain the testimony of absent witnesses that the prosecuting witness had made declarations that she never had intercourse with the defendant, since the prosecuting witness herself might testify to such declarations. *Higginbotham v. State*, (Tex. Crim. App.), 20 S. W. 360.

32. *Reid v. State*, 23 Ga. 190. A continuance should be granted to obtain witnesses to prove material declarations by a deceased person where the credibility of the only witness testifying to such remarks has been attacked. *Fossett v. State*, 41 Tex. Crim. App. 400, 55 S. W. 497.

**Holding Case Open.** — It rests in the sound discretion of the trial court whether a case shall be held open to await evidence to corroborate the testimony of a witness whose credibility has been attacked. *Caldwell v. N. J. Steamboat Co.*, 56 Barb. (N. Y.) 425.

33. *Harris v. State*, 15 Tex. App.



**5. Evidence Cumulative in Part Only.** — A continuance should not be refused where the evidence sought to be procured is in part only cumulative, if otherwise important.<sup>34</sup>

**6. Alibi.** — It has been held that when the case is doubtful, and the evidence circumstantial, a continuance should be granted to enable the defendant to procure cumulative evidence of an alibi.<sup>35</sup>

### III. ADMISSION AND REJECTION ON THE TRIAL.

**1. In General.** — It is not error, on the trial, to admit evidence that is cumulative, if otherwise admissible.<sup>36</sup> And a verdict or judgment will not be set aside, ordinarily, because of the admission of incompetent evidence, which was cumulative to other admissible and convincing evidence.<sup>37</sup>

It is proper to refuse to admit further evidence to establish a point not controverted by the other side, or already conclusively established.<sup>38</sup> But the right to exclude cumulative evidence, other than by limiting the number of witnesses, has generally been denied.<sup>39</sup>

The court may refuse, in its discretion, to permit a witness to be

411. Where the only witnesses to an assault who are present are relatives of the parties, and their testimony is conflicting, a continuance should be granted to obtain the testimony of absent and disinterested witnesses. *Burnly v. State*, (Tex. App.), 14 S. W. 1,008.

34. *Dillingham v. Ellis*, 86 Tex. 447, 25 S. W. 618.

35. *Ninnon v. State*, 17 Tex. App. 650; *Pinckord v. State*, 13 Tex. App. 468.

See also *State v. Stowe*, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609.

But see *Evans v. State*, (Tex. Crim. App.), 31 S. W. 648; *Harrison v. State*, 83 Ga. 129, 9 S. E. 542; *Burns v. People*, 126 Ill. 282, 18 N. E. 550.

It is not an abuse of discretion to refuse a continuance to procure the testimony of two witnesses to an alibi where twenty-two other witnesses have testified upon the subject. *State v. Hillstock*, 45 La. Ann. 298, 12 So. 352.

36. *McLendon v. Frost*, 57 Ga. 448. Where the original mortgage and indorsements of its record have been introduced in evidence, it is not error to permit the introduction of a

certified copy of its record. *Barnett v. Wilson*, 132 Ala. 375, 31 So. 521.

37. *McLendon v. Frost*, 57 Ga. 448; *Chase v. Caryl*, (N. J.), 31 Atl. 1,024.

38. *Canada*. — *Heavy v. Odell*, 10 New Bruns. 524.

*Alabama*. — *Maxwell v. State*, 129 Ala. 48, 29 So. 891.

*Illinois*. — *Clement v. Brown*, 30 Ill. 43; *Gray v. St. John*, 35 Ill. 222; *Union Nat. Bank v. Baldenwick*, 45 Ill. 375; *Mueller v. Rebhan*, 94 Ill. 142; *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510.

*Iowa*. — *Cory v. Hamilton*, 84 Iowa 594, 51 N. W. 54.

*Kentucky*. — *Hollingsworth v. Warnock*, 23 Ky. L. Rep. 1,395, 65 S. W. 163.

*Michigan*. — *Mears v. Cornwall*, 73 Mich. 78, 40 N. W. 931.

*Missouri*. — *Clafin v. Sommers*, 39 Mo. App. 419.

*South Carolina*. — *Cobb v. Cater*, 59 S. C. 462, 38 S. E. 114.

*Texas*. — *Kelly v. State*, (Tex. Crim. App.), 71 S. W. 756.

39. *Union Nat. Bank v. Baldenwick*, 45 Ill. 375; *Dossett v. Miller*,

re-examined upon any point or to answer a substantial repetition of any question.<sup>40</sup>

**2. Limiting Number of Witnesses.** — A. OPINION EVIDENCE. The trial court may limit the number of expert witnesses called to testify upon any point.<sup>41</sup> It is generally held that it may so limit

3 Sneed (Tenn.) 72; *Calvert v. Carter*, 18 Md. 73.

See also *Fenwick v. Bowling*, 50 Mo. App. 516.

Where cumulative evidence is erroneously excluded, the error is without prejudice when the court accepts the fact as proved. *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678.

Where it is apparent that the introduction of cumulative evidence would not have changed the result, the error is without prejudice. *Jackson v. Sharff*, 1 Or. 246.

40. *Spitler v. Kaeding*, 133 Cal. 500, 65 Pac. 1,040; *Buck v. Maddock*, 67 Ill. App. 466, 167 Ill. 219, 47 N. E. 208; *Crow v. Marshall*, 15 Mo. 499; *Marshall v. Davies*, 78 N. Y. 414, 58 How. Pr. 231; *Couts v. Neer*, 70 Tex. 468, 9 S. W. 40; *Hinton v. Cream City R. Co.*, 65 Wis. 323, 27 N. W. 147.

See also *Kreider v. Wisconsin River P. & P. Co.*, 110 Wis. 645; 86 N. W. 662; *Tribune Ass'n v. Follwell*, 107 Fed. 646, 46 C. C. A. 526.

Where facts are in evidence from which a result is mathematically deducible, the court may permit, or refuse to permit, a witness to testify to such deduction. *Darling v. Klock*, 33 App. Div. 270, 53 N. Y. Supp. 593; *Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498.

"So the court may, in its discretion, refuse to permit a witness to give a résumé of his testimony." *Guilfoyle v. Pierce*, 4 App. Div. 612, 38 N. Y. Supp. 697.

Where a controversy arises after the case is closed as to whether the venue has been proved, it is not error for the trial court to permit a witness to be recalled to prove it. *Wiggins v. State*, 80 Ga. 468, 5 S. E. 503.

41. *People v. Kemp*, 76 Mich. 410, 43 N. W. 439 (to two each on handwriting); *Hilliard v. Beattie*, 59 N. H. 462 (to three each on physical condition); *Sizer v. Burt*, 4 Denio

(N. Y.) 426 (to twenty each on genuineness of signature); *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559 (to five each on handwriting); *Huett v. Clark*, 4 Colo. App. 231, 35 Pac. 671; *Sixth Ave. R. Co. v. Metropolitan E. R. Co.*, 138 N. Y. 548, 34 N. E. 400.

See also *Traders' Ins. Co. v. Catlin*, 71 Ill. App. 569; *Green v. Phoenix Mut. L. Ins. Co.*, 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; *Cushing v. Billings*, 2 Cush. (Mass.) 158; *Sheldon v. Minneapolis & St. L. R. Co.*, 29 Minn. 318, 13 N. W. 134; *Cohen v. Simon*, 36 Misc. 858, 74 N. Y. Supp. 921; *Reynolds v. Port Jarvis, B. & S. Factory*, 32 Hun (N. Y.) 64.

**Testamentary Cases.** — "If testamentary cases are ever to be brought to a conclusion, there must be some limit to the reception of expert evidence, and that which was fixed in this case was quite liberal enough. To obtain such evidence is expensive, since desirable witnesses are not to be found in every community; but an army may be had if the court will consent to their examination; and if legal controversies are to be determined by the preponderance of voices, wealth, in all litigation in which expert evidence is important, may prevail almost of course. But one familiar with such litigation can but know that for the purposes of justice the examination of two conscientious and intelligent experts on a side is commonly better than to call more, and certainly, when five on each side have been examined, the limit of reasonable liberality has in most cases been reached. The jury cannot be aided by going farther. Little discrepancies that must be found in the testimony of those even who in the main agree begin to attract attention and occupy the mind, until at last jurors, with their minds on unimportant variances, come to think that expert evidence, from its

testimony as to the value of property and the damage thereto,<sup>42</sup> but this doctrine is disputed.<sup>43</sup>

**B. CHARACTER EVIDENCE.** — The court may also limit the number of witnesses called to impeach or sustain the character of another witness.<sup>44</sup> By the weight of authority it may limit the testimony to the character of a party when in issue, as in slander and breach of promise of marriage,<sup>45</sup> but this has been denied.<sup>46</sup>

very uncertainty, is worthless. This is not a desirable state of things, and it can only be avoided by confining the use of expert evidence within reasonable bounds." Cooley, J., in *Fraser v. Jennison*, 42 Mich. 206, 3 N. W. 882.

**Illinois Rule.** — But it has been held to be error to limit the number of expert witnesses called to prove one of the main issues in the case. *Traders' Ins. Co. v. Catlin*, 71 Ill. App. 569.

By a Kansas statute at least three experts are required to prove any fact resting wholly on such evidence. *State v. Foster*, 30 Kan. 365, 2 Pac. 628.

**42.** *Union R. Trans. & Stockyard Co. v. Moore*, 80 Ind. 548 (to eleven each); *Everett v. Union Pac. R. Co.*, 59 Iowa 243, 13 N. W. 109; *State v. Pratt Co.*, 42 Kan. 641, 22 Pac. 722 (to six each where collateral issue); *Riggs v. Sterling*, 60 Mich. 643, 27 N. W. 705, 1 Am. St. Rep. 554 (to six each to value of homestead); *Detroit City R. v. Mills*, 85 Mich. 634, 48 N. W. 1,007 (to eight or ten); *Sheldon v. Minneapolis & St. L. R. Co.*, 29 Minn. 318, 13 N. W. 134; *Sixth Ave. R. Co. v. Metropolitan E. R. Co.*, 138 N. Y. 548, 34 N. E. 400; *Skeen v. Mooney*, 8 Utah 157, 30 Pac. 363 (to three each).

See also *Burhans v. Norwood Park*, 138 Ill. 147, 27 N. E. 1,088.

**Incompetent Witness Counted.** Where the court limited the parties to seven witnesses each on the value of property and the damage done thereto, it was held that two witnesses called by one of the parties who proved to be incompetent to testify on that subject must be counted in making up the seven. *Preston v. Cedar Rapids*, 95 Iowa 71, 63 N. W. 577. See also *Giordano v. Brandy-*

*wine Granite Co.*, 3 Pen. (Del.) 423, 52 Atl. 332.

**43.** *White v. Hermann*, 51 Ill. 243, 99 Am. Dec. 543.

See also *Ward v. Dick*, 45 Conn. 235, 29 Am. Rep. 677; *State v. Pratt Co.*, 42 Kan. 641, 22 Pac. 722; *Covington v. Taffee*, 24 Ky. L. Rep. 373, 68 S. W. 629.

**44.** *Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1,058 (to four to sustain a witness attacked by two); *Bays v. Herring*, 51 Iowa 286, 1 N. W. 558 (to three); *Bays v. Hunt*, 60 Iowa 251, 14 N. W. 785 (to three); *State v. Beabout*, 100 Iowa 155, 69 N. W. 429 (to five); *Nolton v. Moses*, 3 Barb. (N. Y.) 31 (to three); *Bissell v. Cornell*, 24 Wend. (N. Y.) 354 (to sixteen).

See also *Sheldon v. Minneapolis & St. L. R. Co.*, 29 Minn. 318, 13 N. W. 134; *Green v. Phoenix Mut. L. Ins. Co.*, 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; *Traders' Ins. Co. v. Catlin*, 71 Ill. App. 569; *Reynolds v. Port Jervis B. & S. Factory*, 32 Hun (N. Y.) 64.

The limitation should depend somewhat on the importance of the testimony of the witness whose credibility is sought to be impeached. *Bunnell v. Butler*, 23 Conn. 65.

**Costs.** — It seems that where the court limits the number of witnesses called to testify to the character of a person, it may refuse to tax the costs of witnesses subpoenaed but not testifying. *Biester v. State*, (Neb.), 91 N. W. 416.

**45.** *Bissell v. Cornell*, 24 Wend. (N. Y.) 354; *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730; *Markham v. Herrick*, 82 Mo. App. 327.

See also *Nelson v. Wallace*, 57 Mo. App. 397; *State v. Rutherford*, 152 Mo. 124, 53 S. W. 417.

**46.** *Ward v. Dick*, 45 Conn. 235, 29 Am. Rep. 677.

C. IN GENERAL. — It has often been held that the court may limit the number of witnesses permitted to testify upon any single point, though a principal issue in the case;<sup>47</sup> but to this doctrine there is strong dissent.<sup>48</sup>

47. *Gardner v. State*, 4 Ind. 632; *Mergentheim v. State*, 107 Ind. 567, 8 N. E. 568 (to seven each on the condition of water in a canal); *Minthorn v. Lewis*, 78 Iowa 620, 43 N. W. 465 (to six each as to the making of certain statements); *State v. Lamb*, 141 Mo. 298, 42 S. W. 827 (to six witnesses and defendant to alibi); *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39.

See also *Smith v. Jensen*, 13 Colo. 213, 22 Pac. 434; *Butler v. State*, 97 Ind. 378; *McConnell v. Osage*, 80 Iowa 293, 45 N. W. 550, 8 L. R. A. 778; *State v. Stout*, 49 Ohio St. 270, 30 N. E. 437; *Galveston, H. & S. A. R. Co. v. Matula*, 79 Tex. 577, 15 S. W. 573; *Delgado v. Gonzales*, (Tex.), 28 S. W. 459; *Skeen v. Mooney*, 8 Utah 157, 30 Pac. 363.

"A reasonable limitation of the number of witnesses upon a single question is within the discretion of the trial court. . . . It cannot be admitted that, as a matter of right, the defendant might continue indefinitely to call and examine witnesses in respect to it. Perhaps 100 or more might have been found competent to testify on the subject. It would be highly absurd to hold that the court was bound to sit and hear the testimony of witnesses on this point without limit of number." *Larson v. Eau Claire*, 92 Wis. 86, 65 N. W. 731.

Where two witnesses testified for the plaintiff as to what was said and done by the parties at a time and place named, and six witnesses testified for the defendant upon the same point, it was held not to be error to exclude further testimony for the defendant upon that point. *Anthony v. Smith*, 4 Bosw. (N. Y.) 503.

Where two witnesses testified that a witness for the opposing party could not by any physical possibility have seen that to which he testified from the position he claimed to have occupied, it was held not to be error

to exclude further testimony upon that point. *Kesee v. Chicago & N. W. R. Co.*, 30 Iowa 78, 6 Am. Rep. 643.

A rule of court limiting the number of witnesses to be called to prove a single fact does not apply to witnesses called to show the mental condition of a testator, since that condition is to be determined from a number of observations. *Pritchard v. Henderson*, 3 Pen. (Del.) 128, 50 Atl. 217.

In determining the number of witnesses called to prove a single fact, no distinction is made between expert witnesses and those who testify from actual observations. *Love v. Barnesville Mfg. Co.*, 3 Pen. (Del.) 152, 50 Atl. 536.

**Prosecution Limiting Witnesses.** In those jurisdictions where the prosecution is bound to call all witnesses to a crime and show the whole transaction, it is not bound to introduce evidence cumulative to that already adduced. *Hurd v. People*, 25 Mich. 405; *Bonker v. People*, 37 Mich. 4; *Reynolds v. State*, 33 Tex. Crim. App. 143, 25 S. W. 786, 47 Am. St. Rep. 25.

See also *Mayes v. State*, 33 Tex. Crim. App. 33, 24 S. W. 421.

48. *Ward v. Dick*, 45 Conn. 235, 29 Am. Rep. 677; *Reynolds v. Port Jervis B. & S. Factory*, 32 Hun (N. Y.) 64; *Union Nat. Bank v. Baldenwick*, 45 Ill. 375; *Fenwick v. Bowling*, 50 Mo. App. 516; *Barhyte v. Summers*, 68 Mich. 341, 36 N. W. 93; *Crane Company v. Stammers*, 83 Ill. App. 329; *Cooke Brewing Co. v. Ryan*, 98 Ill. App. 444.

See also *Calvert v. Carter*, 18 Md. 73; *Cohen v. Simon*, 36 Misc. 858, 74 N. Y. Supp. 921.

It has been held error to limit the number of non-expert witnesses called to prove the insanity of a person. "It must be apparent that the limitation of witnesses in such cases to an equal number on each side, as

**D. PRACTICE.** — It seems to be proper practice for the court to notify the parties of any proposed limitation upon the number of witnesses at the beginning of the trial,<sup>49</sup> though this practice has been criticised.<sup>50</sup> It has been suggested that the court may announce the limitation either at the beginning of the trial, or later, when the necessity for it becomes reasonably apparent.<sup>51</sup>

**E. JUDICIAL DISCRETION.** — The court should exercise care in limiting the evidence upon any point, and may be reversed for abuse of sound judicial discretion.<sup>52</sup> The abuse must be apparent on

was here done, even supposing they were of equal credit, and had equal means of knowledge, would be to defeat the party holding the affirmative of the issue." *Greene v. Phoenix Mut. L. Ins. Co.*, 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576.

**On Setting Aside Default.** — Where a default has been set aside as a matter of favor, the court may limit the number of witnesses called to testify upon a single point. *Burhans v. Norwood Park*, 138 Ill. 147, 27 N. E. 1,088.

**Statutes Limiting Costs.** — That the court is authorized by statute to limit the number of witnesses upon any point for whom costs will be taxed, does not authorize the court to exclude other witnesses upon the same point where the party calling them provides for the payment of their fees and costs. *White v. Hermann*, 51 Ill. 243, 99 Am. Dec. 543; *Chicago, B. & N. R. Co. v. Bowman*, 122 Ill. 595, 13 N. E. 814; *Chicago City R. Co. v. Wall*, 93 Ill. App. 411; *South Danville v. Jacobs*, 42 Ill. App. 533; *Kash v. Miller*, 2 Bush (Ky.) 568.

Such statute held constitutional but directory only. *State v. Stout*, 49 Ohio St. 270, 30 N. E. 437.

**Excluding Party.** — It seems that a court has no authority to limit the number of witnesses in such a manner as to deprive any party to the suit of the right to testify. *Fisher v. Conway*, 21 Kan. 18, 30 Am. Rep. 419.

**49.** *Markham v. Herrick*, 82 Mo. App. 327.

See also *Bunnell v. Butler*, 23 Conn. 65; *Greene v. Phoenix Mut. L. Ins. Co.*, 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; *Union R. Trans. & Stockyard*

*Co. v. Moore*, 80 Ind. 458; *Mergenthheim v. State*, 107 Ind. 567, 8 N. E. 568; *Everett v. Union Pac. R. Co.*, 59 Iowa 243, 13 N. W. 109.

It seems that where the court has made a ruling as to the number of witnesses to be called upon any given point, exceptions should be taken to such ruling at that time, and not when a party seeks to call a witness in excess of the number fixed.

**50.** *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39. "In addition we think it unwise at least, if not positive error, for the trial judge, in the beginning and before the testimony is introduced, to fix a limit upon the number of witnesses that he will permit to be examined. Necessarily each particular case will suggest where a reasonable limit has been reached, but this can only be determined as the trial progresses, and the necessities of the case thus develop." *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730.

**51.** *Nolton v. Moses*, 3 Barb. (N. Y.) 31; *Larson v. Eau Claire*, 92 Wis. 86, 65 N. W. 731.

**52.** *Bunnell v. Butler*, 23 Conn. 65; *Greene v. Phoenix Mut. L. Ins. Co.*, 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; *Hubble v. Osborn*, 31 Ind. 249; *Kash v. Miller*, 2 Bush (Ky.) 568; *Cohen v. Simon*, 36 Misc. 858, 74 N. Y. Supp. 921. "Such a power is one, however, to be exercised with the utmost care; and in a case in which there was but little or no controversy as to a given fact, such evidence might properly be cut off at a point where it would be improper to do so when the evidence was greatly conflicting." *Galveston, H. & S. A. R. Co. v. Matula*, 79 Tex. 577, 15 S. W. 573.

the face of the record.<sup>53</sup>

**3. Order of Proof.**—In the regular order of proceedings the party who has, or undertakes, the affirmative should present all his evidence to support his case, and is not entitled to introduce in rebuttal of his adversary's case evidence merely cumulative to that offered by himself in chief.<sup>54</sup> But he has a right to the introduction

See also *Nolton v. Moses*, 3 Barb. (N. Y.) 31. "The leaning of the courts should be to allow as wide a latitude to the defense in criminal cases as is consistent with a proper dispatch of public business." *Gardner v. State*, 4 Ind. 632.

**Character of Party.**—A limitation to six witnesses each on the character of a party to the action, when in issue, has been held to be erroneous. The court said:

"There is no doubt that the trial judge has the right, within reasonable limits, to restrict the number of witnesses to be examined as to any one point or fact. It is apparent that this right must exist, else by multiplying witnesses a trial might be indefinitely prolonged, to the serious detriment of public interests. . . . While this is so, yet it is true that, in an action like this, involving character, it is the duty of the lower court to exercise a liberal discretion in admitting testimony tending to sustain or overthrow it. It might be, in such a case, where a narrow limit is fixed, that a party by gathering in the enemies of his adversary, would succeed in producing a number of impeaching witnesses just within this limit, while the party so impeached might have the whole body of the county behind him ready to testify as to his good name, yet if equally restricted this would be of no avail to him. A rule that worked such a result could not be tolerated." *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730.

"In establishing that reputation it is only reasonable to assume that the testimony of diverse witnesses living at different places in the same neighborhood would afford proof more thorough and satisfactory than that of the three witnesses who had given evidence on this issue. The nature of

the inquiry necessarily broadened the sources of the evidence, and entitled defendant to show, if he could, by sufficient witnesses, that the impairment of plaintiff's reputation was not confined to a part, but extended to the whole of the neighborhood in which she resided." *Nelson v. Wallace*, 57 Mo. App. 397.

To limit the defendant's evidence of the bad character of the plaintiff, in an action for breach of promise, to a cross-examination of two of the plaintiff's witnesses, and to a single witness called by the defendant, is error. *Markham v. Herrick*, 82 Mo. App. 327.

**Damage to Property.**—It has been held error to limit the plaintiff to three witnesses to prove damage to property from grading. *Covington v. Taffee*, 24 Ky. L. Rep. 373, 68 S. W. 629.

**Single Witness.**—It is error to exclude evidence to corroborate the testimony of the defendant as to his inability to read, though he is not contradicted, since the jury is not bound to accept the unsupported testimony of a party. Page v. Krekey, 137 N. Y. 307, 33 N. E. 311, 33 Am. St. Rep. 721, 21 L. R. A. 409.

Where but one witness testifies to the value of property, it is error to limit the other party to the calling of a single witness upon that point. *Ward v. Washington Ins. Co.*, 6 Bosw. (N. Y.) 229.

<sup>53</sup> *Chicago, B. & N. R. Co. v. Bowman*, 122 Ill. 595, 13 N. E. 814; *Gardner v. State*, 4 Ind. 632; *Union R. Trans. & Stockyard Co. v. Moore*, 80 Ind. 458; *Butler v. State*, 97 Ind. 378; *Nolton v. Moses*, 3 Barb. (N. Y.) 31.

<sup>54</sup> *United States*.—*Gilpins v. Consequa*, Pet. C. C. 85, 10 Fed. Cas. No. 5,452.

*California*.—*Yankee Jim's Union*

of evidence which properly rebuts that offered by his adversary, although it is in some sense cumulative to that before offered by him.<sup>55</sup> So where a party anticipates the other party's case and offers evidence to disprove it, he should offer all his evidence upon that point, and is not entitled, as matter of right, to introduce

*Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413.

*Maryland*. — *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422.

*Massachusetts*. — *York v. Pease*, 2 Gray 282.

*Missouri*. — *Rankin v. Rankin*, 61 Mo. 295.

*New York*. — *Seeley v. Chittenden*, 4 How. Pr. 265, 10 Barb. 303; *Guilfoyle v. Pierce*, 4 App. Div. 612, 38 N. Y. Supp. 697.

*South Carolina*. — *Bogan v. Wilburn*, 1 Spears L. 179.

**Rebutting Evidence Defined.** "Rebutting evidence in such cases means, not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove." *Marshall v. Davies*, 78 N. Y. 414, 58 How. Pr. 231.

**Corroborating Witness.** — Where the prosecuting witness is impeached by evidence of his bad reputation for truth and veracity, the state is not entitled on rebuttal to corroborate his testimony by that of other witnesses who will testify to the same state of facts. *State v. Parish*, 22 Iowa 284.

Where the defendant introduces evidence of a conversation, and the plaintiff in reply denies such conversation, the defendant is not entitled on sur-rebuttal to show similar conversations. *Marshall v. Davies*, 78 N. Y. 414, 58 How. Pr. 231.

**Rule in Texas and Maine.** — But in Texas "the party is only required to make a *prima facie* case in opening, and may reserve confirmatory proof in support of the very points made in the opening, till he finds on what points his opening case is at-

tacked, and then fortify it on these points." *Markham v. Carothers*, 47 Tex. 21; *Gulf, C. & S. F. R. Co. v. Holliday*, 65 Tex. 512, 12 S. W. 673; *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768; *Mayer v. Walker*, 82 Tex. 222, 17 S. W. 505; *Galveston, H. & S. A. R. Co. v. Parrish*, (Tex. Civ. App.), 40 S. W. 191.

The same rule seems to obtain in Maine. *Moore v. Holland*, 36 Me. 14.

See also *Davidson v. Overhulser*, 3 Greene (Iowa) 196.

But it seems that in both these states the court may exclude cumulative evidence in rebuttal where notice to that effect is given on the opening of the case. *Yeaton v. Chapman*, 65 Me. 126; *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673.

**55. England.** — *Doe v. Mobbs*, Car. & M. 1, 41 Eng. C. L. 7; *Briggs v. Aynsworth*, 2 M. & Rob. 168.

*Canada*. — *Whelpley v. Riley*, 7 New Bruns. 275; *Heavy v. Odell*, 10 New Bruns. 524; *Briggs v. McBride*, 17 New Bruns. 663.

*Florida*. — *Jacksonville, T. & K. W. R. Co. v. Wellman*, 26 Fla. 344, 7 S. E. 845.

*Georgia*. — *Walker v. Fields*, 28 Ga. 237.

*Massachusetts*. — *Com. v. Moulton*, 4 Gray 39; *Chadbourn v. Franklin*, 5 Gray 312.

*Oregon*. — *State v. Dilley*, 15 Or. 70, 13 Pac. 648.

*South Carolina*. — *Caldwell v. Wilson*, 2 Spears L. 75; *State v. Prater*, 26 S. C. 198, 2 S. E. 108; *State v. Jacobs*, 28 S. C. 29, 4 S. E. 799; *Weaver v. Whilden*, 33 S. C. 190, 11 S. E. 686.

*Vermont*. — *State v. Magoon*, 50 Vt. 333; *Stillwell v. Farewell*, 64 Vt. 286, 24 Atl. 243.

**Sur-rebuttal.** — The defendant should be permitted to rebut new facts shown by the plaintiff on re-

cumulative evidence thereon in rebuttal.<sup>56</sup> But this rule does not apply where a party, in presenting his own case, merely touches upon that of his adversary incidentally.<sup>57</sup>

The court, in its discretion, may permit the introduction of evidence out of the usual order, and may admit or exclude merely cumulative evidence when offered in rebuttal<sup>58</sup> or, as well, in sur-

buttall, though the evidence offered is in some sense cumulative to that before adduced by the defendant on his defense. *State v. Dilley*, 15 Or. 70, 13 Pac. 648; *Walker v. Fields*, 28 Ga. 237.

**Rebutting Evidence Incidentally Cumulative.**—Where the plaintiff in trover introduced evidence to show the general sound condition of a horse, and the defendant offered evidence tending to show that the horse was lame at the time of the alleged conversion, the plaintiff was properly permitted to offer evidence contradicting such lameness. *Stillwell v. Farewell*, 64 Vt. 286, 24 Atl. 243.

Where the defendant offers evidence of an alibi, it is proper to permit the plaintiff to contradict such evidence, although some evidence has already been offered by him incidentally showing the whereabouts of the defendant. *Briggs v. Aynsworth*, 2 M. & Rob. 168.

Where a witness for the plaintiff on cross-examination denied having made a certain statement in the presence of a third person, and such third person testified to the conversation, it was proper to permit the plaintiff to introduce evidence of the entire conversation in which the alleged statement was made. *State v. Jacobs*, 28 S. C. 29, 4 S. E. 799.

So where a witness for the plaintiff on cross-examination denied having made a certain statement in the presence of a third person, and that person testified to the statement, the plaintiff in reply was permitted to offer evidence contradicting him. *Whelpley v. Riley*, 7 New Bruns. (Can.) 275.

<sup>56</sup> *Williams v. Dewitt*, 12 Ind. 309; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Herrick v. Swomley*, 56 Md. 439; *York v. Pease*, 2 Gray (Mass.) 282.

<sup>57</sup> *Fitzpatrick v. Papa*, 89 Ind. 17; *Briggs v. Aynsworth*, 2 M. & Rob. 168.

<sup>58</sup> *Canada*.—*Heavy v. Odell*, 10 New Bruns. 524.

*United States*.—*Sommer v. Carbon Hill Coal Co.*, 107 Fed. 230, 46 C. C. A. 255.

*California*.—*Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145; *Casey v. Le Roy*, 38 Cal. 697.

*Florida*.—*Burroughs v. State*, 17 Fla. 643; *Jacksonville, T. & K. W. R. Co. v. Wellman*, 26 Fla. 344, 7 S. E. 845.

*Georgia*.—*Bryan v. Watson*, 20 Ga. 480.

*Illinois*.—*Chytraus v. Chicago*, 160 Ill. 18, 43 N. E. 335.

*Iowa*.—*Seekel v. Norman*, 78 Iowa 254, 43 N. W. 190.

*Massachusetts*.—*Ashworth v. Kitt-ridge*, 12 Cush. 193, 59 Am. Dec. 178; *York v. Pease*, 2 Gray 282; *Com. v. Moulton*, 4 Gray 39; *Chadbourn v. Franklin*, 5 Gray 312; *Wright v. Foster*, 109 Mass. 57.

*Missouri*.—*State v. Porter*, 26 Mo. 201.

*Nevada*.—*McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124.

*New York*.—*Hastings v. Palmer*, 20 Wend. 225; *Seeley v. Chittenden*, 4 How. Pr. 265, 10 Barb. 303; *Marshall v. Davis*, 78 N. Y. 414; 58 How. Pr. 231.

*North Carolina*.—*Smith v. Smith*, 30 N. C. 29.

*South Carolina*.—*Bull v. Lambson*, 5 Rich. L. 284; *State v. Jacobs*, 28 S. C. 29, 4 S. E. 799; *Weaver v. Whilden*, 33 S. C. 190, 11 S. E. 686; *Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679.

*Texas*.—*San Antonio & A. P. R. Co. v. Robinson*, 79 Tex. 608, 15 S. W. 584.

*Vermont*.—*State v. Magoon*, 50 Vt. 333.



rebuttal,<sup>59</sup> or when offered after both parties have rested<sup>60</sup> or the jury has been charged.<sup>61</sup>

#### IV. NEW TRIALS.

**1. The General Rule.** — It is a general rule, held or announced in a multitude of cases, that a new trial should not be granted for newly-discovered evidence merely cumulative to that adduced on the trial.<sup>62</sup> Other cases announce the rule that newly discovered cumu-

*Wisconsin.* — *Barnes v. Stacy*, 79 Wis. 55, 48 N. W. 53.

But see *Williams v. Dewitt*, 12 Ind. 309.

**Surprise.** — It is proper to permit cumulative evidence on rebuttal upon a point on which the party had no reason to expect a controversy. *Bull v. Lambson*, 5 Rich. L. (S. C.) 284.

**Special Assessments.** — Where, in a proceeding to confirm assessments for local improvements, the city introduced the ordinances, assessment roll and verdict in condemnation proceedings, and then rested, and the defendant showed objections to the proposed assessment, it was held not error to permit the city to contradict the evidence in support of such objections by evidence that was cumulative to that already introduced by it. *Chytraus v. Chicago*, 160 Ill. 18, 43 N. E. 335.

<sup>59.</sup> *Barkly v. Copeland*, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413. See also *Walker v. Fields*, 28 Ga. 237; *State v. Dilley*, 15 Or. 70, 13 Pac. 648.

<sup>60.</sup> *Macon v. Harris*, 75 Ga. 761; *Sisler v. Shaffer*, 43 W. Va. 769, 28 S. E. 721; *Everman v. Menomonic*, 81 Wis. 624, 51 N. W. 1,013. And this though the moving party claims to have been surprised by his adversary's evidence. *Nelson v. Betts*, 21 Mo. App. 219.

<sup>61.</sup> *American Eagle Tobacco Co. v. Pierce*, 70 Mich. 633, 38 N. W. 605; *Hinton v. Cream City R. Co.*, 65 Wis. 323, 27 N. W. 147; *Seekel v. Norman*, 78 Iowa 254, 43 N. W. 190.

<sup>62.</sup> From numberless cases sustaining this point we cite as follows:

*England.* — *Scott v. Scott*, 9 L. T. N. S. 454, 9 Jur. N. S. 1,251.

*Canada.* — *Miller v. Confederation*

*L. Ins. Co.*, 14 Ont. App. 218; *Trumble v. Hortin*, 22 Ont. App. 51; *Howarth v. McGugan*, 23 Ont. 396; *Doe v. Babineau*, 11 New Bruns. 89; *Fawcett v. Mothersell*, 14 U. C. C. P. 104.

*United States.* — *Wiggin v. Coffin*, 3 Story 1, 29 Fed. Cas. No. 17,624; *Macy v. De Wolf*, 3 Woodb. & M. 193, 16 Fed. Cas. No. 8,933; *Chandler v. Thompson*, 30 Fed. 38; *Flint & P. M. R. Co. v. Marine Ins. Co.*, 71 Fed. 210.

**In Civil Actions.** — *Alabama.* *Martin v. Hudson*, 52 Ala. 279; *McLeod v. Shelly M. & I. Co.*, 108 Ala. 81, 19 So. 326; *Alabama M. R. Co. v. Johnson*, 123 Ala. 197, 26 So. 160.

*Arkansas.* — *Berry v. Elliott*, 25 Ark. 89; *Merrick v. Britton*, 26 Ark. 496; *Texas & St. L. R. Co. v. Orr*, 46 Ark. 182; *Brown v. St. Louis, I. M. & S. R. Co.*, 52 Ark. 120, 12 S. W. 203; *St. Louis S. W. R. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Arkansas S. R. Co. v. Loughridge*, 65 Ark. 300, 45 S. W. 907.

*California.* — *Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 157; *Christensen v. McBride*, 101 Cal. 671, 36 Pac. 398; *People v. Kloss*, 115 Cal. 567, 47 Pac. 459; *Kuhlman v. Burns*, 117 Cal. 469, 49 Pac. 585; *Niosi v. Empire Steam Laundry*, 117 Cal. 257, 49 Pac. 185; *Wells v. Snow*, (Cal.), 41 Pac. 858.

*Colorado.* — *Martin v. Hazard Powder Co.*, 2 Colo. 596; *Cole v. Thornburg*, 4 Colo. App. 95, 34 Pac. 1,013.

*Connecticut.* — *Waller v. Graves*, 20 Conn. 305; *Travelers Ins. Co. v. Savage*, 43 Conn. 187; *Hart v. Brainerd*, 68 Conn. 50, 35 Atl. 776.

*Florida.* — *Milton v. Blackshear*, 8 Fla. 161; *Coker v. Merritt*, 16 Fla. 416; *Simpson v. Daniels*, 16 Fla. 677.

*Georgia.* — *Johnson v. Palmour*, 87

Ga. 244, 13 S. E. 637; *White v. Butt*, 102 Ga. 552, 27 S. E. 680; *Atlantic R. Co. v. Jett*, 103 Ga. 569, 29 S. E. 767; *Zorn v. Hannah*, 106 Ga. 61, 31 S. E. 797; *Macon v. Small*, 108 Ga. 309, 34 S. E. 152; *Matthews v. Kennedy*, 113 Ga. 378, 38 S. E. 854; *Sims v. Sims*, 113 Ga. 1,083, 39 S. E. 435; *Louisville & N. R. Co. v. Harrison*, 113 Ga. 1,153, 39 S. E. 472.

*Illinois*.—*Wisconsin C. R. Co. v. Ross*, 142 Ill. 9, 31 N. E. 412, 34 Am. St. Rep. 49; *Bemis v. Horner*, 165 Ill. 347, 46 N. E. 277, S. C. 62 Ill. App. 38; *Conlan v. Mead*, 172 Ill. 13, 49 N. E. 720; *Heldmaier v. Taman*, 188 Ill. 283, 58 N. E. 960, S. C. 88 Ill. App. 209; *Jacobson v. Gunzburg*, 25 Ill. App. 223, S. C. 150 Ill. 135, 37 N. E. 229; *Heenan v. Redmen*, 101 Ill. App. 603; *Janeway v. Burton*, 102 Ill. App. 403.

*Indiana*.—*Marshall v. Mathers*, 103 Ind. 458, 3 N. E. 120; *De Hart v. Aper*, 107 Ind. 460, 8 N. E. 275; *Pennsylvania Co. v. Nations*, 111 Ind. 203, 12 N. E. 309; *Schnurr v. Stults*, 119 Ind. 429, 21 N. E. 1,089; *Morrison v. Carey*, 129 Ind. 277, 28 N. E. 697; *Indianapolis v. Mitchell*, 27 Ind. App. 589, 61 N. E. 947; *Franklin v. Lee*, (Ind. App.), 62 N. E. 78.

*Iowa*.—*Bingham v. Foster*, 37 Iowa 339; *Cohol v. Allen*, 37 Iowa 449; *Trimble v. Tantlinger*, 104 Iowa 665, 69 N. W. 1,045, 74 N. W. 25; *Ritchey v. Ritchey*, (Iowa), 79 N. W. 280; *Sioux City Stockyards Co. v. Sioux City Packing Co.*, 110 Iowa 396, 81 N. W. 712; *Grapes v. Sheldon*, (Iowa), 93 N. W. 57; *Connell v. Connell*, (Iowa.), 93 N. W. 582.

*Kansas*.—*O'Leary v. Reed*, 30 Kan. 749, 2 Pac. 114; *Baughman v. Penn*, 33 Kan. 504, 6 Pac. 890; *Olathe v. Horner*, 38 Kan. 312, 16 Pac. 468; *Titus v. Mitchell*, 3 Kan. App. 90, 45 Pac. 99.

*Kentucky*.—*Thomas v. Louisville & N. R. Co.*, 22 Ky. L. Rep. 1,565, 61 S. W. 43; *Finley v. Curd*, 22 Ky. L. Rep. 1,912, 62 S. W. 501; *Oberdorfer v. Newberger*, 23 Ky. L. Rep. 2,323, 67 S. W. 267; *Stowers v. Singer*, 24 Ky. L. Rep. 395, 68 S. W. 637; *Akers v. Akers*, 24 Ky. L. Rep. 636, 69 S. W. 715.

*Louisiana*.—*Vicknair v. Trosclair*, 45 La. Ann. 373, 12 So. 486.

*Maine*.—*McLaughlin v. Doane*, 56 Me. 289; *Bradford v. Hume*, 90 Me. 233, 38 Atl. 143; *Kimball v. Hilton*, 92 Me. 214, 42 Atl. 394; *Berry v. Ross*, 94 Me. 270, 47 Atl. 512.

*Massachusetts*.—*Gardner v. Mitchell*, 6 Pick. 114, 17 Am. Dec. 349; *Yarmouth v. Dennis*, 6 Pick. 116 note; *Sawyer v. Merrill*, 10 Pick. 16; *Gardner v. Gardner*, 2 Gray 434.

*Michigan*.—*White v. Peabody*, 106 Mich. 144, 64 N. W. 41; *Canfield v. Jackson*, 112 Mich. 120, 70 N. W. 444; *Morin v. Robarge*, (Mich.), 93 N. W. 886.

*Minnesota*.—*Lowe v. Minneapolis St. R. R. Co.*, 37 Minn. 233, 34 N. W. 33; *Elmborg v. St. Paul C. R. Co.*, 51 Minn. 70, 52 N. W. 969; *Adamant Mfg. Co. v. Pete*, 61 Minn. 464, 63 N. W. 1,027; *Meeks v. St. Paul*, 64 Minn. 220, 66 N. W. 966.

*Mississippi*.—*Hare v. Sproul*, 2 How. 772; *Moody v. Farr*, 27 Miss. 788; *Vanderburg v. Campbell*, 64 Miss. 89, 8 So. 206; *Louisville, N. O. & T. R. Co. v. Crayton*, 69 Miss. 152, 12 So. 271.

*Missouri*.—*Dollman v. Munson*, 90 Mo. 85, 2 S. W. 134; *St. Joseph Folding Bed Co. v. Kansas City, F. S. & M. R. Co.*, 148 Mo. 478, 50 S. W. 85; *Thayer v. Williams*, 65 Mo. App. 673; *Bresnan v. Grogan*, 74 Mo. App. 587.

*Montana*.—*Caruthers v. Pember-ton*, 1 Mont. 111; *Morse v. Swan*, 2 Mont. 306; *Garfield M. & M. Co. v. Hammer*, 6 Mont. 53, 8 Pac. 153; *O'Donnell v. Bennett*, 12 Mont. 242, 29 Pac. 1,044.

*Nebraska*.—*Livesey v. Festner*, 28 Neb. 333, 44 N. W. 441; *Flannagan v. Heath*, 31 Neb. 776, 48 N. W. 904; *Hill v. Helman*, 33 Neb. 731, 51 N. W. 128; *Hoffine v. Ewings*, 60 Neb. 729, 84 N. W. 93.

*New Jersey*.—*Tomlin adm. Den. ex dem. Cox*, 19 N. J. L. 76; *Kirk v. Rickerson*, 46 N. J. L. 13; *Thomas v. Consolidated Traction Co.*, 62 N. J. L. 36, 42 Atl. 1,061; *Hoban v. Sandford & Stillman Co.*, 64 N. J. 426, 45 Atl. 819.

*New York*.—*Ott v. Buffalo*, 61 Hun 624, 16 N. Y. Supp. 1; *Jackson v. Ft. Covington*, 61 Hun 622, 15 N. Y. Supp. 793; *O'Harra v. New York, C. & H. R. R. Co.*, 92 Hun 56,

36 N. Y. Supp. 567; Hicks v. British-American Assur. Co., 13 App. Div. 444, 43 N. Y. Supp. 623; Cameron v. Leonard, 17 App. Div. 127, 45 N. Y. Supp. 155; Piehl v. Albany R. Co., 30 App. Div. 166, 51 N. Y. Supp. 755.

*North Carolina.* — Simmons v. Mann, 92 N. C. 12; Munden v. Casey, 93 N. C. 97; Sikes v. Parker, 95 N. C. 232.

*Ohio.* — Reed v. McGrew, 5 Ohio 375; Perrin v. Protection Ins. Co., 11 Ohio 147, 38 Am. Dec. 728.

*Oklahoma.* — Twine v. Kilgore, 3 Okla. 640, 39 Pac. 388; Huster v. Wynn, 8 Okla. 569, 58 Pac. 736.

*Pennsylvania.* — Potts v. Feeder, Dam Coal Co., 6 Phila. 249; Thomas v. French, 6 Phila. 539; Winton v. Savage, 4 C. P. Rep. 47; Com. v. Yot Sing, 7 Kulp 349.

*Rhode Island.* — Kaul v. Brown, 17 R. I. 14, 20 Atl. 10; Carroll v. Allen, 20 R. I. 541, 40 Atl. 419.

*South Dakota.* — Scheffer v. Corson, 5 S. D. 233, 58 N. W. 555; Demmon v. Mullen, 6 S. D. 554, 62 N. W. 380.

*Tennessee.* — McGavock v. Brown, 4 Humph. 251; Jones v. White, 11 Humph. 268; Noel v. McCrory, 7 Coldw. 623.

*Texas.* — Missouri, K. & T. R. Co. v. Wright, 19 Tex. Civ. App. 47, 47 S. W. 56; Gulf, C. & S. F. R. Co. v. Marchand, 24 Tex. Civ. App. 47, 57 S. W. 860; Bridges v. Williams, 28 Tex. Civ. App. 38, 66 S. W. 484; San Antonio & A. P. R. Co. v. Moore, (Tex. Civ. App.), 72 S. W. 226; Fort v. Cameron, 1 White & W. § 1,112; Ratto v. St. Paul's L. & M. Ins. Co., 2 Willson § 117.

*Utah.* — Klopenstine v. Hays, 20 Utah 45, 57 Pac. 712; Larsen v. On-site, 21 Utah 38, 59 Pac. 234.

*Vermont.* — Bullock v. Beach, 3 Vt. 73.

*Virginia.* — Nuckols v. Jones, 8 Gratt. 267; Harnsberger v. Kinney, 13 Gratt. 511; St. John v. Alderson, 32 Gratt. 140; Smith v. Watson, 82 Va. 712, 1 S. E. 96; Booth v. McJilton, 82 Va. 827, 1 S. E. 137.

*Washington.* — McKiver v. Manchester, 1 Wash. 255.

*West Virginia.* — Dower v. Church,

21 W. Va. 23; Carder v. Bank, 34 W. Va. 38, 11 S. E. 716; White v. Ward, 35 W. Va. 418, 14 S. E. 22; Sisler v. Shaffer, 43 W. Va. 769, 28 S. E. 721.

*Wisconsin.* — Gans v. Harmison, 44 Wis. 323, Krueger v. Merrill, 66 Wis. 28, 27 N. W. 836; Thrasher v. Postel, 79 Wis. 503, 48 N. W. 600; Knopke v. Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795.

*Wyoming.* — Link v. Union P. R. Co., 3 Wyo. 680, 29 Pac. 741.

#### In Criminal Actions.

*Canada.* — Queen v. McIlroy, 15 U. C. C. P. 116.

*Arkansas.* — White v. State, 17 Ark. 404.

*California.* — People v. Demasters, 109 Cal. 607, 42 Pac. 236; People v. Benc, 130 Cal. 150, 62 Pac. 404.

*Florida.* — Howard v. State, 36 Fla. 21, 17 So. 84.

*Georgia.* — Fordham v. State, 112 Ga. 228, 37 S. E. 391; Graham v. State, 113 Ga. 724, 39 S. E. 293; Sturkey v. State, 116 Ga. 526, 42 S. E. 747.

*Idaho.* — People v. Biles, 2 Idaho 114, 6 Pac. 120.

*Illinois.* — Burns v. People, 126 Ill. 282, 18 N. E. 550; Williams v. People, 164 Ill. 481, 45 N. E. 987.

*Indiana.* — Smith v. State, 143 Ind. 685, 42 N. E. 913; Rinehart v. State, 23 Ind. App. 419, 55 N. E. 504.

*Iowa.* — State v. Watson, 81 Iowa 380, 46 N. W. 868; State v. Potts, 83 Iowa 317, 49 N. W. 845; State v. Phillips, (Iowa), 89 N. W. 1,092; State v. Blain, (Iowa), 92 N. W. 650.

*Kansas.* — State v. Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. Rep. 284; State v. Rohrer, 34 Kan. 427, 8 Pac. 718.

*Kentucky.* — Williams v. Com., 13 Ky. L. Rep. 753, 18 S. W. 364.

*Louisiana.* — State v. Lejeune, 52 La. Ann. 463, 26 So. 992.

*Minnesota.* — State v. Dumphey, 4 Minn. 438.

*Mississippi.* — Newcomb v. State, 37 Miss. 383; Cooper v. State, 53 Miss. 393.

*Missouri.* — State v. Soper, 148 Mo. 217, 49 S. W. 1,007; State v. Bybee, 149 Mo. 632, 51 S. W. 470.

*Montana.* — Territory v. Clayton, 8

lative evidence is not ground for a new trial unless of a decisive or conclusive character,<sup>68</sup> or unless it makes clear what was before

Mont. 1, 19 Pac. 293; *State v. Brooks*, 23 Mont. 146, 57 Pac. 1,038.

*Nebraska*.—*Davis v. State*, 51 Neb. 301, 70 N. W. 984.

*New Hampshire*.—*State v. Carr*, 21 N. H. 166, 53 Am. Dec. 179.

*New York*.—*Williams v. People*, 45 Barb. 201; *People v. Hovey*, 30 Hun 354; *People v. Leighton*, 1 N. Y. Crim. Rep. 468; *People v. Shea*, 16 Misc. 111, 38 N. Y. Supp. 821.

*North Carolina*.—*State v. Starnes*, 97 N. C. 423, 2 S. E. 447.

*Ohio*.—*Loeffner v. State*, 10 Ohio St. 598.

*Oklahoma*.—*Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837.

*Oregon*.—*State v. Hill*, 39 Or. 90, 65 Pac. 518.

*Pennsylvania*.—*Com. v. Thompson*, 4 Phila. 215; *Com. v. Kane*, 12 Phila. 630.

*South Carolina*.—*State v. Turner*, 39 S. C. 414, 17 S. E. 888; *State v. Jones*, 49 S. C. 330, 26 S. E. 652.

*Texas*.—*Duke v. State*, (Tex. Crim. App.), 38 S. W. 43; *Jones v. State*, (Tex. Crim. App.), 42 S. W. 294; *Baxter v. State*, (Tex. Crim. App.), 43 S. W. 87; *Whitfield v. State*, (Tex. Crim. App.), 48 S. W. 173.

*Utah*.—*United States v. Eldredge*, 5 Utah 161, 13 Pac. 673; *People v. Peacock*, 5 Utah 237, 14 Pac. 332.

*Vermont*.—*Bradish v. State*, 35 Vt. 452.

*Virginia*.—*Thompson v. Com.*, 8 Gratt. 637; *Bond v. Com.*, 83 Va. 581, 3 S. E. 149.

*West Virginia*.—*Bales v. State*, 3 W. Va. 685; *State v. Betsall*, 11 W. Va. 703.

See also *Cobb v. State*, 78 Ga. 801, 3 S. E. 628.

**Rule Criticised in Wilcox Silver Plate Co. v. Barclay**, 48 Hun (N. Y.) 54; *Clegg v. New York Newspaper Union*, 51 Hun. 232, 4 N. Y. Supp. 280; *Bulkin v. Ehret*, 29 Abb. N. C. 62, 20 N. Y. Supp. 731. "We would be loth, however, in any case to relax the general rule, the object and tendency of which are to establish a reasonable limit to litigation." *Irwin v. Morell*, Dud. (Ga.) 72.

A new trial will not necessarily be granted to permit the defendant to corroborate the testimony of a single witness who was impeached on the trial. *Bales v. State*, 3 W. Va. 685.

**Award of Arbitrators.**—So it seems an award of arbitrators will not ordinarily be set aside on the ground of newly discovered cumulative evidence. *McDaniels v. Van Fosen*, 11 Iowa 195.

**Military Lots.**—It has been held proper to grant a new trial on the ground of cumulative evidence in ejectment for military lots. *Jackson v. Crosby*, 12 Johns. (N. Y.) 354; *Jackson v. Hooker*, 5 Cow. (N. Y.) 207.

### 63. In Civil Cases.

*Georgia*.—*Ersine v. Duffy*, 76 Ga. 602; *Coggin v. Parks*, 85 Ga. 516, 11 S. E. 840.

*Illinois*.—*Smith v. Shultz*, 2 Ill. 490, 32 Am. Dec. 33; *Martin v. Ehrenfels*, 24 Ill. 187; *Sulzer v. Yott*, 57 Ill. 164; *Bowers v. People*, 74 Ill. 418; *Fuller v. Little*, 61 Ill. 21; *Chapman v. Burt*, 77 Ill. 337; *Krug v. Ward*, 77 Ill. 603; *Skelly v. Boland*, 78 Ill. 438; *Gottschalk v. Hughes*, 82 Ill. 484; *Dyer v. People*, 84 Ill. 624; *Abrahams v. Weiller*, 87 Ill. 179; *Harvey v. Collins*, 89 Ill. 255; *Laird v. Warren*, 92 Ill. 204; *McCollom v. Indianapolis & St. L. R. Co.*, 94 Ill. 534; *Sconce v. Henderson*, 102 Ill. 376; *Sterling v. Merrill*, 124 Ill. 522, 17 N. E. 6; *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401; *Chicago, B. & Q. R. Co. v. Sullivan*, 21 Ill. App. 580; *Jacobson v. Gunzburg*, 25 Ill. App. 223; *Sterling v. Merrill*, 25 Ill. App. 596; *Cleary v. Cummings*, 28 Ill. App. 237; *Chicago, R. I. & P. R. Co. v. Clough*, 33 Ill. App. 129; *First Nat. Bank v. Ruehl Brewing Co.*, 33 Ill. App. 121; *Bilderman v. Brown*, 49 Ill. 483; *Calhoun v. O'Neal*, 53 Ill. 354; *Woolverton v. Sumner*, 53 Ill. App. 115; *Toledo, P. & W. R. Co. v. Endres*, 57 Ill. App. 69; *DeKalb v. Ashley*, 61 Ill. App. 647; *Reid v. Flanders*, 62 Ill. App. 106; *Madison Coal Co. v. Beam*, 63 Ill. App. 178; *Chandler v. Smith*, 70 Ill. App. 658; *Bingham v. Spruill*, 97 Ill. App. 374.

doubtful,<sup>64</sup> or unless it would change the result.<sup>65</sup> Many other cases hold that a new trial should not be granted for cumulative evidence that would not render a change in the result probable.<sup>66</sup>

**2. Negligence of Moving Party.**—It is especially true that a new trial will not be granted because of cumulative evidence which the

*Kentucky.*—*Newton v. Cook*, 17 Ky. L. Rep. 1, 189, 33 S. W. 934.

*Nebraska.*—*Gran v. Houston*, 45 Neb. 813, 64 N. W. 245.

*Rhode Island.*—*Potter v. Padel-ford*, 3 R. I. 162; *Heaton v. Man-hattan F. Ins. Co.*, 7 R. I. 502.

See also *Jester v. Francis*, (Tex. Civ. App.), 31 S. W. 245.

**In Criminal Cases.**—*Sahlinger v. People*, 102 Ill. 241; *Leigh v. People*, 113 Ill. 372; *Bean v. People*, 124 Ill. 576, 16 N. E. 656; *Spahn v. People*, 137 Ill. 538, 27 N. E. 688; *Lilly v. People*, 148 Ill. 467, 36 N. E. 95; *Lathrop v. People*, 197 Ill. 169, 64 N. E. 385; *Adams v. People*, 47 Ill. 376.

"Where the evidence sought to be introduced is cumulative, new trials will not be granted unless the evidence is decisive of the case, conclusively leading to a change in the result," etc. *Petefish v. Watkins*, 124 Ill. 384, 16 N. E. 248.

**64.** *Waller v. Graves*, 20 Conn. 305; *Brooks v. Dutcher*, 22 Neb. 644, 36 N. W. 128; *Hill v. Helman*, 33 Neb. 731, 51 N. W. 128; *Hoffine v. Ewings*, 60 Neb. 729, 84 N. W. 93.

**65.** *Georgia.*—*Barber v. Terrell*, 57 Ga. 538.

*Illinois.*—*Fay v. Richards*, 30 Ill. App. 477.

*Kentucky.*—*Palmer v. Mt. Sterling Nat. Bank*, 13 Ky. L. Rep. 790, 18 S. W. 234.

*Maine.*—*Dodge v. Dodge*, 86 Me. 393, 30 Atl. 14.

*Missouri.*—*Donovan v. Ryan*, 35 Mo. App. 160.

*Nebraska.*—*Schreckengast v. Ealy*, 16 Neb. 510, 20 N. W. 853.

*Texas.*—*Stewart v. Hamilton*, 19 Tex. 96; *Ziegler v. Stefanek*, 31 Tex. 30; *Missouri, K. & T. R. Co. v. Gordon*, 11 Tex. Civ. App. 672, 33 S. W. 684.

**66. In Civil Cases.**

*Arizona.*—*Hayden Milling Co. v. Lewis*, (Ariz.), 32 Pac. 263.

*California.*—*McCormick v. Central R. Co.*, 75 Cal. 506, 17 Pac. 542;

*O'Rourke v. Vennekohl*, 104 Cal. 254, 37 Pac. 930; *Silva v. Silva*, (Cal.), 38 Pac. 105.

*Georgia.*—*Ogden v. Dodge Co.*, 97 Ga. 461, 25 S. E. 321; *Hanye v. Candler*, 99 Ga. 214, 25 S. E. 606.

*Illinois.*—*Fay v. Richards*, 30 Ill. App. 477.

*Indiana.*—*Jackson v. Swope*, 134 Ind. 111, 33 N. E. 909; *Fleming v. McClaffin*, 1 Ind. App. 537, 27 N. E. 875.

*Kansas.*—*Douglass v. Anthony*, 45 Kan. 439, 25 Pac. 853.

*Mississippi.*—*Louisville, N. O. & T. R. Co. v. Crayton*, 69 Miss. 152, 12 So. 271.

*Nebraska.*—*Flannagan v. Heath*, 31 Neb. 776, 48 N. W. 904; *Keiser v. Decker*, 29 Neb. 92, 45 N. W. 272.

*New York.*—*Lee v. Supreme Council*, 64 App. Div. 622, 72 N. Y. Supp. 274; *Jackson v. Ft. Covington*, 61 Hun 622, 15 N. Y. Supp. 793.

*Rhode Island.*—*Windham Co. Bank v. Kendall*, 7 R. I. 77.

*Texas.*—*Wolf v. Mahan*, 57 Tex. 171; *Eddy v. Newton*, (Tex. Civ. App.), 22 S. W. 533.

*Vermont.*—*Burr v. Palmer*, 23 Vt. 244; *Thayer v. Central Vt. R. Co.*, 60 Vt. 214, 13 Atl. 859.

**In Criminal Cases.**—*California.* *People v. Chrisman*, 135 Cal. 282, 67 Pac. 136.

*Georgia.*—*Windom v. State*, 114 Ga. 36, 39 S. E. 949.

*Indiana.*—*Smith v. State*, 143 Ind. 685, 42 N. E. 913.

*Louisiana.*—*State v. La Mothe*, 37 La. Ann. 43; *State v. Albert*, 109 La. 201, 33 So. 196.

*Pennsylvania.*—*Com. v. Moss*, 6 Kulp 31.

*Tennessee.*—*King v. State*, 91 Tenn. 617, 20 S. W. 169.

*Texas.*—*Johnson v. State*, 2 Tex. App. 456; *Higginbotham v. State*, 3 Tex. App. 447; *Screws v. State*, (Tex. Crim. App.), 23 S. W. 796; *Hickman v. State*, (Tex. Crim. App.), 25 S. W. 126.

moving party did not exercise proper diligence to discover before the trial.<sup>67</sup>

### 67. In Criminal Cases.

*Georgia*.—Callahan *v.* State, 75 Ga. 887; Johnson *v.* State, 83 Ga. 553, 10 S. E. 207; Greer *v.* State, 87 Ga. 559, 13 S. E. 552; Tucker *v.* State, 102 Ga. 571, 27 S. E. 678; Dill *v.* State, 106 Ga. 683, 32 S. E. 660; Mayes *v.* State, 108 Ga. 787, 33 S. E. 811; Tyre *v.* State, 112 Ga. 224, 37 S. E. 374; Somers *v.* State, 116 Ga. 535, 42 S. E. 779.

*Illinois*.—Lilly *v.* People, 148 Ill. 467, 36 N. E. 95.

*Indiana*.—Stalcut *v.* State, 129 Ind. 519, 28 N. E. 1,116.

*Iowa*.—State *v.* Oeder, 80 Iowa 72, 45 N. W. 543.

*Kansas*.—State *v.* Nelson, 59 Kan. 776, 52 Pac. 868.

*Kentucky*.—Marcum *v.* Com., 8 Ky. L. Rep. 418, 1 S. W. 727.

*Missouri*.—State *v.* Myers, 115 Mo. 394, 22 S. W. 382; State *v.* Cushenberry, 157 Mo. 168, 56 S. W. 737; State *v.* Allen, 171 Mo. 562, 71 S. W. 1,000.

*Pennsylvania*.—Ruddy *v.* Ruddy, 6 Kulp 297.

*Tennessee*.—King *v.* State, 91 Tenn. 617, 20 S. W. 169.

*Texas*.—Washington *v.* State, 35 Tex. Crim. App. 156, 32 S. W. 694; Price *v.* State, 36 Tex. Crim. App. 403, 37 S. W. 743; Johnson *v.* State, 2 Tex. App. 456; Granger *v.* State, (Tex. Crim. App.), 31 S. W. 671; Porter *v.* State, (Tex. Crim. App.), 32 S. W. 695; Little *v.* State, (Tex. Crim. App.), 35 S. W. 659; Adler *v.* State, (Tex. Crim. App.), 50 S. W. 358.

### In Civil Cases.

*United States*.—Brown *v.* Evans, 8 Sawy. 488, 17 Fed. 912; Fuller *v.* Harris, 29 Fed. 814.

*Arizona*.—Hayden Milling Co. *v.* Lewis, (Ariz.), 32 Pac. 263.

*Arkansas*.—Bourdon *v.* Mason, 5 Ark. 256; Kirkpatrick *v.* Wolfe, 17 Ark. 96.

*California*.—Baker *v.* Joseph, 16 Cal. 173; Levitsky *v.* Johnson, 35 Cal. 41; Von Glahn *v.* Brennan, 81 Cal. 261, 22 Pac. 596; Jones *v.* Jones, 38 Cal. 584; Russell *v.* Dennison, 45 Cal. 337.

*Georgia*.—Crawford *v.* Gaulden,

33 Ga. 173; Wilkinson *v.* Smith, 57 Ga. 609; Hines *v.* Beers, 74 Ga. 839; Dalton *v.* Drake, 75 Ga. 115; Russell *v.* Hubbard, 76 Ga. 618; Etheridge *v.* Hobbs, 77 Ga. 531, 3 S. E. 251; Poulain *v.* Poullain, 79 Ga. 11, 4 S. E. 81; Southern R. Co. *v.* Pulliam, 108 Ga. 808, 34 S. E. 147.

*Idaho*.—Knollin *v.* Jones, (Idaho), 63 Pac. 638.

*Illinois*.—Farrell *v.* Dooley, 17 Ill. App. 66; Dueber Match Case Mfg. Co. *v.* Lapp, 35 Ill. App. 372; LeFevre *v.* DuBrule, 71 Ill. App. 263; Wetz *v.* Greffe, 71 Ill. App. 313; McDonald *v.* Harris, 75 Ill. App. 111.

*Iowa*.—Taylor *v.* Chicago, M. & St. P. R. Co., 80 Iowa 431, 46 N. W. 64; McBride *v.* McClintock, 108 Iowa 326, 79 N. W. 83.

*Kansas*.—Beachly *v.* McCormick, 41 Kan. 485, 21 Pac. 646; Finfrock *v.* Ungeheuer, 8 Kan. App. 481, 54 Pac. 504.

*Kentucky*.—Sellars *v.* Cincinnati, N. O. & P. T. R. Co., 16 Ky. L. Rep. 833, 29 S. W. 332; Ferrell *v.* McCoy, 21 Ky. L. Rep. 787, 53 S. W. 23; Bragg *v.* Moore, 21 Ky. L. Rep. 1,721, 56 S. W. 163.

*Missouri*.—Goff *v.* Mulholland, 33 Mo. 203; Johnston *v.* Shortridge, 93 Mo. 227, 6 S. W. 64; Mercantile Bank *v.* Hawe, 33 Mo. App. 214; Corrigan *v.* Brady, 38 Mo. App. 649.

*Nevada*.—Howard *v.* Winters, 3 Nev. 539.

*New York*.—Bartean *v.* Phoenix M. L. Ins. Co., 67 Barb. 354; Taylor *v.* Pinckney, 12 N. Y. Civ. Proc. 107; Hooker *v.* Terpening, 55 Hun 610, 8 N. Y. Supp. 639.

*Pennsylvania*.—Wilson *v.* Talheimer, 20 Pa. Co. Ct. 203; Kambeitz *v.* Harrisburg Traction Co., 24 Pa. Co. Ct. 453, 9 Pa. Dist. 750.

*South Dakota*.—Axiom Min. Co. *v.* White, 10 S. D. 198, 72 N. W. 462.

*Texas*.—Sabine & E. T. R. Co. *v.* Wood, 69 Tex. 679, 7 S. W. 372; Jester *v.* Francis, (Tex. Civ. App.), 31 S. W. 245; Durnett *v.* Gulf City R. & R. E. Co., (Tex. Civ. App.), 37 S. W. 336; Texas & P. R. Co. *v.* Porter, (Tex. Civ. App.), 41 S. W. 88.

A new trial should not be allowed for newly discovered evidence of a fact which might have been proved by similar evidence available to the party on the trial but not used.<sup>68</sup>

**3. Impeaching and Contradictory Evidence.** — New trials for newly-discovered cumulative evidence to contradict<sup>69</sup> or impeach<sup>70</sup> witnesses are particularly disfavored.

**4. Evidence Cumulative in Part Only.** — But if the evidence tends to prove a distinct new fact, a new trial should not be refused because it is also cumulative as to other facts,<sup>71</sup> or because it is also of

*Vermont.* — *Thayer v. Central Vt. R. Co.*, 60 Vt. 214, 13 Atl. 859.

*Wisconsin.* — *Ketchum v. Breed*, 66 Wis. 85, 26 N. W. 271; *Wieting v. Millston*, 77 Wis. 523, 46 N. W. 879.

But see *Keet v. Mason*, 167 Mass. 154, 45 N. E. 81.

**68.** *Travelers' Ins. Co. v. Savage*, 43 Conn. 187; *Ripperdan v. Scott*, 1 A. K. Marsh. (Ky.) 151; *Hanley v. Life Ass'n of America*, 69 Mo. 380.

**69.** *California.* — *Live Yankee Co. v. Oregon Co.*, 7 Cal. 40; *Klockenbaum v. Pierson*, 22 Cal. 160.

*Illinois.* — *Kendall v. Limberg*, 69 Ill. 355.

*Indiana.* — *Harrison v. Price*, 22 Ind. 165; *Meurer v. State*, 129 Ind. 587, 29 N. E. 392.

*Minnesota.* — *Gilmore v. Brost*, 39 Minn. 190, 39 N. W. 139; *Schacherl v. St. Paul City R. Co.*, 42 Minn. 42, 43 N. W. 837; *Meeks v. St. Paul*, 64 Minn. 220, 66 N. W. 966.

*Missouri.* — *Liberty v. Burns*, 114 Mo. 426, 19 S. W. 1, 107, 21 S. W. 728.

**70. In Civil Cases.**

*California.* — *Wilson v. Southern Pac. R. Co.*, 62 Cal. 164.

*Connecticut.* — *Husted v. Mead*, 58 Conn. 55, 19 Atl. 233.

*Georgia.* — *Wilkinson v. Smith*, 57 Ga. 609; *Thorpe v. Wray*, 68 Ga. 359; *Eaton v. Reid*, 108 Ga. 779, 33 S. E. 657.

*Illinois.* — *Jacobson v. Gunzburg*, 150 Ill. 135, 37 N. E. 229; *Chicago & N. W. R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1, 095, 88 Am. St. Rep. 68.

*Indiana.* — *Shigley v. Snyder*, 45 Ind. 543; *Green v. Beckner*, 3 Ind. App. 39, 29 N. E. 172.

*Massachusetts.* — *Hammond v. Wadhams*, 5 Mass. 353.

*Minnesota.* — *Jones v. Chicago, M.*

*& St. P. R. Co.*, 42 Minn. 183, 43 N. W. 1, 114; *Brazil v. Peterson*, 44 Minn. 212, 46 N. W. 331.

*Missouri.* — *State v. Beard*, 126 Mo. 548, 29 S. W. 592; *State v. Johnson*, 139 Mo. 197, 40 S. W. 767.

*South Dakota.* — *Axiom Min. Co. v. White*, 10 S. D. 198, 72 N. W. 462.

*Texas.* — *Luke v. El Paso*, (Tex. Civ. App.), 60 S. W. 363.

**In Criminal Cases.**

*California.* — *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 295.

*Georgia.* — *Flanagan v. State*, 64 Ga. 52; *Carter v. State*, 75 Ga. 747; *Callahan v. State*, 75 Ga. 887; *Johnson v. State*, 83 Ga. 553, 10 S. E. 207;

*Walker v. State*, 97 Ga. 197, 22 S. E. 401; *Reid v. State*, 103 Ga. 572, 30 S. E. 248; *Isham v. State*, 112 Ga. 406, 37 S. E. 735.

*Illinois.* — *Collins v. People*, 103 Ill. 21; *Kinney v. People*, 108 Ill. 519.

*Indiana.* — *Sutherland v. State*, 108 Ind. 389, 9 N. E. 298.

*Massachusetts.* — *Com. v. Waite*, 5 Mass. 261.

*Minnesota.* — *State v. Barrett*, 40 Minn. 65, 41 N. W. 459.

*Missouri.* — *State v. Willoughby*, 76 Mo. 215; *State v. Potter*, 108 Mo. 424, 22 S. W. 89.

*Pennsylvania.* — *Com. v. Brown*, 12 Kulp 103.

*Texas.* — *Little v. State*, (Tex. Crim. App.), 35 S. W. 659.

*Utah.* — *People v. Peacock*, 5 Utah 237, 14 Pac. 332.

A new trial will not be granted on the ground of newly discovered cumulative evidence of contradictory statements of a witness. *Shigley v. Snyder*, 45 Ind. 543; *Jones v. Chicago, M. & St. P. R. Co.*, 42 Minn. 183, 43 N. W. 1, 114.

**71.** *Alger v. Merritt*, 16 Iowa 121; *Stineman v. Beath*, 36 Iowa 73; *Ham-*

an impeaching or contradictory character.<sup>72</sup>

**5. Limitations Upon the General Rule.**—In a few cases it has been distinctly announced that a new trial will never be granted for newly discovered cumulative evidence.<sup>73</sup> But if such was ever the general rule (the facts of very few cases requiring the application of so stringent a rule), it may be said that the general trend of modern authority is favorable to the granting of new trials where the newly discovered cumulative evidence is of a controlling or decisive character,<sup>74</sup> or even where it is such as to render a change in the result fairly probable.<sup>75</sup> It is of course true that to effect such a change would ordinarily require a greater weight or volume of evidence

bel *v.* Williams, 37 Iowa 224; Layman *v.* Minneapolis St. R. Co., 66 Minn. 452, 69 N. W. 329.

<sup>72</sup> Alger *v.* Merritt, 16 Iowa 121; Rains *v.* Ballow, 54 Ind. 70; Houston & T. C. R. Co. *v.* Forsyth, 49 Tex. 171; Com. *v.* Yot Sing, 7 Kulp (Pa.) 349.

<sup>73</sup> State *v.* Davis, (Idaho), 53 Pac. 678; Findley *v.* Curd, 22 Ky. L. Rep. 1,912, 62 S. W. 501.

"It looks like a great hardship that a defeated litigant should not be permitted to have the advantage of after-discovered and strongly decisive corroborating testimony which he was unable to use at the trial; yet to establish such a precedent would be to cause litigants to be careless in preparation for trial, and open the way to the manufactory of such testimony, to the delay and subversion of justice." Sisler *v.* Shaffer, 43 W. Va. 769, 28 S. E. 721.

<sup>74</sup> Illinois.—Schlencker *v.* Risley, 4 Ill. 483, 38 Am. Dec. 100.

Kentucky.—Mercer *v.* King, 19 Ky. L. Rep. 781, 42 S. W. 106.

South Carolina.—Durant *v.* Philpot, 16 S. C. 116.

Texas.—Young *v.* State, 30 Tex. App. 308, 17 S. W. 413; Halliday *v.* Lambright, (Tex. Civ. App.), 68 S. W. 712.

Vermont.—Myers *v.* Brownell, 2 Aik. 407, 16 Am. Dec. 729; Barker *v.* French, 18 Vt. 460.

Washington.—State *v.* Stowe, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609.

It has even been held that a court may grant a new trial for cumulative evidence where the moving party has not exercised a proper degree of diligence, where the newly discovered

evidence is convincing. Keet *v.* Mason, 167 Mass. 154, 45 N. E. 81.

"It has been well observed that it often happens that neither of the parties know of all the persons who may be acquainted with some of the circumstances relating to the point in controversy, and if suggestions of this sort were listened to, there would be no end to litigation. But this rule must be taken in its proper sense, and is not to be understood as precluding a new trial in every case, where the new testimony relates to a point contested on the former trial; for if it were so a new trial could seldom, if ever, be granted in any case. The rule, when properly applied, is a salutary guide to the discretion of the court, and where the testimony is strictly cumulative and merely increases the weight of evidence, leaving the cause still in doubt, a new trial will not be granted. But when the point was left doubtful by the testimony on the former trial, and the newly discovered testimony will remove all doubt, or it is apparent that injustice has been done, it is certainly reasonable, and violates no rule, to grant a new trial." Myers *v.* Brownell, 2 Aik. (Vt.) 407, 16 Am. Dec. 729.

<sup>75</sup> California.—Oberlander *v.* Fixen, 129 Cal. 690, 62 Pac. 254; People *v.* Lapique, 136 Cal. 503, 69 Pac. 226.

Georgia.—Holmes *v.* Clark, 54 Ga. 303.

Iowa.—Cleslie *v.* Frerichs, 95 Iowa 83, 63 N. W. 581.

Kentucky.—Millar *v.* Field, 3 A. K. Marsh. 104; Butts *v.* Christy, 23 Ky. L. Rep. 2,355, 67 S. W. 377.

Maine.—Parsons *v.* Lewiston, B.



of a cumulative character than of evidence of a new and distinct

& B. St. R., 96 Me. 503, 52 Atl. 1,006.  
*Massachusetts*. — Keet v. Mason, 167 Mass. 154, 45 N. E. 81.

*New York*. — Bulkin v. Ehret, 29 Abb. N. C. 62, 20 N. Y. Supp. 731; Clegg v. New York Newspaper Union, 51 Hun 232, 4 N. Y. Supp. 280; Vollkommer v. Nassau Elec. R. Co., 23 App. Div. 88, 48 N. Y. Supp. 372; Keister v. Rankins, 34 App. Div. 288, 54 N. Y. Supp. 274; Hess v. Sloane, 47 App. Div. 585, 62 N. Y. Supp. 666; Solowye v. Hazlett, 35 Misc. 197, 71 N. Y. Supp. 486.

*Vermont*. — Gilman v. Nichols, 42 Vt. 313.

*Washington*. — State v. Townsend, 7 Wash. 462, 35 Pac. 367.

See also Ogden v. Dodge Co., 97 Ga. 461, 25 S. E. 321; Berberich v. Louisville Bridge Co., 20 Ky. L. Rep. 467, 46 S. W. 691; Preston v. Otey, 88 Va. 491, 14 S. E. 68; German Nat. Bank v. Edwards, 63 Neb. 604, 88 N. W. 657; Lister v. Mundell, 1 Bos. & P. 427.

"It seems to be apparent that newly discovered evidence may be of as much importance upon an issue as to which evidence has been already given, as though no evidence upon that point had been adduced upon the trial." Keister v. Rankins, 34 App. Div. 288, 54 N. Y. Supp. 274.

"It is not the law that newly discovered evidence is not ground for a new trial merely because it comes within the category of 'cumulative.' It is, no doubt, the general rule that such evidence, when merely an addition to a mass of evidence of the same import and effect, differing in no way in its character and significance, would not warrant a new trial. Each case must depend upon its own circumstances. For instance, to put an extreme case, a mass of highly important, newly discovered evidence should not be disregarded because there has been some slight, insignificant and inconclusive evidence introduced at the trial on the same subject." People v. Lapique, 136 Cal. 503, 69 Pac. 226.

Probably the true rule is that when the newly discovered evidence, to-

gether with the evidence already introduced in the case, would render a different verdict probable, a new trial should be granted, rather than that the newly discovered evidence alone should have such effect. Parsons v. Lewiston, B. & B. St. R., 96 Me. 503, 52 Atl. 1,006.

Where the defendant and his wife testified that he could not have executed the note sued on because he was not in the country where it was made at the time of its alleged execution, and fixed the time by the date of their marriage in this country, the newly discovered record evidence of their marriage at a later time, and after the execution of the note, should warrant a new trial. Cleslie v. Frerichs, 95 Iowa 83, 63 N. W. 581.

**Accident.** — Where the issue is whether or not the deceased person ran into a street car or was run into by it, and the evidence is close and conflicting, the newly discovered evidence of three witnesses who saw the accident, and will testify clearly to the point in issue, should require a new trial. Vollkommer v. Nassau Elec. R. Co., 23 App. Div. 88, 48 N. Y. Supp. 372.

Where the direct question involved was whether a child was on the sidewalk or in the roadway when struck and injured by a truck, newly discovered testimony of three witnesses that the child was in the roadway was held to require a new trial. Bulkin v. Ehret, 29 Abb. N. C. 62, 20 N. Y. Supp. 731.

**Admissions** — Where, in a prosecution for forgery, the defendant undertook to show by the declarations of the prosecuting witness made to himself and to a notary public, that the prosecuting witness himself forged the note on which the prosecution was based, and it did not clearly appear from the testimony of the notary public that he clearly understood what the prosecuting witness had said to him, it was held that newly discovered evidence of the declarations and admissions of the prosecuting witness to other persons that he had signed the note should re-

probative fact.<sup>76</sup> That the moving party was surprised by the character of his adversary's evidence on some point affords the stronger reason for a new trial for cumulative evidence.<sup>77</sup>

**6. Similarity of Rules in Civil and Criminal Actions.**—It has been held that the rules governing applications for new trials for newly-discovered evidence are the same in criminal and civil actions.<sup>78</sup> But it has been suggested that while the general rules are the same, they should be less rigidly applied in criminal prosecutions. In one jurisdiction it has even been said that a new trial in a criminal case should be allowed for newly-discovered cumulative evidence which would raise a reasonable doubt of the defendant's guilt.<sup>79</sup>

## V. REVIEW IN EQUITY.

A petition for a rehearing, or bill of review, or bill in the nature of a bill of review, or bill to relieve against a judgment at law, or code proceeding equivalent to any of them, will rarely be sustained for newly-discovered oral evidence which is merely cumulative to

quire a new trial. *People v. Lapique*, 136 Cal. 503, 69 Pac. 226.

76. "When the newly discovered evidence is additional to some already in the case in support of the same proposition, the probability that such new evidence would change the result is generally very much lessened, so that much more evidence, or evidence of much more value, will generally be required when such evidence is cumulative, but if the newly discovered testimony, although merely cumulative, is of such a character as to make it seem probable to the court that, notwithstanding the same question has already been passed upon by the jury, a different result would be reached upon another trial with the new evidence, then such new trial should be granted." *Parsons v. Lewiston, B. & B. St. R.*, 96 Me. 503, 52 Atl. 1,006.

77. *Millar v. Field*, 3 A. K. Marsh. (Ky.) 104.

**Surprise.**—"The reason of the rule forbidding a new trial for the purpose of admitting cumulative testimony does not apply where the party has had no fair opportunity to procure and adduce evidence on the issue raised by his adversary for the first time, during the trial, by the introduction of evidence which could

not be anticipated. The reason of the rule is that public policy, looking to the finality of trials, requires that parties be held to diligence in preparing their cases, and that they shall not be allowed a second trial because they mistook the amount of testimony requisite. But the policy which seeks to limit continued litigation does not apply where a party has had no fair opportunity to present his side of the case, no real day in court." *Wolf v. Mahan*, 57 Tex. 171.

Where the newly discovered evidence was clear and convincing, and the attorney who originally had charge of the case died shortly before the trial, and his successor was not guilty of negligence in not discovering the new evidence, a new trial was granted. *Butts v. Christy*, 23 Ky. L. Rep. 2,355, 67 S. W. 377.

78. *Adams v. People*, 47 Ill. 376; *Shaw v. State*, 27 Tex. 750; *White v. State*, 10 Tex. App. 167. It has been doubted whether, under the New York statute, a new trial should ever be granted in a criminal case for cumulative evidence. *People v. O'Connor*, 37 Misc. 754, 76 N. Y. Supp. 511.

79. *Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 669.

that adduced on the original hearing.<sup>80</sup>

Largely on account of the danger of subornation of perjury after publication passed, it has been held in some cases, and suggested in others, that a review should never be granted for cumulative oral evidence.<sup>81</sup>

80. *England*. — *Norris v. Le Neve*, 3 Atk. 25.

*United States*. — *Craig v. Smith*, 100 U. S. 226; *Baker v. Whiting*, 1 Story 218; *Jenkins v. Eldredge*, 3 Story 299; *Dexter v. Arnold*, 5 Mason 303, 7 Fed. Cas. No. 3,856; *Wood v. Mann*, 2 Sumn. 316, 30 Fed. Cas. No. 17,953; *Southard v. Russell*, 16 How. 547.

*Alabama*. — *Caller v. Shields*, 2 Stew. & P. 417; *McDougall v. Dougherty*, 39 Ala. 409.

*Indiana*. — *Humphreys v. Klick*, 49 Ind. 189.

*Iowa*. — *Kinsell v. Feldman*, 28 Iowa 497.

*Kentucky*. — *Respass v. McClanahan*, *Hardin* 342; *Finley v. Tyler*, 3 T. B. Mon. 400.

*Mississippi*. — *Iler v. Routh*, 3 How. 276; *Moody v. Farr*, 27 Miss. 788.

*New Jersey*. — *McDowell v. Perrine*, 36 N. J. Eq. 632.

*New York*. — *Munn v. Worrall*, 16 Barb. 221; *Livingston v. Hubbs*, 3 Johns. Ch. 124; *Dunham v. Winans*, 1 Paige 24.

*North Carolina*. — *Love v. Blewit*, 21 N. C. 108.

*Ohio*. — *Stevens v. Hey*, 15 Ohio 313.

*Oregon*. — *Hilts v. Ladd*, 35 Or. 237, 58 Pac. 32.

*Tennessee*. — *Long v. Granberry*, 2 Tenn. Ch. 85; *Burson v. Dosser*, 1 Heisk. 754.

*Virginia*. — *Randolph v. Randolph*, 1 Hen. & M. 179; *Harnsbarger v. Kinney*, 13 Gratt. 511; *Connolly v. Connolly*, 32 Gratt. 657; *St. John v. Alderson*, 32 Gratt. 140; *Douglas v. Stephenson*, 75 Va. 747; *Travelyan v. Lofft*, 83 Va. 141, 1 S. E. 901; *Akers v. Akers*, 83 Va. 633, 8 S. E. 260; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549.

*West Virginia*. — *Bloss v. Hull*, 27 W. Va. 503; *Sewing Mach. Co. v. Dunbar*, 32 W. Va. 335.

See also *Finlayson v. Lipscomb*, 16

Fla. 751; *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Parker v. Logan*, 82 Va. 376, 4 S. E. 613; *Hoomer v. Krohn*, 4 Call (Va.) 274; *German Nat. Bank v. Edwards*, 63 Neb. 604, 88 N. W. 657; *Smith v. McLain*, 11 W. Va. 654.

"The policy of the law is not to protract or continue litigation, but to end it; but if whenever a new witness or witnesses can, honestly or by subornation, be found, whose testimony might probably have been sufficient to have justified a different finding and decree in a suit already terminated, an original suit can be maintained on that account; there never could be a certainty that a cause once tried out and passed to a final decree was ended. The danger and mischief to society which would naturally flow from a rule of that kind are too great and too universal to justify its sanction by the courts." *Hilts v. Ladd*, 35 Or. 237, 58 Pac. 32.

**Negligence.** — This is especially true where the party seeking the review has been guilty of negligence. *Taylor v. Boardman*, 25 Mich. 527.

81. "But whether it can be truly said that there is any universal or absolute rule which prohibits courts from allowing the introduction, upon a bill of review, of the oral testimony of newly discovered witnesses to prove an issue on a former hearing, it is agreed by all the authorities that such evidence, if allowed at all, should be permitted with very great caution, and only in extreme cases, for fear of opening the doors to perjury and subornation of perjury, and that where the new evidence consists in the mere accumulation of witnesses to a fact once litigated, a bill of review should rarely, if ever, prevail. . . .

"The newly discovered evidence sufficient to support a bill of review, whatever its nature, should be of so clear and decisive a character to leave

But it has been pointed out that the methods of taking evidence in equity are now the same as those at law in most jurisdictions;<sup>82</sup> and it has been held that a review may be granted for newly-discovered cumulative evidence of a clear and convincing character.<sup>83</sup>

no doubt that it would of itself compel a reversal of the former ruling." *Hilts v. Ladd*, 35 Or. 237, 58 Pac. 32. And see review of cases therein.

82. *Mulock v. Mulock*, 28 N. J. Eq. 15.

83. "It may be that testimony to the same effect as that which is made the ground of the application has been given in the cause, but it may have been so slight as to have been therefore unimportant. It may have been the mere adumbration of a most important fact, which, if fully proved, would have turned the scale. The applicant may have been unable, from want of knowledge of the means or source of proof, to establish the fact on the trial, and the evidence may have come to him by the merest accident almost immediately afterward. To say that, because evidence to the same effect was given in the cause, though it was too weak to be

of any value (but yet the best within the applicant's knowledge or reach at the time), strong, and it may be thoroughly conclusive, testimony subsequently discovered shall not avail him merely because of a rule which is within the control of the court, would be to do injustice judicially and with deliberation." *Mulock v. Mulock*, 28 N. J. Eq. 15.

See also *Aholtz v. Durfee*, 25 Ill. App. 43, S. C. 122 Ill. 286; *Griggs v. Gear*, 8 Ill. 2; *Hilts v. Ladd*, 35 Or. 237, 58 Pac. 32; *Society of Shakers v. Watson*, 47 U. S. App. 170, 23 C. C. A. 263, 77 Fed. 512; *Owens v. Love*, 9 Fla. 325.

"The new evidence, if it be cumulative merely, should be very clear, highly pertinent, and so well proven as to be controlling in its influence." *Society of Shakers v. Watson*, 47 U. S. App. 170, 23 C. C. A. 263, 77 Fed. 512.

# CUSTOMS AND USAGES.

BY CHARLES W. HATTON.

## I. JUDICIAL NOTICE, 949

## II. PRESUMPTIONS, 951

1. *As to Foreign Countries*, 951
2. *As to Knowledge of Customs*, 951
3. *Particular Customs*, 951

## III. BURDEN OF PROOF, 956

## IV. PROVING A CUSTOM, 956

1. *In General*, 956
2. *Knowledge of Witnesses*, 958
  - A. *Where Acquired*, 959
  - B. *When Acquired*, 959
3. *Number of Witnesses Necessary*, 959
4. *Facts Relevant*, 960
  - A. *Analogous Transactions*, 960
  - B. *Single Transactions*, 961

### CROSS-REFERENCES.

Admiralty; Ambiguity; Bailments;  
Carriers; Contracts; Corporations; Insurance;  
Landlord and Tenant; Negligence; Parol Evidence;  
Railroads; Shipping; Water and Water Courses.

## I. JUDICIAL NOTICE.

The customs of universal prevalence in a particular jurisdiction become part of the existing law, and are judicially noticed,<sup>1</sup> but no

1. *United States*.—Railroad & Tel. Co. v. Board of Equalizers, 85 Fed. 302; Sullivan Timber Co. v. Mobile City, 110 Fed. 186.

*Arkansas*.—Davis v. Hanly, 12 Ark. 645.

*Illinois*.—Nash v. Classen, 163 Ill. 409, 45 N. E. 276.

*Iowa*.—Burlington C. R. & N. R. Co. v. Dey, 82 Iowa 312, 48 N. W. 98.

*Maine*.—Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611.

*Maryland*.—Merchants' Mut. Ins. Co. v. Wilson, 2 Md. 217.

*Massachusetts*.—Sawyer v. Baldwin, 11 Pick. 492.

*New York*.—Hutchinson v. Manhattan Co., 150 N. Y. 250, 44 N. E. 775.

In *Munn v. Burch*, 25 Ill. 21, the court said: "When there is a certain well-beaten track upon any subject, which the commercial public habitually follows, which business men almost or quite universally pursue, without express promise or dictation, everybody has a right to assume that all similarly situated, or in the way of that road, will pursue it. That is what is called commercial custom or usage, and enters into and forms a part of every contract to which it is applicable. These are

such notice will be taken of customs that prevail in a foreign jurisdiction,<sup>2</sup> Indian tribe,<sup>3</sup> or in a particular locality or business.<sup>4</sup>

principles of the law merchant, which have been adopted and have become a part of the common law."

**The Extent of the Rule.**—In *McKibbin v. Great Northern R. Co.*, 78 Minn. 232, 80 N. W. 1,052, Judge Mitchell said: "In the present case the custom or manner of doing business between the plaintiffs and the defendant alleged in the complaint does not go far enough to charge the defendant with liability. For example, it is not averred that it was the custom of the defendant to permit the transportation of plaintiffs' sample trunks as baggage on its trains without being informed or having knowledge that they belonged to the plaintiffs, or without being advised as to the character or value of their contents. In short, the custom pleaded does not cover all the facts of the case. The same would be true of any general custom of which courts would take judicial notice. It is a matter of general knowledge that it is the general custom of railroad companies to carry on their passenger trains, as the baggage of commercial travelers, trunks which, to the knowledge of the carrier, contain merchandise belonging, not to the passenger, but to his employer. Of this custom, to this extent, we would unhesitatingly take judicial notice. To hold otherwise would be to stultify ourselves. But we would not be justified in taking judicial notice of the conditions or limitations under which such trunks are thus received and transported as baggage."

2. *Dempster v. Stephen*, 63 Ill. App. 126.

3. The court was urged in *Wilson v. Owens*, 86 Fed. 571, to judicially notice the laws and customs of the Chickasaw Indian Nation. Thayer C. J., delivering the opinion of the court, said: "We cannot assent to this view. There are a number of tribes domiciled in the Indian Territory, which have different laws, customs, and usages. This court does not have convenient access to books, local decisions, or official documents

which would enable it to determine with certainty what are the laws of these tribes on various subjects; and we apprehend that the United States courts sitting in the Indian Territory are confronted, in a measure, at least, with the same difficulty. Any attempt, therefore, to take judicial notice of the local laws of the various tribes in that territory would be attended with doubt and difficulty, and would lead to error."

4. *United States*.—*Meydenbauer v. Stevens*, 78 Fed. 787.

*Colorado*.—*Sullivan v. Hense*, 2 Colo. 424.

*Indian Territory*.—*Hockett v. Alston*, 3 Ind. Ter. 432, 58 S. W. 675; *Campbell v. Scott*, 3 Ind. Ter. 462, 58 S. W. 719.

*Kentucky*.—*Tranter v. Hibberd*, 21 Ky. L. Rep. 710, 56 S. W. 169.

*Maryland*.—*Johnson v. Robertson*, 31 Md. 476.

*Massachusetts*.—*Eager v. Atlas Ins. Co.*, 14 Pick. 141, 25 Am. Dec. 363.

*Mississippi*.—*Turner v. Fish*, 28 Miss. 306.

*Nebraska*.—*First Nat. Bank v. Farmers' & M. Bank*, 56 Neb. 149, 76 N. W. 430.

*New York*.—*In re Walter*, 75 N. Y. 354.

*North Dakota*.—*First Nat. Bank v. Minneapolis & N. E. Co.*, (N. D.), 91 N. W. 436.

*Oregon*.—*Lewis v. McClure*, 8 Or. 274.

*Tennessee*.—*McCorkle v. Driskell*, (Tenn. Ch. App.), 60 S. W. 172.

*Washington*.—*Cady v. Case*, 11 Wash. 124, 39 Pac. 375.

In *Goldsmith v. Sawyer*, 46 Cal. 209, the court said: "It appears from the plaintiffs' evidence that the sale was made for the reason that the defendant, after being notified, failed to make a deposit 'to cover the margins.' It is apparent that it was not made in accordance with the terms of the agreement, as stated in the complaint; and it is also apparent that the plaintiffs rely upon the sale as having been made in conformity with the terms of the con-

## II. PRESUMPTIONS.

1. **As to Foreign Countries.** — In the absence of proof the court will proceed upon the presumption that the customs and usages of foreign nations are the same as those of its own jurisdiction.<sup>6</sup>

2. **As to Knowledge of Customs.** — Every one is presumed to know of the existence of the general customs of the realm.<sup>6</sup>

3. **Particular Customs.** — Where it is shown that a general uniform usage is established in a trade or line of business it will be presumed that such usage is a part of any dealings in such trade or business;<sup>7</sup> but it may always be shown that by express stipulation

tract, because made in accordance with the rules of the Board of Brokers. The court, however, will not take judicial cognizance of those rules, unless they are rules or usages of trade and commerce which would be recognized without their adoption by any particular board or association; and the party who relies upon them must plead them. When a contract is entered into with reference to rules of that character, they become, in effect, special terms of the contract, and they must be averred by the party who claims that he has performed the contract on his part in accordance with such rules, or that the other party has failed to comply therewith."

5. *The Alpin*, 23 Fed. 815; *Olivari v. Thames & M. M. Ins. Co.*, 37 Fed. 894; *Dempster v. Stephen*, 63 Ill. App. 126; *Tinkler v. Cox*, 68 Ill. 119.

6. *British & Am. Mortg. Co. v. Tibballs*, 63 Iowa 468, 19 N. W. 319; *U. S. Life Ins. Co. v. Advance Co.*, 80 Ill. 549; *Hursh v. North*, 40 Pa. St. 241.

7. *England*. — *Rushforth v. Hadfield*, 7 East 224; *Graves v. Legg*, 12 Ex. 642, 2 Hurlst. & N. 210.

*United States*. — *Robinson v. U. S.*, 13 Wall. 363; *Bliven v. New England Screw Co.*, 23 How. 420; *Armstrong v. Chemical Nat. Bank*, 83 Fed. 556; *Adams v. Otterback*, 15 How. 539; *Ward v. Vosburgh*, 31 Fed. 12.

*Alabama*. — *Sampson v. Gazzam*, 6 Port. 123, 30 Am. Dec. 578.

*California*. — *Laver v. Hotaling*, 115 Cal. 613, 46 Pac. 1,070, 47 Pac. 593.

*Connecticut*. — *Smith v. Phipps*, 65 Conn. 302, 32 Atl. 367.

*Delaware*. — *Bryan v. Brown*, 3 Penn. (Del.) 504, 53 Atl. 55.

*Indiana*. — *Lupton v. Nichols*, 28 Ind. App. 539, 63 N. E. 477.

*Iowa*. — *Smith v. Hess*, 83 Iowa 238, 48 N. W. 1,030.

*Kansas*. — *Seymour v. Armstrong*, 62 Kan. 720, 64 Pac. 612.

*Maine*. — *Gleason v. Walsh*, 43 Me. 397.

*Massachusetts*. — *Lincoln & Kennebeck Bank v. Page*, 9 Mass. 155, 6 Am. Dec. 52; *Eager v. Atlas Ins. Co.*, 14 Pick. 141, 25 Am. Dec. 363; *Mooney v. Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277.

*Massachusetts*. — *Howard v. Great Western Ins. Co.*, 109 Mass. 384.

*Minnesota*. — *Van Dusen-Herrington Co. v. Jungeblut*, 75 Minn. 298, 77 N. W. 970.

*Mississippi*. — *Burbridge v. Cumbel*, 72 Miss. 371, 16 So. 792.

*Missouri*. — *Soutier v. Kellerman*, 18 Mo. 509; *Martin v. Ashland Mill Co.*, 49 Mo. App. 23.

*Montana*. — *Fitzgerald v. Hanson*, 16 Mont. 474, 41 Pac. 230.

*Nebraska*. — *Johnson v. Wilwaukee & W. Inv. Co.*, 46 Neb. 480, 64 N. W. 1,100.

*New Hampshire*. — *Foye v. Leighton*, 22 N. H. 71.

*New York*. — *Hinton v. Locke*, 5 Hill 437; *Robertson v. National S. S. Co.*, 139 N. Y. 416, 34 N. E. 1,053.

*Pennsylvania*. — *Corcoran v. Chess*, 131 Pa. St. 356, 18 Atl. 876; *Ambler v. Phillips*, 132 Pa. St. 167, 19 Atl. 71.

*Tennessee*. — *Jefferson Co. Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, 39 S. W. 338.

*Virginia*. — *Richlands Flint Glass Co. v. Hildebeitel*, 92 Va. 91, 22 S. E.

such usage was excluded from the transaction in question.<sup>8</sup>

806; *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593.

*West Virginia*. — *Connolly v. Bruner*, 48 W. Va. 71, 35 S. E. 927.

*Wisconsin*. — *Wausau Boom Co. v. Dunbar*, 75 Wis. 133, 43 N. W. 739; *Hewitt v. Lumber Co.*, 77 Wis. 548, 46 N. W. 822; *Shores Lumber Co. v. Stitt*, 102 Wis. 450, 78 N. W. 562.

In *Southwestern F. & C. Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255, it was said: "Where a contract is made as to a matter about which there is a custom well established, such custom is to be understood as forming a part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract. But evidence of custom, however, is never admissible to oppose or alter a general principle or rule, so as to make the rights and liabilities of parties other than they are at law."

In *Barton v. McKelway*, 22 N. J. L. 165, under a contract to deliver trees not less than one foot high, it was held proper to show a usage of all dealers that the length was measured only to the top of the ripe wood, rejecting the green immature top. Judge Nevius in his opinion stated "That contracting parties are always presumed to make their contracts with reference to the general custom and usage that appertains to the subject matter of their contract, if any such general custom prevails, and all ambiguous terms or phrases used in expressing such contract may be explained by resorting to such general usage. And all terms and phrases employed by parties to express their intentions, if at all ambiguous, are to be construed in conformity with such usage, in order to arrive at their true intent and meaning."

In *Van Camp Packing Co. v. Hartman*, 126 Ind. 177, 25 N. E. 901, Judge Mitchell said: "It is undoubtedly true that parties who contract in respect to a particular business are presumed to do so with

reference to any uniform practice which has been so long continued as to have ripened into a usage of the business to which the contract relates; and when the contract is silent, or terms of doubtful signification are employed, or when it is necessary, in order to give the agreement effect, assuming it to have been made with the usage in view, it is competent to prove the usage, so as to raise a presumption that the transaction in question was intended to conform to the known, usual and ordinary course of the business. The usage may always be referred to for the purpose of showing the intention of the parties in all those particulars concerning which they have not expressed themselves with clearness and certainty in the contract; or where words have been used which have acquired a broader or different signification than that commonly attributed to them, the fact may be proved."

**What is Deemed Sufficient to Establish a Usage.** — It is not enough that it be the usage or custom of one of the parties to the contract, or of some persons engaged in the trade, but it must be the general usage or custom of those engaged in the trade at the place where the contract was made or was to be performed, so general that those who are there engaged in the trade are to be presumed to know of its existence. On the other hand it is not necessary that such usage or custom should be universal, or that it should prevail all over the country. It is sufficient that it be general, uniform and notorious in the particular trade or business to which the contract relates, at the place where the contract was made or was to be performed. If you find from the evidence that such a custom or usage existed where the contract was made or to be performed, it is to be presumed that the parties had it in view when they made the contract, and intended to be bound by it. *Fraser v. Ross*, 1 Penn. (Del.) 348, 41 Atl. 204.

<sup>8</sup> *England*. — *Mollett v. Robinson*, L. R. 5 C. P. (33 Vic.) 646.



Parties who are engaged in a particular trade or business,<sup>9</sup> or persons accustomed to deal with those engaged in a particular business,<sup>10</sup> may be presumed to have knowledge of the uniform course

*Illinois*.—Lyon v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349.

*Indiana*.—Mand v. Trail, 92 Ind. 521; Lupton v. Nichols, 28 Ind. App. 539, 63 N. E. 477.

*Kansas*.—Seymour v. Armstrong, 62 Kan. 720, 64 Pac. 612.

*Louisiana*.—Crook v. Tensas Basin L. Dist., 51 La. Ann. 285, 25 So. 88.

*Maryland*.—Baltimore Baseball Club v. Pickett, 78 Md. 375, 28 Atl. 279.

*Mississippi*.—Burbridge v. Gumbel, 72 Miss. 371, 16 So. 792.

*South Carolina*.—Fairley v. Wappoo Mills, 44 S. C. 227, 22 S. E. 108.

*Virginia*.—Ferguson v. Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234.

*England*.—Cropper v. Cook, L. R. 3 C. P. 194.

*United States*.—Robinson v. U. S., 13 U. S. 363; Barnard v. Kellogg, 77 U. S. 383.

*California*.—Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Union Ins. Co. v. American Ins. Co., 107 Cal. 327, 40 Pac. 431.

*Indiana*.—Morningstar v. Cunningham, 110 Ind. 328, 11 N. E. 593; Scott v. Hartley, 126 Ind. 239, 25 N. E. 826; Lane v. Union Nat. Bank, 3 Ind. App. 299, 29 N. E. 613.

*Massachusetts*.—Winson v. Dilloway, 4 Metc. 221; Daniels v. Hudson R. F. Ins. Co., 12 Cush. 416.

*New York*.—De Cernea v. Cornell, 52 N. Y. St. 136, 22 N. Y. Supp. 941; Gleason v. Morrison, 20 Misc. 320, 45 N. Y. Supp. 684; Dickinson v. Poughkeepsie, 75 N. Y. 65; Harris v. Tumbridge, 83 N. Y. 92.

*Pennsylvania*.—Carter v. Philadelphia Coal Co., 77 Pa. St. 286.

*England*.—Sewell v. Corp., 1 Car. & P. 392, 11 Eng. C. L. 432.

*Illinois*.—Taylor v. Bailey, 169 Ill. 181, 48 N. E. 200.

*Indiana*.—Lane v. Union Nat. Bank, 3 Ind. App. 299, 29 N. E. 613; Morningstar v. Cunningham, 110 Ind. 328, 11 N. E. 593.

*Maryland*.—Patterson v. Crowther, 70 Md. 124, 16 Atl. 531.

*Massachusetts*.—Florence Co. v. Daggett, 135 Mass. 582.

*Missouri*.—Fitzsimmons v. Academy, 81 Mo. 37.

*New York*.—Cooper v. Kane, 19 Wend. 386.

*Pennsylvania*.—Pittsburg v. O'Neill, 1 Pa. St. 342.

*Tennessee*.—Kelton v. Taylor, 11 Lea 264; Jefferson Co. Sav. Bank v. Commercial Nat. Bank, 98 Tenn. 337, 39 S. W. 338.

In *Daniels v. Hudson R. F. Ins. Co.*, 12 Cush. (Mass.) 416, Judge Shaw in his opinion stated that, "When, therefore, the defendant company undertook to insure a manufactory in Massachusetts, with the machinery and stock therein, they must be presumed to be acquainted with the structure and arrangement of such building, and the distribution of the apartments within it, with a view to its adaptation to the business to be therein carried on, and with the use of the language employed by the owners, superintendents, and persons employed therein. If, therefore, the language of this representation was understood in a particular manner by manufacturers, according to which understanding the representation was true, the legal presumption is that it was so understood by the insurers, in their contract."

In *Gehl v. Milwaukee Produce Co.*, 105 Wis. 573, 81 N. W. 666, the plaintiffs made a verbal contract to deliver clover seed to the defendant. The question in dispute was the place of delivery, and upon this point the contract was silent. The court refused to submit to the jury the question of the existence of the custom claimed by plaintiff. Upon appeal Dodge J. in his opinion said: "A uniform trade custom is readily accepted by courts to define what is ambiguous or is left indeterminate in a contract, where both parties have knowledge of the custom, or are so situated that such knowledge may be presumed, for the reason that the

of such business; and one may be bound thereby, though ignorant, unless the other party be shown to have knowledge of his ignorance thereof.<sup>11</sup>

This presumption may generally be rebutted,<sup>12</sup> but not where the person, without knowing the other to be ignorant of the usage, has performed the contract in concordance therewith.<sup>13</sup> The particular

majority of such transactions are had in view of the custom, and the agreement on which the minds of the parties actually met will thereby be carried into effect. . . . The custom proved in this case was general, for it was uniform in the seed trade in the [locality], and unless it was shown that both parties intended to exclude it, or that the plaintiff was ignorant thereof, to the knowledge of the defendant, should have controlled as to the manner and place of delivery. Such facts should have been submitted to the jury, unless indeed the court resolved them in favor of the defendant. Failure to so submit them was error, and, without a verdict thereon, the judgment in favor of the plaintiff is without support."

11. *Mollett v. Robinson*, L. R., 5 C. P. (33 Vict.) 646; *Taylor v. Bailey*, 169 Ill. 181, 48 N. E. 200; *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50; *Gleason v. Morrison*, 20 Misc. 320, 45 N. Y. Supp. 684; *Smith v. Clews*, 114 N. Y. 190, 21 N. E. 160; *Jefferson Co. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, 39 S. W. 338; *Shores Lumber Co. v. Stitt*, 102 Wis. 450, 78 N. W. 562.

In *Heyworth v. Miller Grain & E. Co.*, 173 Mo. 171, 73 S. W. 498, the plaintiff and defendant contracted that certain grain should be delivered to the plaintiff and out of these transactions arose the disagreement as to the construction of the contract. Appellant says in his briefs that the testimony as to the usage should not have been received, "because it was not shown that he had any knowledge of such foreign usage." The court said: "If it was a usage of the trade, the defendant was bound to know it when it entered the trade. A merchant is chargeable with knowledge of the usages of a business in which he holds himself out

to the public as competent to be dealt with."

12. *Barnard v. Kellogg*, 10 Wall. (U. S.) 383; *Winsor v. Dillaway*, 4 Metc. (Mass.) 221; *Johnson v. De Peyster*, 50 N. Y. 666.

In *Pennell v. Delta Transp. Co.*, 94 Mich. 247, 53 N. W. 1,049, the defendant employed the plaintiff to clear a stream from logs, stumps, and snags. Upon the completion of the work, plaintiff was paid the \$2.00 per day for himself and each man as the contract stipulated. Defendant was then presented a bill for the board of the men during the time employed. The court allowed the plaintiff to give evidence of a custom or usage of that community to pay the board of men employed in certain kinds of business, but refused to allow the defendant to show that he had no knowledge of the custom. Long J. in his opinion held, "We think the court was in error in refusing to permit defendant's agent to testify that he had no knowledge of such a custom. . . . Where the custom or usage is restricted to a certain locality or business, though it has become general and uniform in that locality, or in that particular business, and the custom is relied upon as a ground of recovery, it is settled, we think, that such custom is not conclusive on the party, so that he may not give evidence that it was unknown to him."

13. In *Jefferson Co. Sav. Bank v. Commercial Nat. Bank*, 98 Tenn. 337, 39 S. W. 338, *Beard J.* in his opinion stated: "Every business man knows that in the constantly increasing volume and variety of banking transactions, the larger number of which are settled or disposed of by a simple exchange of credits, methods have been adopted by bankers to economize labor, reduce risks, and simplify dealings with one another, and with

custom or usage of a person or corporation must be proved as an existing fact at the time the contract was entered into, for no presumption of knowledge exists;<sup>14</sup> but if dealings are had with knowledge of such custom or usage, they impliedly form a part of the

their customers. Some of these methods are of a general character, while others are dictated by local convenience or necessity. That these methods so prevail is a fact of such public notoriety that no business can well affect to be ignorant, and, least of all, a banking institution. . . . The usages which were observed in the unsuccessful effort to collect the paper in controversy, and which are shown to have been established among the banks of Nashville, we find were reasonable and proper. It follows that the complainant was conclusively affected by them, although actually ignorant of their existence."

14. *Alabama*.—East Tennessee, Va. & Ga. R. Co. v. Johnston, 75 Ala. 596; German Ins. Co. v. Commercial Ins. Co., 95 Ala. 469, 11 So. 117.

*Kansas*.—Stout v. McLachlin, 38 Kan. 120, 15 Pac. 902.

*Massachusetts*.—Loring v. Gurney, 5 Pick. 15; Stevens v. Reeves, 9 Pick. 198; Packard v. Earle, 113 Mass. 280; Collins v. New England Iron Co., 115 Mass. 23.

*Missouri*.—Hyde v. St. Louis B. & N. Co., 32 Mo. App. 298; Walsh v. Mississippi Transp. Co., 52 Mo. 434.

*Nebraska*.—Union Stockyards Co. v. Westcott, 47 Neb. 300, 66 N. W. 419; Gamble v. Stauber Mfg. Co., 50 Neb. 463, 69 N. W. 960.

*Oregon*.—McBee v. Ceaser, 15 Or. 62, 13 Pac. 652.

In *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417, the court held that "Proof of knowledge, as a matter of fact, is required in order to give effect to any and all particular usages not of so general a nature as to furnish a presumption of knowledge. There certainly can be no legal presumption that every traveler who alights at an inn has knowledge of the particular usages of that particular inn, of which there

is no notice in any way given to him. Whether Russell had any knowledge of the alleged custom of the defendants' inn for the guests to deposit their money, was properly submitted to the jury as a question of fact, to be decided by them upon the evidence in the case."

In *Croucher v. Wilder*, 98 Mass. 322, the defendant owned and controlled a certain wharf in the city of Boston, and had established certain rules in regard to unloading vessels there. Plaintiff hired a berth at this wharf and began to unload his ship contrary to the rules of the defendant, but according to the usages of trade of the city. *Held*, that in the absence of any evidence to prove any notice to the master of the vessel of the existence of any special rule as to the mode of unloading cargoes at the wharf at which he had hired a berth, or any knowledge by him of such a rule, before or at the time the bargain was completed, the agreement for the use of the wharf would draw with it such incidents of such a contract as usually attach to it in the port of Boston. He would have a right to discharge his cargo, or to contract with another person to perform the services in the mode and by the use of means which were ordinarily adopted in unloading vessels at wharves in the city, provided the usage was reasonable and proper and adapted to the business to which it related.

In *Loring v. Gurney*, 5 Pick. (Mass.) 15, the Supreme Court of Massachusetts held that all persons accustomed to transact business at banks and other public offices, are presumed to know and assent to their usages. But the usages cannot affect their contracts, unless it appears that the usage was known to the persons with whom they contracted.

contract.<sup>15</sup>

No presumption of knowledge arises as to the existence of a particular usage of a locality against an entire stranger to that locality,<sup>16</sup> nor can such ignorant stranger subsequently assert the usage as against the other party.<sup>17</sup>

### III. BURDEN OF PROOF.

All the courts place the burden of proof upon the party seeking to establish the usage.<sup>18</sup> It has been held that a preponderance is sufficient,<sup>19</sup> but the evidence required is characterized by the courts as "clear and convincing,"<sup>20</sup> "clear and explicit,"<sup>21</sup> and "clear and satisfactory."<sup>22</sup> It is not necessary that the proof should be conclusive.<sup>23</sup>

### IV. PROVING A CUSTOM.

**1. In General.**—Some courts distinguish between custom and usage, but not in respect to the mode of proof.<sup>24</sup> A usage not

15. *Partridge v. Insurance Co.*, 15 Wall. (U. S.) 573; *Celluloid Mfg. Co. v. Chandler*, 27 Fed. 9; *Stout v. McLachlin*, 38 Kan. 120, 15 Pac. 902; *Union Stockyards Co. v. Westcott*, 47 Neb. 300, 66 N. W. 419.

16. *Hathesing v. Laing*, L. R., 17 Eq. 92; *Horan v. Strachan*, 86 Ga. 408, 12 S. E. 678; *Gilmer v. Young*, 122 N. C. 806, 29 S. E. 830.

*Benevolent Soc. v. Baldwin*, 86 Ill. 479; *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215; *Cogswell v. Chubb*, 72 N. Y. St. 20, 36 N. Y. Supp. 1,076; *Off v. Inderrieden Co.*, 74 Ill. App. 105; *Herring v. Skaggs*, 73 Ala. 446. In an action on an express warranty that the vessel insured was to sail only upon inland waters. *Held*, that evidence that this was usually done scarcely established a usage of such a character to qualify an express warranty.

17. In *Hendricks v. Middlebrooks Co.*, (Ga.), 44 S. E. 835, the court said: "A mere local custom or business usage which springs up in a particular city is not, therefore, binding except upon those who have recognized it in their own transactions, and thus adopted it for their own dealings." As to one who has never recognized the existence of such a custom, his assent thereto cannot reasonably be inferred, unless it affirmatively appears that he had knowledge thereof at the time he contracted. And it necessarily fol-

lows that, unless he did in fact have such knowledge, and actually contracted with reference to such custom, he is not in a position to assert that it became, by implication, a part of a contract into which he and another entered, whether the latter had or had not, in prior dealings with others, given recognition to the custom.

18. *Allen v. Lyles*, 35 Miss. 513; *Thomas v. Hooker-Colville Steam Pump Co.*, 28 Mo. App. 563; *Dickinson v. Poughkeepsie City*, 75 N. Y. 65; *Milroy v. Chicago, M. & St. P. R. Co.*, 98 Iowa 188, 67 N. W. 276.

19. *Smith & Wallace Co. v. Lunger*, 64 N. J. L. 539, 46 Atl. 623.

20. *Runyan v. Central R. Co.*, 64 N. J. L. 67, 44 Atl. 985; *Adams v. Pittsburg Ins. Co.*, 76 Pa. St. 411; *Hinton v. Coleman*, 45 Wis. 165.

21. *Hibbard v. Peek*, 75 Wis. 619, 44 N. W. 641; *Savage v. Pelton*, 1 Colo. App. 148, 27 Pac. 948.

22. *Powell v. Luders*, 84 Minn. 372, 87 N. W. 940.

23. *Milroy v. Chicago, M. & St. P. R. Co.*, 98 Iowa 188, 67 N. W. 276; *Walls v. Bailey*, 49 N. Y. 464; *Richmond v. Union Steamboat Co.*, 87 N. Y. 240; *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404.

24. In *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, the court said: "When a usage becomes general, the courts will notice the same. It is true that many usages are not

judicially noticed must be proved as an existing fact, and is susceptible of direct proof,<sup>25</sup> but evidence of a custom which is unreasonable,<sup>26</sup> or which will controvert a rule of law, is not admissible.<sup>27</sup>

judicially noticed in the courts. Such usages are often shown to exist by testimony [of witnesses.] 'The leading distinction between customs, considered as usage, and law is that the former is restricted to a particular locality or class of persons, or business, while the latter is universal throughout the state.' . . . There is a clear distinction between usage, however general, and custom. Usage is local practice, and must be proved. . . . Custom is the law. There may be usage without custom, but there can be no custom without usage to accompany or precede it. Usage consists of a repetition of acts. Usage is the evidence of custom. Usage is inductive, based on consent of persons in a locality. Custom is deductive, making established local usage a law." And the court declined to admit proof of what it was claimed was a general custom.

25. *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141, 25 Am. Dec. 363; *Allen & Co. v. Lyles*, 35 Miss. 513.

26. *The Gran Canaria*, 16 Fed. 868; *Palmer v. Osborne*, 115 Iowa 714, 87 N. W. 712; *Pulsifer v. Berry*, 87 Me. 405, 32 Atl. 986; *Minneapolis S. & D. Co. v. Metropolitan Bank*, 76 Minn. 136, 78 N. W. 980; *Boardman v. Spooner*, 13 Allen (Mass.) 353, 90 Am. Dec. 196; *Cox v. Charleston F. & M. Ins. Co.*, 3 Rich. L. (S. C.) 331, 45 Am. Dec. 771; *Dern v. Kellogg*, 54 Neb. 560, 74 N. W. 844; *Dempsey v. Dobson*, 184 Pa. St. 588, 39 Atl. 493.

In *Hill v. Portland & R. R. Co.*, 55 Me. 438, the plaintiff's horse was frightened by the loud and sudden blowing of the defendant's locomotive whistle, and evidence of the custom in that respect was held rightly excluded. The court say in the opinion: "It does not appear in terms whether the object was to prove a general custom on all railroads. The question might be limited to one or two roads. But, if such a general custom could be established, it would not be a legitimate defense in this case, or tend

to establish it. If all the railroads in the country adopt any rule or custom which is unreasonable or dangerous and productive of injury, the generality of the custom cannot, in a given case, in any degree excuse or justify the act."

27. *Alabama*.—First Nat. Bank v. Nelson, 105 Ala. 180, 16 So. 707.

*California*.—Davis v. First Nat. Bank of Fresno, 118 Cal. 600, 50 Pac. 666.

*Florida*.—Sullivan v. Jernigan, 21 Fla. 264; Hendry v. State, 39 Fla. 235, 22 So. 647.

*Illinois*.—Western Union C. S. Co. v. Winona Produce Co., 94 Ill. App. 618.

*Indiana*.—Cox v. O'Riley, 4 Ind. 368, 58 Am. Dec. 633.

*Kansas*.—McWilliams v. Great Spirit Springs Co., 7 Kan. App. 210, 52 Pac. 905.

*Louisiana*.—Cranwell v. The Fanny Fosdick, 15 La. Ann. 436, 77 Am. Dec. 190.

*Massachusetts*.—Page v. Cole, 120 Mass. 37; Pickering v. Weld, 159 Mass. 522, 34 N. E. 1,081.

*Minnesota*.—Merchants' Ins. Co. v. Prince, 50 Minn. 53, 52 N. W. 131; Healey v. Mannhiemer, 74 Minn. 240, 76 N. W. 1,126; State v. Oftedal, 72 Minn. 498, 75 N. W. 692; Baxter v. Sherman, 73 Minn. 434, 76 N. W. 211.

*Montana*.—Penn v. Oldhauber, 24 Mont. 287, 61 Pac. 649.

*New York*.—Wadley v. Davis, 63 Barb. 501.

*Pennsylvania*.—Atwood v. Reliance Transp. Co., 9 Watts 87, 34 Am. Dec. 503; Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. 354.

*Tennessee*.—Charles v. Carter, 96 Tenn. 607, 36 S. W. 396.

*Texas*.—Vick v. State, (Tex. Crim. App.), 69 S. W. 156.

*Virginia*.—Ferguson v. Gooch, 94 Va. 1, 26 S. E. 397; Southwest Va. M. L. Co. v. Chase, 95 Va. 50, 27 S. E. 826.

*Wisconsin*.—Marshfield Land & Lumb. Co. v. John Week Lumber Co., 108 Wis. 268, 84 N. W. 434.

**2. Knowledge of Witnesses.** — A witness, in order to be competent to testify to the existence of a custom, must have had experience in the particular trade or business, or have been so connected with the business as to become familiar with the manner in which it is conducted.<sup>28</sup> The evidence offered must consist of his knowledge so acquired.<sup>29</sup> Mere opinion of the witness is not admissible to estab-

In *Southwestern Freight Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255, an action for conversion of flour, evidence was introduced to show a custom among the merchants that the effect of an order given by the owner of the mills was sufficient to pass the title to the flour in the purchasers, and that from the time the card was handed over, they became the absolute owners. The court held that the evidence should have been excluded. "Evidence of custom, however, is never admissible to oppose or alter a general principle or rule, so as to make the liabilities of parties other than they are at law. What constituted a delivery of the flour was a question of law; and the rights and liabilities of the vendor or vendee must be ascertained and fixed by the same standard."

**Effect of a Local Statute.** — In *Fleming v. King*, 100 Ga. 449, 28 S. E. 239, it was said that the court below did not err in refusing to allow plaintiffs in error to prove the existence of a local custom in the City of Augusta to the effect that tenants are not expected to pay rent or required to pay rent for buildings after they have been destroyed by fire. A custom makes the law of a contract only where there is no law governing it. It does not supersede the law. A local custom cannot have the effect of depriving the contracting party of right secured to him by a positive statute, unless he expressly so agrees.

**28. England.** — *Cropper v. Cook*, L. R. 3 C. P. 194.

**California.** — *Redfield v. Oakland Con. St. R. Co.*, 112 Cal. 220, 43 Pac. 1, 117.

**Illinois.** — *Wilson v. Bauman*, 80 Ill. 493.

**Maine.** — *Hartley v. Richardson*, 91 Me. 424, 40 Atl. 336.

**Maryland.** — *Merchants' Mut. Ins. Co. v. Wilson*, 2 Md. 217; *Chesa-*

*peake Bank v. Swain*, 29 Md. 483.

**Massachusetts.** — *Haskins v. Warren*, 115 Mass. 514; *Worcester v. Northborough*, 140 Mass. 397, 5 N. E. 270.

**Missouri.** — *Hill v. Morris*, 21 Mo. App. 256.

**New Hampshire.** — *Sumner v. Tyson*, 20 N. H. 384.

**New Jersey.** — *Wallace, Muller & Co. v. Leber*, 65 N. J. L. 195, 47 Atl. 430.

**New York.** — *Hart v. Thompson*, 75 N. Y. St. 1, 279, 41 N. Y. Supp. 909.

In *King v. Woodbridge*, 34 Vt. 565, it was held that the knowledge of the party of the general course of the business in a particular trade, which he derived from being in the trade, although partly derived from others in the course of such business, is of that general character that renders it competent evidence. The limited extent of the knowledge of the witness in question is to be considered by the jury in weighing the evidence, and not one affecting the competency.

**29. Garry v. Meagher**, 33 Ala. 630; *Redfield v. Oakland Con. St. R. Co.*, 112 Cal. 220, 43 Pac. 1, 117; *Haskins v. Warren*, 115 Mass. 514; *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215.

In *Wilson v. Bauman*, 80 Ill. 493, an action upon a building contract, the contractor offered the testimony of two contractors to prove a custom that the employment of an architect to make plans and designs for a building carried with it an agreement to superintend its construction. *Held*, "that if there was such a custom they must have known of it. It could not be wholly confined to architects, but must, if it existed, be just as well known to builders and contractors, without whom there could be no opportunity for the existence of the custom. It was not to be settled by special skill or science,

lish a custom.<sup>80</sup>

A. WHERE ACQUIRED. — A witness testifying to the existence of a custom must limit his testimony to the locality in which it is sought to be established, since evidence that it exists in another place will not prove that it exists in the locality in question.<sup>81</sup>

B. WHEN ACQUIRED. — The witness must have known of the existence of the usage at the time the transaction took place or the injury occurred.<sup>82</sup>

3. Number of Witnesses Necessary. — Some courts hold that one witness may be sufficient, if the testimony is clear in every particular and uncontradicted,<sup>83</sup> and others hold that more than one is re-

but by a knowledge of what the architects did under a particular form of employment, and anybody who had any experience in the matter was competent to testify."

30. *England*. — *Cunningham v. Fonblanque*, 6 Car. & P. 44.

*United States*. — *Oelricks v. Ford*, 64 U. S. 49.

*Alabama*. — *Garey v. Meagher*, 33 Ala. 630.

*Georgia*. — *Horan v. Strachan*, 86 Ga. 408, 12 S. E. 678.

*Indiana*. — *Cox v. O'Riley*, 4 Ind. 368, 58 Am. Dec. 633.

*Missouri*. — *Southwestern F. & C. Press Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255.

*New York*. — *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305.

*Washington*. — *Williams v. Nine-mire*, 23 Wash. 393, 63 Pac. 534.

In *Armstrong v. Lake Champlain Granite Co.*, 147 N. Y. 495, 42 N. E. 186, an action concerning mining deeds, testimony of witnesses who lived and owned property in the section was given showing that the word "minerals" meant only iron ores. *Held*, "that the evidence offered and received upon that subject in this case only went to the extent of showing [what] certain persons understood . . . and was quite insufficient to establish a settled and recognized usage which shall override the legal meaning of the word. The custom must be collected, not from what witnesses say they think the custom is, but from what was publicly done throughout the district."

31. *Coffman v. Campbell Co.*, 87

Ill. 98; *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Allen & Co. v. Lyles*, 35 Miss. 513; *Long Bros. v. Armby Co.*, 43 Mo. App. 253; *Hale v. Gibbs*, 43 Iowa 380.

32. In *Chicago City R. Co. v. Taylor*, 170 Ill. 49, 48 N. E. 831, an action to recover for personal injuries, a witness was allowed to give his knowledge as to the existence of the custom; the court held that the evidence was incompetent, as the witness had only been connected with the company since the accident and had no knowledge of the existence or non-existence of a custom at the time of the accident; and for this reason his evidence was incompetent.

33. *Robinson v. U. S.*, 13 Wall. 363; *Greenwich Ins. Co. v. Waterman*, 54 Fed. 839; *Jones v. Hoey*, 128 Mass. 585; *Vail v. Rice*, 5 N. Y. 155; *Southwest Va. M. & L. Co. v. Chase*, 95 Va. 50, 27 S. E. 826.

In *Partridge v. Forsyth*, 29 Ala. 200, a particular trade custom was sought to be set up by the testimony of one witness. The court (Stone J.) said: "We cannot lay it down as a positive rule that more than one witness is required to prove the existence of a custom or usage before such usage or custom can become an element of contracts. . . . We do not wish to be understood as saying that the testimony in this case was sufficient. . . . All we decide is that there was some evidence of a custom before the jury. It may have been weak; but it was the province of that body to pass on its sufficiency."

quired.<sup>34</sup> A custom may be established, however, even when the evidence is conflicting.<sup>35</sup>

**4. Facts Relevant.** — A. ANALOGOUS TRANSACTIONS. — Evidence of the continued and general mode of transacting business of the same nature by parties in the trade or business is admissible.<sup>36</sup> It must be shown that they were not transacted under special contract,<sup>37</sup>

**34.** *Halwerson v. Cole*, 1 Spears L. (N. C.) 321, 40 Am. Dec. 603; *Bisell v. Ryan*, 23 Ill. 517; *Parrott v. Thacher*, 9 Pick. (Mass.) 426; *Wood v. Hickok*, 2 Wend. (N. Y.) 501.

**35.** *Farnsworth v. Chase*, 19 N. H. 534; *Hill v. Morris*, 21 Mo. App. 256; *Scott v. Brown*, 29 Misc. 320, 60 N. Y. Supp. 511; *Bloom v. Cox Shoe Mfg. Co.*, 154 N. Y. 711, 49 N. E. 56.

If the party establishing the custom has produced evidence which when fairly and reasonably considered would prove the alleged custom, the question becomes one of fact for the jury under the proper instructions from the court, and the mere conflict in the testimony does not necessarily negative the custom. *Milroy v. Chicago, M. & St. P. R. Co.*, 98 Iowa 188, 67 N. W. 276.

*Contra.* — In *The Harbinger*, 50 Fed. 941, the court said: "When the evidence is conflicting, that is, the party setting up the custom produces some evidence, and nearly an equal number of witnesses with equal opportunities of knowledge are produced upon the other side who say that no custom exists—that they never heard of it. On both sides the witnesses are men of high character and entirely worthy of credit. They testify according to their respective understanding. It is clear that the custom set up is not proved. It is incredible that a uniform, long established and notorious custom should exist and witnesses engaged in the business should be ignorant of it."

**36.** *Berry v. Cooper*, 28 Ga. 543; *Anewalt v. Hummel*, 109 Pa. St. 271; *Hibbard v. Peek*, 75 Wis. 619, 44 N. W. 641.

*Carlisle v. Wallace*, 12 Ind. 252, 74 Am. Dec. 207, was an action to recover value of wheat placed in defendant's warehouse to be used by him for milling purposes. The wheat

was destroyed by fire, and defendant endeavored to set up a custom controlling the liability. *Held*, "that it is very difficult to see how such a custom could be proved. It could not be proved by showing that it was the custom of millers to make such a stipulation a part of the contract, because that would make the question of liability one not of custom, but of special contract. Such a custom could only be proved by showing that the millers [of this city] had long been in the habit of thus receiving wheat and losing it, or having it destroyed, and that the sellers did not claim pay for it in such cases—in short, that losses of wheat by millers, and exemption from liability to pay for it, had been so frequent, and for so long a time, as to have become the law of the place."

**37.** *Leitner v. Boehm*, 26 Misc. 790, 56 N. Y. Supp. 227; *Woldert v. Arledge*, 11 Tex. Civ. App. 484, 33 S. W. 372.

In *McConnell v. Bettman*, (Neb.), 90 N. W. 648, the question arose whether heat was intended to be included in the lease when it was made. A right to such heat under the lease is sought to be established by proof of a custom to furnish heat with rooms in the case of steam-heated buildings, and when the owner maintained the steam-heating plant. Such a custom is proved by several witnesses, although all of them say it was usual to insert a stipulation for heat in the leases, and most of them knew of no instances where such heat was furnished without such agreement in the lease. *Held*, that the mere general statement of the several witnesses that there was such a custom, when taken in connection with the lack of knowledge of instances of its application in connection with a written lease, and their own statements in each instance that it was usual to put such a stipulation



or merely acts of accommodation.<sup>38</sup> The evidence must also show that the transactions proved to have taken place were characterized by a certain and uniform mode of dealing.<sup>39</sup>

B. SINGLE TRANSACTIONS. — Particular instances are not admissible to establish a custom or usage,<sup>40</sup> except when transacted with the party against whom the usage is set up, as tending to prove that he knew of the existence of the custom.<sup>41</sup>

on the lease, where written leases were made, makes the evidence quite insufficient to uphold a finding that it existed, and was part of the contract.

38. *Garey v. Meagher*, 33 Ala. 630; *Cincinnati & L. Mail Line Co. v. Boal*, 15 Ind. 345; *Chenery v. Goodrich*, 106 Mass. 566; *Chouteau v. Steamboat St. Anthony*, 20 Mo. 519.

In *Runyan v. Central R. Co.*, 64 N. J. L. 67, 44 Atl. 985, an action for damages for refusing to allow the plaintiff to enter the defendant's car with certain packages of merchandise, the plaintiff relied upon a general usage. *Held*, that the attitude and acquiescence of the defendant company must be distinguished from mere acts of accom-

modation. The evidence given merely related to the treatment he had received when traveling on former occasions, and does not establish a usage upon which he could rely, alike with other passengers, as establishing a regulation equally applicable to all.

39. *Fay v. Alliance Ins. Co.*, 16 Gray (Mass.) 455; *Stewart v. Scudder*, 24 N. J. L. 96; *Cavanagh v. O'Neill*, 19 Misc. 233, 45 N. Y. Supp. 789; *Nelson v. Southern Pac. R. Co.*, 15 Utah 325, 49 Pac. 644.

40. *Hewlett v. Burrell*, 105 Fed. 80; *Price v. White*, 9 Ala. 563.

41. *Herring v. Skaggs*, 73 Ala. 446; *Georgia & A. R. Co. v. Pound*, 111 Ga. 6, 36 S. E. 312.













